SCHNAPF ENVIRONMENTAL JOURNAL

A Newsletter Covering Recent Environmental Developments and Caselaw

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Contents

LITIGATION ROUNDUP

Aviall Update

With the federal appeals courts divided on whether potentially responsible parties (PRPs) had an implied right of contribution under section 107 of CERCLA, the United States Supreme Court agreed to review a decision by the Court of Appeals for the Eighth Circuit in United States v. Atlantic Research Corp. The Second and Seventh Circuits have found an implied right to contribution under Section 107(a), while the Third Circuit has ruled the PRPs cannot recover such costs under Section 107(a).

New York AG Files RCRA Action to Address Vapor Intrusion

In the wake of an investigation finding explosive levels of methane and elevated levels of benzene in the basements of homes and businesses from a massive underground petroleum plume located in the Greenpoint section of Brooklyn, the New York Attorney General, Andrew Cuomo, served a notice of intent to sue under section 7002 of the Resource Conservation & Recovery Act (RCRA). If successful, the lawsuit could serve as model for forcing parties to address vapor intrusion.

The notice of intent to sue ExxonMobil, BP, Chevron, Keyspan and Phelps Dodge charges that the defendants have contributed or are contributing to the past and present disposal of petroleum and other hazardous wastes that are posing an "imminent and substantial endangerment" to human health and the environment. An earlier RCRA lawsuit filed by an environmental organization is currently in discovery and slated to go to trial in 2008. *Riverkeeper, Inc., et al. v. Exxon Mobil Corporation,* No. 04-2056 (E.D.N.Y.)

Commentary: *It is estimated that over 17 million gallons of petroleum have been discharged into the soil and groundwater, far exceeding the 11 million gallon Exxon Valdez spill in 1989. The zone of contamination extends over 50 acres and petroleum fumes have been encountered by workers constructing a new water tunnel 520 feet below the surface. The spill first became known in 1978 and Exxon Mobil as successor to the owner of the refinery that is believed to be principally responsible for the contamination has extracted approximately 9 million gallons.*

Earlier this year, nearly 400 Greenpoint residents filed a lawsuit against Exxon Mobil and other defendants for failing to properly remediate the contamination, Baumbach et al v. ExxonMobil, No. 37644/2005 (Sup.Ct. Kings). One of the named defendants is an environmental consultant, Roux Associates. The plaintiffs allege that Roux not only failed to act in a reasonably diligent manner to investigate and remediate the contamination but also designed sampling plans "in a manner that avoided revealing contamination and improperly or ineffectively remediating" the plume.

Plaintiffs Alleging Exposure to Contaminated Vapors and Groundwater Reach $15 Million Settlement

Plaintiffs to class action lawsuit have reached a $15,750 million settlement with 13 manufacturers in the Ellsworth Industrial Park near Chicago, IL over exposure to trichloroethylene (TCE) or perchloroethylene (PCE). In *Ann Muniz et al v. Rexnord Corporation*, et al, No. 1:04-CV-2405 (N.D.Ill.), the class of approximately 800 residents had charged that hazardous substances generated by the defendants had migrated to their properties in Downers Grove and contaminated hundreds of drinking water wells. The residents were forced to purchase bottled water for drinking and bathing and were exposed to contaminated vapors. In 2003, the residents' homes were converted from well water to public drinking water supplies. In exchange for cash payment and free medical monitoring, the plaintiffs released the defendants from liability under CERCLA, or costs for diminution in property value, costs of bottled water or other water supply costs, vapor intrusion, medical monitoring and fear of personal injury. However, the settlement does not bar the plaintiffs from seeking damages for personal injury.

PA Vapor Intrusion Trial Begins

A landmark vapor intrusion trial began on March 15th after the court ruled that the plaintiffs may introduce expert testimony that retrospectively establishes the indoor air concentrations that existed in their homes in 1998.

The plaintiffs in *Ball v. Bayard Pump & Tank Co.*, Pa. Ct. of Common Pleas, No. 99-6438 allege that a petroleum release at a nearby gas station has exposed residents to harmful levels of benzene. In August, the court held a *Frye* hearing to determine if the plaintiff's could introduce the analysis of their vapor intrusion expert, William A. Schew. Under the test articulated in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), a court is charged with determining if novel scientific evidence meets the test of "general acceptance in the scientific community."

After the 1998 gasoline release, vapor samples were collected from two homes which were evacuated after high levels of benzene were detected. In 1999, the plaintiffs commenced their lawsuit alleging property damage and a variety of personal injuries including blood cancers and neurological problems. While groundwater sampling had been performed following the 1998 spill, the vast majority of the plaintiffs did not have air sampling tests done in their homes and therefore could not document their level of contaminants they have been exposed to during that period, Thus, the plaintiffs retained Schew to conduct a retrospective vapor intrusion analysis using the groundwater data to predict what the likely indoor air concentrations were in the plaintiffs' homes in 1998. In his 2003 report, Schew concluded that the "likely lower-bound estimate" or minimum vapor levels of benzene in indoor air were well above state and federal standards.

In developing his model to predict the past exposures, Schew determined that the Johnson-Ettinger (J-E) model recommended by EPA was not appropriate because the J-E model was not designed for the fractured bedrock setting in this case and the authors of the model conceded it was inappropriate for use with petroleum contamination. As a result, Schew developed what the defendants later termed the "Schew hybrid model," combining part of the J-E Model with an attenuation factor used by the state Department of Environmental Protection.

In the *Frye* hearing, the defendants argued that the Schew hybrid model was not accepted in the scientific community because it was different from the J-E model and that indoor air concentration models generally accepted in Pennsylvania were used to estimate upper-bound or the highest concentrations, instead of the lower-bound or minimum vapor levels. However, the court ruled that defendants were attacking what Schew's methodology purports to answer rather than the methodology itself. The court said that the Frye test analysis evaluates if the principles and methodology that the expert employs are generally accepted by scientists in the relevant field and does not focus on the conclusions reached by the expert. Even though the Schew-hybrid model had never been published or peer-reviewed, the court found that the methodology Schew used was scientifically sound. Accordingly, the court ruled that Schew's findings could be introduced into evidence.

Eighth Circuit Upholds Use of Substantial Continuity Test For Successor Liability

During the 1990s, many federal courts applied a federal common law approach to successor liability in CERCLA cases that was less stringent than the traditional tests developed under state law. Unlike the traditional state law, which focused on whether there was a continuity of the corporate structure such as by merger or common shareholder, the federal test known as the Substantial Continuity Test focused on whether the purchaser continued the enterprise or business.

Beginning with the United States Supreme Court decision in *U.S. v. Bestfoods*, 524 U.S. 51 (1998), the federal courts have seen to limit the application of the Substantial Continuity Test even though the *Bestfoods* case involved liability of a parent corporation and not successor liability. However, because the Supreme Court ruled that a traditional corporate veil-piercing analysis had to be used to determine if a parent corporation could be liable as an owner of a subsidiary's facility under CERCLA, federal courts have begun returning to the more traditional state law analysis in successor liability cases. For example the Second Circuit in *State of New York v. National Services Industries Inc.*, 352 F.3d 682 (2d Cir. 2003) and the Third Circuit in *U.S. v. Gen. Battery Corp*., 423 F.3d 294 (3d Cir. 2005) recently ruled that the Substantial Continuity Test was no longer valid law after *Bestfoods*.

One of the few exceptions to this trend was the opinion of the Court of Appeals for the Eighth Circuit in *K.C. 1986 Limited Partnership v. Reade Manufacturing*, 2007 U.S. App. LEXIS 95 (8th Cir. 1/4/07). The Eighth Circuit was one of the first federal appeals courts to adopt the Substantial Continuity Test and apparently believes it is still valid. The court held that *Bestfoods* did not directly address successor liability, and therefore there might be situations in which the substantial continuity test could survive.

DIGEST OF 2006 ENVIRONMENTAL CASES

The year 2006 was one of the more interesting years for environmental litigation. Besides the continuing fallout from the Aviall decision, the volume of interesting environmental decisions accelerated as the year progressed. Selecting which cases to highlight in each issue of SEJ can be a difficult task and the pace of litigation in the second half of the year made this job even more daunting. We could devote entire issues to environmental litigation and still not report on all of the cases that we felt could be particularly significant to our readership. As a result, we tried to select the more notable environmental cases that illustrated key environmental issues that can impact transactions, and then provided our unique commentary on how a particular decision serves as a cautionary tale to parties in transactions as well as the third party service providers for those transactions.

Given our space constraints, though, there are always opinions that we have to leave in our drawer but that nonetheless deserve some discussion. Thus, as a service to our readers, we have decided to provide a brief summary of cases from 2006 that did not make it into SEJ but nevertheless merit attention. The cases are organized by topic and by chronological order within each topic. The cases are not necessarily a scientifically valid sampling of legal trends. However, when viewed in this fashion, several trends leap off the page that we have suspected for some time. First, despite all of the attention that has been devoted to Aviall, it is clear that the majority of environmental caselaw is occurring in state courts. The other trend is the plethora of contract-related litigation. Many transaction lawyers do not understand environmental issues and many environmental lawyers are primarily litigators by training who do not have much experience drafting contracts. Although draftmanship is a highly specialized legal skill, too often business terms are negotiated and contracts drafted before environmental due diligence is completed. One of the take-away lessons from the contract interpretation cases is that it is far better to use the information generated during environmental due diligence to draft clear environmental provisions than to have judges try to guess what the parties intended.

Bankruptcy

U.S. v. Apex Oil Company, 2006 U.S. Dist. LEXIS 52608 (S.D. Ill. 7/6/06). Federal government brought RCRA 7003 action 15 years after bankruptcy confirmation asserting that the relief sought was not discharged by the bankruptcy court order of confirmation. Court rules that because 7003 does not allow government to obtain right of

payment but simply seek injunctive relief, government did not have a claim that was discharged and grants partial motion for summary judgment.

Pacificorp et al v. W.R. Grace et al, 2006 U.S. Dist. LEXIS 57470(D.Del. 8/16/06). Defendant sold unprocessed vermiculite to Intermountain Insulation who processed the material at property located in downtown Salt Lake City. Defendant filed bankruptcy petition in April 2001 listing Intermountain as creditor. EPA filed proof of claim for vermiculate contamination at the former Intermountain site before expiration of March 2003 bar date for filing claims. In 2004, EPA sent information request to plaintiffs as current and former owners of the contaminated site and entered into administrative consent order with Pacificorp who in turn demanded contribution from other plaintiffs. In 2005, plaintiffs filed motion with bankruptcy court for permission to file late proof of claim. The court denied the motion and district court affirmed on basis that plaintiffs were not "known" creditors that are required to receive actual notice. Plaintiffs argued that defendant could have discovered their identify by performing title search on site it knew was contaminated. However, court ruled that a debtor's obligation to exercise "reasonable diligence" was limited to searches of its own books and records, and that a debtor was not required to search out all parties who might be affected by its actions.

Glidden v. FV Steel and Wire Co., 350 B.R. 96 (E.D. Wisc. 9/21/2006). The Sherman Wire Company and other PRPs entered into an agreement to remediate the Chemical Recycling, Inc., site in Wylie, TX pursuant to a 1989 EPA administrative order on consent. In 2004, Sherman filed a chapter 11 bankruptcy petition and the PRPs filed a proof of claim to collect future costs to remediate the site. In February 2005, Sherman withdrew from the PRP agreement. At the time it withdrew, Sherman did not owe any unpaid assessments. The bankruptcy court granted Sherman's motion for summary judgment and the district court upheld the ruling. The court found that under the terms of the PRP agreement, Sherman was free to withdraw any time. Thus, the court found the value of any future claim was zero. On the PRPs CERCLA claim, the bankruptcy court had held that the United States Supreme Court's Aviall decision precluded the PRPs from seeking contribution. The district court found that the Administrative Consent Order (ACO) was a settlement agreement pursuant to §113(f)(1) and the PRPs therefore had a "contingent" claim. The court remanded the matter to the bankruptcy court to value the contingent claim under §502(c)(1) of the bankruptcy code.

CERCLA

Otay Land Company v. U.E.Limited, L.P., 440 F.Supp. 2d 1152 (S.D. Ca. 7/18/06). Plaintiff/developer purchases former trap and skeet range for $19.5

million and seeks recovery of response costs after contamination is greater than anticipated. Court grants summary judgment to defendant because lead shot at target practice range falls within "consumer product" exception to CERCLA definition of hazardous substances. Court also denies RCRA citizen suit because EPA Military Munitions Rule finds that lead shot is not "discarded" and therefore not a solid waste.

*City of Martinsville v. Masterwear Corp.,*2006 U.S. Dist. LEXIS (S.D. Ind. 9/20/06). Plaintiff files motion for summary judgment under §107 to recover costs for remediating contamination of wellfield attributable to release from dry cleaner tenant and owner that leased property to dry cleaner. Defendants assert that wellfield is a "facility," that plaintiff is liable as an owner of the wellfield and therefore may not bring a cost recovery action under §107. Following the reasoning of the Seventh Circuit in *Nutrasweet v. X-L Engineering Co.,* 227 F. 3d 776 (7th Cir. 2000), court finds that plaintiff did not contribute to the contamination and was therefore a non-polluting PRP who qualified for the innocent landowner defense.

*General Cable Industries, Inc. v. Zurn Pex, Inc. (f/k/a United States Brass Corp.),*2006 U.S. Dist. LEXIS (E.D. Tex. 9/28/06). Defendant United States Brass Corp (USBC) sold a parcel to Tenth Street Industries, LP (Tenth Street) in March 2001. Tenth Street subsequently advised USBC of TCE-contaminated groundwater at the site. After USBC notified the Texas Commission on Environmental Quality (TCEQ), both Tenth Street and USBC submitted an application to enroll into state voluntary cleanup program (VCP). TCEQ denied the application because USBC was a responsible party. USBC then formed Shelby Properties, Inc., to serve as the VCP applicant and TCEQ accepted the VCP application. During the investigation, USBC discovered that TCE had migrated beneath plaintiff's property. USBC entered into access agreement with plaintiff to install groundwater monitoring wells. Prior to entering into the access agreement, plaintiff had entered into an agreement to sell its property but the purchaser terminated the agreement after learning of the TCE contamination. Plaintiff then filed CERCLA cost recovery actions and sought damages under state common law claims. However, plaintiff failed to adequately allege what response costs it had incurred and that such costs had been incurred consistent with the NCP. District court granted USBC's motion to dismiss without prejudice and dismissed the remaining state claims without prejudice to refiling them in the appropriate state court.

Carrier Corp v. Piper, 2006 U.S. Dist. LEXIS 80098 (W.D.Tenn. 09/30/06). Plaintiff files CERCLA §113(f) contribution and §107 cost recovery actions for costs of treating groundwater contaminated with chromium (See RCRA section for more details) . Defendant files motion to dismiss on cost recovery action, arguing plaintiff is a PRP and

not entitled to maintain action under §107. Plaintiff asserts that it qualifies for the CERCLA §107(b)(3) third party defense because it exercised due care and took precautions regarding the contamination by notifying the town of the discovery of chromium contamination and entered into agreement with the town to treat the groundwater. The court found that plaintiff asserted sufficient facts that it satisfied the due care and precautionary elements of the third party defense and denies defendant's motion to dismiss.

California DTSC v. Farley and Kluck, 2006 U.S.Dist. LEXIS 78607 (N.D. Cal. 10/17/06). Defendants purchased drum recycling and disposal facility in 1984 from Bay Area Drum Company and then leased site to the company for five years. Following filing of plaintiff's cost recovery action, defendants assert third party and innocent landowner defenses. Court grants plaintiff's summary judgment motion on third party defense because existence of purchase agreement and lease was a "contractual relationship with the only third party who could otherwise acknowledge responsibility for releases at the site." On innocent landowner defense, plaintiff asserts that defendants had reason to know of contamination because they were aware of use of site, had seen drums on the property prior to purchase, there was obvious odor and visible pools of purplish liquids. Defendants countered that no information about toxic conditions at the site had been uncovered in the chain of title or by any posting on the property. As a result, court said there was a disputed issue of material fact that needed to be determined at trial as to whether defendants had any reason to know at the time of purchase that hazardous substances had been disposed at the site.

U.S. v. Brook Village Associates, L.P. and Centerdle Manor Associates, 2006 U.S. Dist. LEXIS 81197(D.R.I.11/6/06). As previously discussed in the June/July 2005 issue of SEJ, EPA reached settlement with owners of elderly affordable housing project previously constructed on a contaminated site who said they had limited ability to pay while continuing to operate the affordable housing facilities. The settlors agreed to pay $3.8 million funded by refinancing of mortgages through the Rhode Island Housing and Mortgage Authority and equity contributions of general partners of the settlors. One of the PRPs objected to the settlement on grounds that it was unfair to the other PRPs because different loan terms (such as lower interest rate, greater use of capital reserves) could have yielded a settlement of $7 million and was not reasonable when viewed against the estimated $50 million cleanup cost. The court upheld the settlement, finding that EPA had carefully reviewed the financial position of the settlors and was in the public interest.

Vine Street, LLC v. Keeling, 2006 U.S. Dist. LEXIS 80944 (E.D. Tex. 11/6/06). As discussed in the April/May 2005 issue of SEJ, the district court had ruled that the plaintiff could seek to recover its

costs through an implied right of contribution under §107(a). At trial, the court found that the plaintiffs constructed the laundromat that was the source of the 500 foot PCE plume according to the design and layout specifications of the Norge division of Borg-Warner. Norge workers installed the equipment, connected the machines to the sewer lines, filled and tested the machines, and trained the attendants. Moreover, the court said that flushing wastewater to the sewer was not simply a Norge recommended practice but was an integral part of Norge's design. The court held that Norge's activities showed that it had the authority to and actually exercised control over the specific method and manner of the PCE disposal, and that Norge was actually involved in deciding how to dispose of PCE-laded wastewater. The court said there was evidence that Norge knew its water separators would discharge PCE. The plaintiff also produced testimony showing that PCE in the wastewater would cause the rubber drain joints to quickly corrode, allowing PCE to escape into the environment. Based on the totality of the circumstances, the court held that Norge had arranged for the disposal of PCE. Because Norge was an unincorporated division of Borg-Warner, the court concluded that Borg-Warner was liable as a CERCLA arranger. In allocating liability, the court noted that the parties had expended extraordinary sums on legal fees arguing who was liable and had failed to spend any meaningful money to remediate the contamination. Since the PCE was migrating during the time of the plaintiff's ownership of the property, the court determined that the plaintiff was responsible for 25% of the contamination. While the plaintiff initially incurred $574,576.28 in response costs, it had received reimbursements from other settlements for all but $32,042.58. Accordingly, the court held that Borg-Warner's 75% responsibility amounted to $24,031.94.

U.S. v. Mallinckrodt, 2006 U.S. Dist. LEXIS 83211 (E.D.Mo. 11/15/06). District court rules that private settlement among PRPs confers contribution protection pursuant to section 113(f)(2) of CERCLA.

Agere Systems v. Advanced Environmental Technology Systems, 2006 U.S.Dist. LEXIS 84114 (E.D. Pa. 11/17/06). Generator liability imposed on basis of constructive possession and exercise of control over waste disposal decision.

Contract Interpretation

Roy O. Ball and Norman W. Berstein v. Versar, Inc., 2006 U.S. Dist. LEXIS 63358 (S.D.Ind. 9/5/06). PRP steering committee for the Environmental Conservation and Chemical Corporate Site Trust Fund entered into a fixed-price contract with defendant in 1997 to design and implement an SVE system to achieve the cleanup standards required by an EPA consent decree within two years. When groundwater monitoring data indicated that the cleanup standards would not likely be achieved within the required

timeframe, plaintiffs served a notice of default upon defendant for failing to augment the SVE system to achieve the cleanup standards. The plaintiffs filed a lawsuit charging that defendant was in breach of its contract and sought a declaratory judgment that defendant was obligated under the contract to achieve the mandated cleanup standards. The defendant argued that an amendment to the contract excused it from further performance, filed counterclaims for unjust enrichment as well as recission or reformation of the contract because of mutual mistake or unilateral mistake involving the geology of the site. On cross-motions for summary judgment, the court ruled that defendant bore the risks of uncertainties relating to hydrological and subsurface conditions, that it was undisputed that defendant was obligated to achieve the cleanup standards mandated by the consent decree and had failed to achieve those requirements. The court also held that the defendant was not excused from its obligations by the exclusion of "Additional Work" from the scope of its responsibilities. However, the court did find that there was a genuine material issue if the failure to achieve the cleanup standards was caused by one of the conditions of the contract amendment excusing remedy failure due to existence of contamination beneath the "zone of influence." Accordingly, the court denied the plaintiff's motion for summary judgment on this issue. The court also ruled that the defendant was not entitled to reformation or recission of the contract.

*Nola Realty LLC v. DM&M Holding LLC,*2006 N.Y.App. Div. LEXIS 12731 (1st Dept. 10/26/06). Plaintiff agreed to sell building in Mineola, New York for approximately $2.3 million in 2004. Contract provided that defendant/buyer could perform a Phase I ESA and if the results showed "there is a strong likelihood of or actual contamination on or under the premises in levels that exceed permitted State standards and that said standards require removal of said contamination," parties could cancel the contract if they do not reach agreement on who shall pay the remediation costs. The Phase I ESA disclosed 1500 square feet of non-friable suspect Asbestos Containing Materials (ACM) in the form of floor tile and that additional suspect ACM tile may be located beneath carpeting in the majority of the building. In the conclusions and recommendations section, the report provided that eventual abatement or removal of the ACM was recommended but an asbestos O&M plan should be implemented if a decision was made to leave the tile in place. The report estimated costs of $2500 for a comprehensive asbestos survey, $4500 to abate/removal the floor tile and $650 for implementing the O&M plan. On April 12, 2004, the defendant advised plaintiff that based on the results of the Phase I ESA, additional investigation and remediation is necessary. Four days later, the defendant notified plaintiff that if it did not want to remediate the condition, either party had the right to cancel the contract. Plaintiff responded with a letter notifying

defendant that a time of essence closing would take place on July 15, 2004. After defendant rejected this letter and failed to close, plaintiff commenced a breach of contract action and sought to retain the down payment as liquidated damages. The trial court denied plaintiff's motion for summary judgment but the appeals court reversed, finding that the Phase I ESA report did not identify the level of contamination that exceeded state standards as required by the contract. The court said the recommendation of the low-cost O&M was further evidence that there was no contamination that needed to be remediated.

City of Chicago v. Arvinmeritor Inc, 2006 U.S.Dist. LEXIS 86976 (S.D. Ill. 11/28/06). Defendant seeks ruling that parties that sold property to defendant have contractual duty to defend and indemnify defendant. Court denies motion to dismiss by the third party defendants that claim was not ripe and agreement cannot be read to impose duty to defend.

Ann Stockton and Steffen Jacobson v. Nenadic Investments, 2006 Wash. App. LEXIS 2834 (12/26/06). Plaintiffs agree to purchase waterfront property impacted with arsenic contamination and waive due diligence escape clause based on preliminary remediation estimate of $322K. After remediation costs triple the estimate to nearly the purchase price, plaintiffs seek indemnity. Court rules that seller is required to indemnify purchaser for arsenic contamination because the indemnification clause exercise operated independently and was not linked to waiver of due diligence escape clause.

Lead-Based Paint

Rhode Island v. Lead Industries Ass'n., 2006 WL 691803 (R.I. Super. 02/28/06). Jury finds former lead paint manufacturers responsible for creating a public nuisance due to the presence of lead in buildings throughout the state.

County of Santa Clara et al. v. Atlantic Richfield Co. et al., 137 Cal. App. 4th 292 (Cal. Ct. App. 2006). Municipalities brought a class action seeking damages from paint manufacturers under a variety of common law theories. The trial court granted summary judgment to defendants but a California appeals court found that although the governmental plaintiffs failed to allege any physical injury to their buildings, they sufficiently alleged that the defendants had participated in the creation of a public nuisance by engaging in a campaign against government regulations, failing to warn the public about the dangers of lead, and selling, promoting, and marketing lead paint within the state. The court also found that the plaintiffs had adequately alleged a cause of action for fraud based on their allegations that defendants had made false misrepresentations and concealments to the public in an effort to deceive the public as to the dangers of low-level exposure to lead paint. The court also ruled that the action was not barred by the statute of limitations because the discovery rule tolled the statute of limitations until 1998, when the

plaintiffs first became aware of scientific studies disclosing the dangers of low-level lead exposure.

Johnson v. City of Detroit and City of Detroit Housing Comm'n., 446 F.3d 614 (6th Cir. 2006). Sixth Circuit affirmed the dismissal of claims for damages for lead-based paint poisoning allegedly suffered by the plaintiff's minor son while he was a tenant at a public housing project. The court held that while the plaintiff fell within the class of beneficiaries intended to be protected under the Lead-Based Paint Poisoning Prevention Act (LBPPPA), the statute did not create an implied private right of action. Instead, the court ruled LBPPPA imposed obligations on HUD to implement procedures to eliminate as far as practicable the hazards of lead based paint poisoning.

McCormick v. Kissel, 2006 WL 2669955 (S.D. Ind. 09/18/06). District court holds Residential Lead-Based Paint Hazard Reduction Act of 1992 (RLPHRA) clearly provides a private right of action that allows a tenant to sue for three times the damages incurred as a result of a lessor's failure to make the appropriate lead paint disclosures required by the statute. Adopting the reasoning of the United States Court of Appeals for the Third Circuit, the court said that while RLPHRA did not explicitly provide standing to sue to a tenant's child, the child in this case had suffered actual injuries that were the exact kind of injuries that Congress intended to be redressed by RLPHRA.

Mold

NPR, LLC v. KABB, Inc., 811 N.Y.S.2d 706 (App..Div- 2nd Dept. 01/24/06). New York intermediate court granted summary judgment for landlord for unpaid rent and denied tenant's claim of constructive eviction when landlord provided evidence of a diligent mold remediation project.

Krasnow v. JRBG Management Corp., 808 N.Y.S.2d 75, 77 (App.Div-3rd Dept. 1/24/06). New York intermediate court held that a trial court had improperly denied a landlord's motion for summary judgment because the plaintiff had failed to present evidence rebutting the opinion of physicians that absence of fungal growth in cultures taken from plaintiff precluded mold as the cause of plaintiff's sinusitis.

Terry v. Ottawa County Bd. of Mental Retardation and Developmental Delay, 847 N.E.2d 1246 (Ohio App. 2/24/06). Ohio appeals court using a *Daubert* analysis, ruled that the trial court erroneously excluded the testimony of plaintiffs' expert with respect to general causation but had correctly excluded the expert's opinions regarding specific causation because the expert failed to reliably perform differential diagnoses of the individual plaintiffs.

In *Geffcken v. D'Andrea,* 41 Cal.Reptr.3d 80 (Cal.App. 2/27/06, as modified 3/28/06). State court of appeals had held that a trial court had properly excluded environmental

sampling data, mycotoxin antibody test results and blood serology test results of plaintiff's experts because all results were based on unreliable methodologies not generally accepted in the scientific community.

Roche v. Lincoln Property Co., 175 Fed.Appx.597 (4th Cir. 04/7/06). Fourth Circuit affirmed exclusion of plaintiffs' medical expert because the expert failed to perform proper differential diagnoses and did not rule out other possible causes of the plaintiffs' respiratory symptoms, including smoking and pet allergies.

Welsch v. Groat, 897 A.2d 710 (Conn.App. 05/30/06). State appeals court ruled that landlord's failure to repair water damage and abate mold amounted to a constructive eviction of his tenant.

Killian v. Equity Residential Properties Trust, 2006 WL 1876907 (9th Cir. 06/30/06). Ninth Circuit upheld exclusion of plaintiff's medical and industrial hygiene experts under a Daubert analysis because of the use of questionable methods not generally accepted in their respective industries. The court found that the industrial hygienist's use of vacuum samples to extrapolate past air levels of mold was particularly problematic.

Fiess v. State Farm Lloyds, 2006 Tex. LEXIS 806 (Sup. Ct. 8/31/06). State court held that a form of Homeowner HO-B policy providing, "We do not cover loss caused by… mold," is unambiguous and the ensuing-loss provision for water damage does not serve as an exception to the exclusion.

Montgomery Mutual Ins. Co. v. Chesson, 907 A.2d 873 (Md.App. 9/20/06). Maryland appeals court upheld a trial court's decision to allow a jury to consider the opinions of plaintiff's medical expert because his opinions were based in part on generally accepted practices, and the expert had extensive clinical experience with toxin exposure generally.

Oil Pollution Act (Opa) Of 1990

U.S. v. Louisiana Land & Exploration Company, 2006 U.S. Dist. LEXIS 11453 (E.D. La. 3/17/06). Purchaser of land subject to mineral rights lease not liable as OPA "owner" because it did not own the oil well equipment and structures installed and abandoned by mineral rights holder. Court grants summary judgment to defendant because it was not an owner of the structures abandoned by mineral rights holder under state law and OPA imposes liability for abandoned onshore facilities on person who would have been responsible party prior to the abandonment of the facility.

Kenan Transport Company v. U.S. Coast Guard, 2006 U.S. App. LEXIS 31647 (11th Cir. 12/21/06). Plaintiff/owner of tanker truck collided with pickup truck, causing discharge of 3,000 gallons of diesel fuel. Plaintiff incurs over $100K in removal costs, and settles with insurance company of pickup truck for $25K and release of liability. Court affirms denial of plaintiff claim for removal costs from Oil Spill Liability Trust Fund on grounds that

claimants are required to subrogate claims against responsible party to government but release with insurance company operated to waive such rights and prevented plaintiff from transferring those rights to the government.

RCRA/USTs

Lynn v. Amoco Oil Company, 2006 U.S. Dist. LEXIS 74156 (M.D. Ala. 10/10/06). Plaintiffs owning property within proximity to gas stations allege that defendants conspired to contain their costs and avoid liability for leaking USTs that they owned, operated, leased or controlled. Plaintiffs claim that defendants conspired to divest themselves of leaking USTs for nominal prices, agreed upon and implemented cheap and inadequate UST standards for replacing or upgrading USTs, and conspired to influence legislators and regulators to adopt a risk-based corrective action approach that enabled the defendants to reduce or avoid clean-up costs. Following years of discovery, court grants defendants motion for summary judgment.

Carrier Corp. v. Piper, 460 F.Supp. 2d 853 (W.D.Tenn. 2006). Plaintiff was issued a unilateral administrative order (UAO) in 1993 by EPQA following discovery of TCE at its facility and the water plant operated by the Town of Collierville. Under the 1993 UAO, plaintiff implemented groundwater treatment system and discharged treated groundwater into the town's potable water supply. The town discovered chromium in its water plant in 2003 and plaintiff entered into interim agreement with town to treat groundwater for chromium. In 2004, EPA issued an administrative order on consent with defendants for chromium contamination discovered at their facility and proposed to list the site on the NPL. Plaintiff sought contribution/cost recovery under CERCLA for the costs of treating the chromium and then filed a motion to amend its complaint to seek injunctive relief under the citizen suit provision of section 7002 of RCRA. Defendants assert plaintiff is barred from bringing §7002 action because §7002(b)(2)(B)(iv) precludes such lawsuits when EPA has issued an administrative order that a responsible party is diligently conducting. Plaintiff argues that the 1993 UAO was limited to addressing TCE contamination and should not bar action for chromium action. While the UAO did not specifically refer to chromium, court holds that UAO provided that plaintiff was to remediate the presence of other hazardous substances detected in the water plant. Since chromium is a hazardous substance, it was within the scope of the 1993 UAO, and court concluded that plaintiff's proposed amendment would not survive a motion to dismiss and denied the motion to amend the complaint.

Wickens v. Shell Oil Co., 2006 U.S .LEXIS 82263 (S.D.Ind.11/9/06.) Plaintiff/proprietors of custom shoe and repair business decide to retire after 50 years and tried to sell property. Contamination is discovered associated with gas

station that had been owner/operated by Shell prior to 1953. Shell denies responsibility and plaintiff's seek order compelling Shell to remediate site and recover their damages. In motion for summary judgment, Shell argues that state law patterned after RCRA does not impose any corrective action liability for USTs taken out of service prior to 1974 but simply notification obligation. Court finds that Shell may be liable as pre-1974 owner of tanks but that there was a material dispute as to the extent contamination is from former Shell tanks, on-site heating oil tank or former adjacent gasoline station.

Litgo New Jersey and Sheldon Goldstein v. Jackson, 2006 U.S. Dist. LEXIS 83474 (D.N.J. 11/15/06). Plaintiff seeks order requiring NJDEP to remediate warehouse site contaminated by NJDEP contractor. NJDEP files motion to dismiss alleging that Goldstein does not have standing to sue under 7002(a)(1)(B) because he does not own property. Court denies NJDEP motion and holds that Goldstein has standing to bring his RCRA claim because he faces financial risk as past owner of site.

*Humboldt Baykeeper v. Simpson Timber Company,*2006 U.S.LEXIS 91667 (N.D. Ca. 12/8/06). Complaint alleges that president of current property owner is liable under responsible corporate officer doctrine for directing excavation of soils at distribution center contaminated with wood preservatives by prior timber company. Court denies motion to dismiss by company president that complaint fails to allege that he knowingly or intentionally violated environmental laws because allegations were sufficient to warrant a finding he had responsibility and authority by virtue of his position to prevent or correct the violations and failed to do so).

*U.S. v. DiPaolo***,** 2006 U.S. LEXIS 90980 (S.D.N.Y. 12/15/06). Plaintiff seeks civil penalties totaling $42,212,500 against sole owner of bus company for failing to comply with leak detection and upgrade two 3,000-gallon diesel USTs installed in 1984 as well as ignoring administrative orders. ALJ awards default judgment of $80, 317. Court affirms on grounds that penalty sought by EPA would be “draconian” and uncollectible, there was no evidence of any environmental damage and the penalty assessment together with injunction compelling compliance is sufficient to deter future wrongdoing.

State Law

Greyrock v. OBC Associates Inc., (Conn. Super. Ct., No. X08CV044002173S, 2/7/06). Seller is not liable to remote vendee for failing to comply with Connecticut Transfer Act.

Cook v. Rockwell International Corp. (D. Colo., No. 90-CV-181, 2/14/06). Homeowners awarded up to $554 million for property damage associated with airborne plutonium that defendants negligently allowed to migrate from Rocky Flats nuclear weapons plant.

Nnadili v. Chevron U.S.A. Inc., (D.D.C., No. 02-1620, 6/1/06). Landowners allowed to recover emotional distress damages without physical injury as part of trespass claim.

Carrier Corp. v. Piper, 2006 U.S. Dist. LEXIS (W.D.Tenn. 9/30/06). District court denied the defendant's motion to dismiss because the plaintiff had alleged sufficient facts to support a claim of successor liability under the "de facto merger" exception to the general rule of non-liability of asset purchasers. The plaintiff claimed that defendant Quanex was a corporate successor to Piper Impact, Inc. (Piper) because Quanex had acquired nearly all of Piper's assets, Piper had dissolved shortly after the transaction, and Quanex continued Piper's business operations. Quanex's motion to dismiss asserted that Carrier had failed to sufficiently plead successor liability under the "de facto merger" doctrine because there was no allegation that assets were exchanged for stock in the Piper transaction. The court said that Tennessee law did not require a rigid application of the "de facto merger" test and that the absence of an exchange of assets for stock was "not fatal" to establish corporate successor liability under CERCLA.

Nonnon v. City of New York, 2006 NY Slip Op 04373 (1st Dept. 6/1/06). After conducting "Frye" analysis, state court allows residents of four Bronx neighborhoods to bring toxic tort claims against City of New York for exposure to toxic chemicals from former landfill. The defendant argued that the residents did not have enough evidence to prove a causal connection between the landfill and cases of cancer and Hodgkin's disease in 13 children between 1963, when the landfill opened, and 1979, when it closed. However, the court ruled that the methodology used by epidemiologists and toxicologists hired by the residents met the test of "general acceptance in the scientific community."

Longobardi v. Shree Ram Corp., 2006 Conn.Super. LEXIS 2477 (8/15/06). In this case, a bucket of PCE was dumped outside dry cleaner in 1996; CT DEP pumped out catch basins and advised landlord/plaintiff of cleanup activities. In 2000, defendant advises plaintiff it plans to vacate premises. At plaintiff's request, defendant performs Phase II ESA with sampling and analysis that detected excessive PCE in basement sump. Defendant hires licensed environmental professional to clean out sump and piping but does not obtain written approval from CT DEP. In 2003, plaintiff sells property and the investigation to comply with Connecticut Transfer Act reveals PCE outside building. Plaintiff agrees to escrow $54,200 from sales proceeds to cover costs of groundwater monitoring and files cost recovery action under state superfund law (C.G.S. 22§22a-452) in June 2006. Court rules that statute does not have its own period of limitations and that applicable statute of limitations (SOL) for damage to property (§52-577) or damages caused by hazardous chemicals (§52-577c) expired because plaintiff

was aware of contamination in 1996. Likewise, six-year SOL for breach of lease (§52-776) expired in 2002.

Brown Group Retail, Inc. v. Colorado, 2006 Col. App. LEXIS 1380 (Ct. App. 8/24/06). Owner of Redfield site who spent $14 million remediating groundwater plume and lost $1 million judgment to homeowners for property damages from vapor intrusion sought damages from Colorado Department of Transportation. Court dismissed claims for trespass and negligence on government immunity grounds but allows claims for unjust enrichment and contribution to proceed.

Cantrell v. Ashland, In.c, No. 2003-CA-001784 (Ct. App. 09/15/06). Property owners claim that defendant's oil production activities on their properties resulted in above-normal concentrations of naturally-occurring radioactive material (NORM). All mineral leases with plaintiffs expired in 1987 and defendant entered into two consent decrees with EPA to address non-NORM radioactive in 1987-88. Following trial, jury concludes defendant's failure to exercise ordinary care in its oil production was a substantial factor in causing NORM to be deposited on plaintiffs' properties but that plaintiffs had not suffered damages from the presence of NORM. On appeal, court rules that plaintiffs are not entitled to new trial because they brought their claims for damage to real property caused by negligence after the five year SOL had expired.

Allgood v. General Motors Corp., 2006 U.S. Dist. LEXIS 70764 (S.D.Ind. 9/18/06) Court excludes plaintiffs' testimony supporting PCB remediation costs on *Daubert* grounds and rejects plaintiffs' damage claims for restoring their property because alleged restoration costs were 20 times market value of all plaintiffs' properties.

Scott v. National Grid USA, 2006 Mass. App. LEXIS 1001 (10/2/06). Plaintiff purchases property to build two townhouses, encounters contamination associated with former manufactured gas plant (MGP) and seeks cost recovery under state superfund law on theory that defendants are successors to owner of MGP, Salem Gas Light Company (Salem). The MGP plant had ceased operations in 1890 and was dismantled in 1906. In the late 1920s, North Boston Lighting Properties (NBLP) purchased Salem's stock and New England Power Association (NEPA) then purchased the NBLP stock, with Salem becoming a NEPA subsidiary. In 1947, NEPA was reorganized into New England Electric System (NEES) with the gas operations formed into an unincorporated gas division. In 1952, NEES formed North Shore Gas (North Shore) to acquire the NEES gas operations, including Salem. Following divestment order by the Securities and Exchange Commission (SEC), NEES sold its North Shore assets to Boston Gas who assumed all "then existing" liabilities. After the transaction, NEES dissolved North Gas. While many North Shore employees were retained by Boston

Gas, there was no continuity of management, shareholders or directors. In 2002, Boston Gas became a subsidiary of Keyspan New England through a corporate merger of its parent with Keyspan. Trial court grants summary judgment to NEES and Boston Gas. However, the appeals court reversed as to NEES. Court holds that corporate veil may be pierced under state law because of relationship of former parent of Salem to its subsidiary. Although this relationship would not be sufficient to impose liability under CERCLA following the United States Supreme Court ruling in *U.S. v. Bestfoods,* Massachusetts courts take public policy and statutory purposes in account when determining if circumstances warrant using the equitable principle of veil-piercing. Court found that MGP companies were aware of the health and environmental hazards posed by their operations yet failed to take action so that hazardous substances continued to migrate up to the time plaintiff filed its lawsuit. Because of the "injurious consequences" flowing from the control exercised by the defendants in their corporate relationship with Salem, the court vacated the summary judgment in favor of NEES. Court affirmed the summary judgment for Boston Gas, finding that there was no de facto merger under state law when Boston Gas acquired North Shore due to the lack of continuity of management, officers, directors and shareholders. The court also agreed with a prior decision by the Court of Appeals for the First Circuit that Boston Gas was not liable under a successor liability theory for the liabilities of North Shore .

City of Moses Lake v. United States, 2006 WL 2981427 (E.D. Wash. 10/16/06). Court holds that statute of limitations (SOL) for filing cost recovery actions for self-directed or "independent actions" under the state Model Toxics Control Act (MTCA) is three years from when the remediator can show that it has achieved applicable cleanup levels, which in this case was the EPA Maximum Contaminant Level (MCL). In contrast, the MTCA SOL for cleanups performed under the oversight of the Department of Ecology or EPA does not begin to run until Ecology or EPA established cleanup standards in a Cleanup Action Plan or Record of Decision.

Middleton v. Calhoun, 821 N.Y.S.2d 444 (Rensselaer Cty. 9/19/06). Plaintiff purchases house under "as is" contract with completed Property Condition Disclosure Statement (PCDS). Property contained a 22 year old septic system that had last been pumped in 2001. Contract provides sale was contingent on satisfactory test of septic system and seller had marked "no" box of PCDS in response to question "Any known material defects?". Plaintiff does not perform septic test and several months after taking title, began observing puddles in front yard. Plaintiff had to replace septic system at cost of $3000. Appeals court affirms dismissal of plaintiff's action, holding that the statute requiring preparation of PCDS did not create a separate cause of action for a breach of the disclosure form or for willful misrepresentations but simply provided for a $500 credit for failing

to deliver the PCDS. Court also found plaintiff had not provided any evidence that defendant had actual or constructive knowledge of the septic system condition that would support a breach of contract or fraud action.

500 Associates, Inc. v. Natural Resources and Environmental Protection Cabinet, 2006 Ky. App. LEXIS 290 (Ct. App. 9/22/06). In 1987, plaintiff acquired an industrial building from Vermont American Corporation (VAC) that had been used to manufacture circular saw blades and hand tools. VAC had been registered as a RCRA generator and decommissioned the building in 1986. Prior to taking title, plaintiff retained an environmental consultant who conducted a cursory inspection of the building and discussed the decommissioning activities with VAC's environmental director but did not review any public records. VAC represented that the building had only one spill incident in 1982 involving 100 gallons of nickel. The consultant recommended that no further investigation was required and plaintiff purchased the property. In 1990, plaintiff demolished a portion of the building creating a courtyard. The renovation involved removing the floor concrete where electroplating and wastewater treatment operations and exposing the underlying soils. Later that year, the plaintiff entered into an agreement to sell the property to Doe Anderson Advertising Agency (Doe). Sampling performed by Doe's consultant revealed elevated levels of metals and VOCs in the groundwater. The plaintiff did not share this information with the then Natural Resources and Environmental Protection Cabinet (Cabinet). In 1991, the plaintiff retained its own consultant and when its investigation confirmed the results of the 1990 study, Doe declined to proceed with the purchase. Beginning in 1994, the Cabinet began a series of investigations and despite several requests, both the plaintiff and VAC declined to assume responsibility for site remediation. In 1998, the Cabinet filed an administrative complaint against the plaintiff and VAC. Following a 17-day hearing, the hearing office concluded that both parties were jointly liable under the state superfund law. The hearing officer ordered VAC to pay a $160K fine and the plaintiff to pay $10.5K civil penalty. In addition, both entities were ordered to further characterize and remediate the contamination, and reimburse the Cabinet for its past costs with VAC bearing 95% of the costs and the plaintiff 5%. After the Cabinet Secretary adopted the hearing officer's report, both parties sought judicial review. A county court affirmed the penalties but ruled that the Cabinet did not have authority to apportion liability. The court also rejected plaintiff's argument that it qualified for innocent landowner defense. On appeal, the court held that the plaintiff did not qualify for the innocent landowner defense. The court ruled that plaintiff's pre-acquisition inspection was inadequate in light of the prior use of the property. The court said that a review of the public records would have suggested that sampling should be conducted and, "*To reward*

plaintiff's lack of diligence with a liability exemption would be directly contrary to the policy of CERCLA, which does not sanction willful or negligent blindness." The court also found that the plaintiff's failure to notify the Cabinet and leaving contaminated soil exposed during the renovation amounted to a failure to exercise due care. Accordingly, the court affirmed the plaintiff's liability allocation.

Carson Hill Gold Mining Corp. v. Sutton Enterprises, No. 1:06-CV-01193 (E.D. Cal. 9/29/06). Plaintiff had operated a gold mine until 1989. After implementing its closure plan, plaintiff sold the property to defendant in 1996 who planned to use the site to mine tailings for aggregate to supply to construction contractors. The agreement provided that seller had right to enter property to inspect and perform such actions as may be required to comply with regulatory requirements as well as to determine if the buyer's actions were impairing the property or adversely affecting seller's ability to satisfy its obligations. In 2005, the regional water control board (RWCB) advised the defendant that contaminated runoff was flowing from waste management units (WMUs) comprised of mine tailings and that the WMUs had to be capped. Plaintiff submitted a correction action plan (CAP) but defendant denied access to plaintiff because implementation of the CAP would impair defendant's ability to mine aggregate from the tailings during the rainy season, thereby causing it to default on its contracts. Plaintiff then filed an action seeking injunctive relief and an order restraining defendant from interfering with the CAP implementation. Defendant argued that the plaintiff was only allowed to perform monitoring activities under the sales agreement and that the RWCB directive was not a "Regulatory Requirement" under the agreement since it had not been formally approved by the RWCB and was not promulgated as a final rule. The court held that the sales agreement did provide plaintiff with the right to enter the property and that the CAP was a Regulatory Requirement as contemplated by the agreement. Because of the environmental harm that could result from the runoff from the WMUs, the court also found that irreparable harm in the form of environmental injury would occur if the plaintiff was not allowed to implement the CAP. The court also noted that the defendant would become subject to the same directive if the plaintiff did not implement the CAP. The court concluded that the potential economic harm to the defendant would not outweigh the harm to the environment and agreed to issue the temporary restraining order.

Kinn v. Alaska Sales & Service Partnership, 144 P.3d 474 (Ak. 9/29/06). Alaska Sales and Service Partnership (Alaska) acquired two parcels and 80% of the stock of an auto dealership in June 1995. The seller represented that there were no environmental violations. The property contained a septic system, oil/water separator and waste oil UST. After the closing, Alaska discovered that the property

had been contaminated with used oil when the UST had been was overfilled. The oil then migrated through the oil/water separator and into the septic system. Alaska requested the sellers remediate the contamination and when they refused, Alaska exercised the arbitration clause in the agreement. Alaska provided evidence that there had been surface spills that one of the seller's had tried to conceal by directing employees to dig up oil-stained gravel into opaque bags and filling the excavation with clean gravel from a local river bed. Alaska also produced evidence that the sellers had not notified or obtained approval from the state Department of Environmental Conservation or EPA for the design and installation of the oil and septic systems. The arbitrator ruled that the sellers had illegally concealed the contamination from Alaska and contributed to the contamination. As a result, the arbitrator ordered the real estate contract should be rescinded and sellers repay Alaska the purchase price of $1,211,928 along with interest of $308,209.70, transactional costs of $67,060, 100% of the remediation costs for one lot and 80% of the remediation costs for the second lot, attorneys' fees of $181,782.50, and the arbitrator's fees. Alaska was ordered to pay rent of $15,968 per month while it continued to occupy the property. A trial court upheld the arbitrator's findings and both parties appealed certain aspects of the rulings. The Alaska Supreme Court affirmed all of the lower court's rulings.

In Parker v. Mobil Oil, 2006 N.Y. LEXIS 3188 (10/17/06). Gas station employee alleges he developed acute myelogenous leukemia (AML) from exposure to benzene through inhalation of gasoline vapors and dermal contact with gasoline. Defendant files motion to exclude plaintiff's expert testimony as scientifically unreliable under *Frye* v. *United States*, 293 F. 1013 (D.C. Cir. 1923). Trial court denies defendant's motion without conducting a *Frye* hearing because causal connection between exposure to benzene in gasoline and AML was generally accepted in scientific community, and plaintiff's expert had followed generally accepted principles and methodology in showing plaintiff's exposure, demonstrating link between benzene and leukemia, and presenting dose-response rela= tionship. Appellate Division reversed, holding that plaintiff's expert failed to establish plaintiff's precise level of exposure to benzene. In affirming the intermediary court's holding, the New York Court of Appeals said a court had to balance the needs to prevent introduction of junk science against establishing insurmountable standards that would effectively deprive toxic tort plaintiffs of their day in court. Thus, court held that the plaintiffs did not always have to precisely quantify its exposure levels use dose-response relationships provided their experts used methods generally acceptable methods to establish causation. Turning to the case before it, the court found that the appeals court had properly excluded plaintiff's expert opinion. The court said there was no dispute about the risk of developing AML

from exposure to benzene but that that the plaintiff's expert had failed to demonstrate the link between exposure to gasoline containing benzene and AML. In addition, the court held that standards promulgated by regulatory agencies as protective measures such as the OSHA PEL for benzene are inadequate to demonstrate legal causation.

D.J. Nelson v. Superior Court of Sacramento County, 2006 Cal. App. LEXIS 1748 (3rd App. Dist. 11/6/06). Property owner brought product liability action against Exxon Mobil for MTBE contamination of water supply system. Trial court granted judgment on pleadings to Exxon on grounds that strict product liability doctrine did not apply because plaintiff was not injured by use of the allegedly defective product by the ultimate consumer or end user. Appeals court vacated judgment, ruling that strict liability extends to products that have left the control of manufacturer and placed in market. Court said California provides broader protection than other jurisdictions to bystanders and does not require a sale of a product. Placement of gasoline in leaking tanks was a foreseeable misuse of the product.

Flynn v. Polemis, 2006 Conn. Super. LEXIS 3427 (11/17/06). State statute of limitations bars purchaser claim under Connecticut Transfer Act.

Cadlerock Properties Joint Venture, L.P. v. Town of Ashford, *2006 Conn. App. LEXIS 499 (11/28/06).* Property owner claim that town appraisal overvalued contaminated property rejected because owner had knowledge of contamination when it purchased property.