
BOND INFORMATION MEMO

Toxic Tort and Environmental Litigation

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Third Department Clarifies Scope of Recoverable Medical Monitoring Damages in Waterborne and Airborne TCE Exposure Case

On the heels of the Court of Appeals' landmark decision rejecting an independent cause of action for medical monitoring in *Caronia v. Phillip Morris USA*,¹ on February 20, 2014, the Third Department decided *Ivory v. IBM*.² Ivory is noteworthy because it significantly limits the availability of medical monitoring damages for plaintiffs who have been exposed to toxic substances through groundwater or airborne contamination. Ivory also provides fresh insight regarding the viability of traditional tort theories, such as negligence, public nuisance, private nuisance, and trespass, for toxic tort plaintiffs.

The plaintiffs in *Ivory* are residents of the Village of Endicott, Broome County, who allege that IBM's release of trichloroethylene (TCE) at its machine manufacturing facility caused both airborne (vapor intrusion) and waterborne contamination at their properties. In 2008, a putative class action was commenced against IBM, alleging causes of action for negligence, private nuisance and trespass, and seeking damages for medical monitoring. Eventually, the claims of two families, comprising seven plaintiffs, were severed from the class to be tried separately. Of the seven plaintiffs, two allege that they developed cancer as a result of their TCE exposure, and five allege that while they do not presently manifest any physical injury related to TCE, they are entitled to medical monitoring costs as consequential damages flowing from their negligence and other tort claims. On motions for summary judgment, Broome County Supreme Court dismissed the medical monitoring damages claim, but let certain other claims proceed.

Negligence

In holding that the trial court properly declined to dismiss the negligence claims of the two plaintiffs who manifest present physical injury, the Third Department made a number of noteworthy observations regarding a toxic tort plaintiff's burden of proof on a defendant's standard of care. Principally, the court noted that IBM's expert proof that it complied with the standard of care by following industry standards for the disposal of TCE was insufficient to support dismissal of the negligence claim on summary judgment. The court held that compliance with industry standards does not establish that the defendant was not negligent, because "an industry standard may fail to meet the appropriate standard of care." The court also noted that the following factual issues raised by the Plaintiffs were sufficient to create a triable question of fact regarding whether IBM breached its standard of care: (1) the lack of an explanation as to how a large pool of solvents developed beneath IBM's facility; (2) evidence that IBM was aware of missing or leaking solvents; and (3) evidence that IBM was aware of ill health effects of TCE. The Third Department also affirmed that the plaintiffs could rely on the doctrine of *res ipsa loquitur* to establish IBM's negligence, observing that the formation of a large solvent pool is not something that ordinarily happens absent negligence.



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Nuisance and Trespass

The Third Department significantly limited the viability of trespass and private nuisance causes of action in the modern toxic tort arena. First, applying the black letter principle that trespass represents an injury to the “right of possession,” the court concluded that a plaintiff does not have valid claim for trespass based on vapor intrusion, because this contamination interferes with a property owner’s “use and enjoyment,” rather than his or her “possession,” of land. Also noteworthy was the court’s holding that a plaintiff cannot have a valid claim for trespass based on groundwater contamination, because “groundwater does not belong to the owners of real property, but is a natural resource entrusted to the state by and for its citizens.” The court’s opinion suggests that going forward, trespass theories will largely be nonviable in groundwater and vapor intrusion cases, absent evidence of soil contamination, which the court found to be a proper subject of a trespass claim.

Additionally, the Third Department clarified that an ownership interest in property is a prerequisite for a viable private nuisance claim, and therefore cannot be pursued by children or other family members who do not have an ownership interest in the property where they live.

Medical Monitoring

As we noted in an earlier information memorandum, the Court of Appeals in *Caronia* held that medical monitoring may only be awarded as consequential damages where a plaintiff proves a present injury to “person” or “property.” The implications of this holding have been particularly troubling for groundwater contamination and vapor intrusion defendants, who often have to defend claims based on traditional property-damage tort theories, such as public nuisance, private nuisance, and trespass. However, the Third Department’s analysis in *Ivory* should provide some comfort that a toxic tort plaintiff must allege more than a mere “trespass” or “nuisance” to recover medical monitoring damages.

While the Third Department avowed *Caronia*’s holding that a plaintiff may recover medical monitoring costs as a consequence of “damage” to property, the court concluded that only plaintiffs with viable trespass claims (e.g. claims based on soil contamination, not vapor or groundwater contamination) and plaintiffs with negligence claims based on present physical illness may recover medical monitoring damages. Notably, the court rejected the plaintiff’s argument that medical monitoring damages could be recovered by the plaintiffs who alleged private nuisance. The court noted that while private nuisance is based on an “interference” with property, “interference,” by itself, is not the same as “damage” to property within the meaning of *Caronia*, although a nuisance claim might include a property damage component.

Left unresolved by *Ivory* is whether medical monitoring costs may be recoverable as consequential damages of a *public nuisance* claim based on soil, groundwater, or vapor intrusion, where the plaintiff does not exhibit any present injury. A public nuisance under New York law “consists of conduct or omissions which offend, interfere with or cause damage to the public in the exercise of rights common to all in a manner such as to offend public morals, interfere with use by the public of a public place or endanger or injure the property, health, safety or comfort of a considerable number of persons.”³ A private person “who suffers damage or injury, beyond that of the general inconvenience to the public at large, may recover for such nuisance in damages or obtain an injunction to prevent its continuance.”⁴

Although one New York trial court has held that a need for medical monitoring is a special harm sufficient to confer standing on a plaintiff to bring a public nuisance action,⁵ this reasoning would likely no longer be persuasive in light of the Court of Appeals’ holding in *Caronia* that medical monitoring damages cannot be recovered absent proof of present injury to person or property. More uncertain is whether the “interference” caused by vapor intrusion or groundwater contamination will be sufficient to constitute “damage” or “injury,” different from the public at large, sufficient to confer standing on a plaintiff to bring a public nuisance claim. The court’s private nuisance analysis in *Ivory* will provide fodder for toxic tort defendants to argue that absent actual damage to person or property, public nuisance is not a path to medical monitoring damages.

Moreover, like *Caronia*, *Ivory* provides little guidance regarding a plaintiff's burden of proof at trial on medical monitoring. For example, the decision does not address whether plaintiffs will have to demonstrate (1) that they have a significantly increased risk of developing a disease; (2) that the prescribed medical monitoring regime is distinct from the regime normally recommended in the absence of exposure; (3) that a monitoring procedure exists that makes the early detection of the disease possible, or any of the other elements of proof that have been addressed by federal medical monitoring case law.⁶

Nonetheless, the court's medical monitoring analysis is a significant victory for toxic tort defendants, as it effectively forecloses asymptomatic plaintiffs who were exposed to airborne or waterborne contaminants from recovering medical monitoring costs as consequential damages of either negligence or trespass causes of action. Although the court's language leaves open the possibility that with crafty pleading, private nuisance may be a gateway for medical monitoring damages, the decision leaves no doubt that a plaintiff will have to allege more than "annoyance, inconvenience, loss of quiet enjoyment and emotional injury" to establish an "injury to property" within the meaning of *Caronia*.

To learn more, contact:

Thomas R. Smith	315-218-8325	smithtr@bsk.com
Richard L. Weber	315-218-8375	rweber@bsk.com
Kate I. Reid	315-218-8625	kreid@bsk.com

1 *Caronia v. Philip Morris USA, Inc.*, No. 227, 2013 N.Y. LEXIS 3476 (N.Y. Dec. 17, 2013).

2 No. 516276 (N.Y. App. Div. Feb. 20, 2014).

3 *Copart Indus., Inc. v. Consol. Edison Co. of New York*, 41 N.Y.2d 564, 568 (1977); see also *532 Madison Ave. Gourmet Foods, Inc. v. Finlandia Ctr., Inc.*, 96 N.Y.2d 280 (2001).

4 *Leo v. Gen. Elec. Co.*, 145 A.D.2d 291 (2d Dep't 1989)

5 *Acevedo v. Consol. Edison Co.*, 151 Misc. 2d 347 (Sup. Ct. New York Co. 1991)

6 See, e.g., *Abbatiello v. Monsanto Co.*, 522 F. Supp. 2d 524, 539 (S.D.N.Y. 2007)