



California Toxic Tort Law Alert

Richard Finn

September 2011

JONES v. CONOCOPHILLIPS **Cal.App 2nd / 7DAR 13382**

TOXIC TORT: Plaintiff Not Required to Identify Specific Toxin Contained In Product To Which Exposed / Alleged Superior Knowledge of Toxic Properties of Products May Warrant A Fraudulent Concealment Claim

BACKGROUND:

Plaintiffs' decedent died of chemically induced diseases of the heart, liver and kidney, each attributed to occupational exposures to multiple chemical products allegedly manufactured by 19 defendants. Plaintiffs' initial complaint failed to allege specific facts to any one product, this defect supporting the granting of a demurrer with leave to amend. The first amended complaint identified the products at issue, it asserted these compounds "contained significant concentrations of organic solvents and other cardio toxic, hepatotoxic, nephrotoxic and other toxic chemicals." It was further alleged decedent "was exposed to toxicologically significant levels of these chemicals..." that as result of the exposures the toxins entered into his body and that "[E]ach toxin that entered [decedent's] body was a substantial factor in bring about, prolonging and aggravating..." the diseases at issue. Several defendants objected to the amended complaint, it argued that the failure to identify the toxins at issue lacked specificity. More precisely, defendants asserted plaintiffs had failed to reference the toxin contained in the particular product that caused the alleged injury. The court sustained the demurer without leave to amend. A judgment of dismissal was subsequently entered.

Plaintiffs challenged the ruling not only as to the issue of the adequacy of the toxic tort allegations but also as to the decision regarding their fraudulent concealment and breach of implied warranty claims.

DISCUSSION:

The focus of the decision was the scope of the ruling of Brockrath v. Aldrich Chemical Co., Inc. (1999) 21 Cal 4th 71 which "had established the causation pleading threshold for a complaint alleging harmful long term exposure to multiple toxins under California law." Reviewing the "explicit guidelines for plaintiffs attempting to allege injury resulting from exposure to toxic materials" the Jones court read Brockrath as rejecting the "specificity" argument presented by defendants, concluding that Brockrath did not express a requirement that a "plaintiff identify specific chemical compounds before a claim can be asserted. Rivas v. Safety-Kleen (2002) 98 Cal App 4th 218, 241 .

More significant is the ruling regarding plaintiffs' Fraudulent Concealment cause of action. The trial court sustained the demurrer to this claim, in part, because none of the defendants owed decedent a fiduciary duty giving rise to a duty to disclose. Acknowledging the lack of a fiduciary relationship, the court observed "[t]he duty to disclose may arise without any confidential relationship where a defendant alone has knowledge of material facts which are not accessible to the plaintiff." Magapali v. Farmers Group, Inc. (1996) 48 Cal App 4th 471, 482. Since plaintiffs employed the necessary language of superior knowledge and decedent's lack thereof, the court concluded the allegations were sufficient to put defendants on notice of the basis of this cause of action.

The court also addressed plaintiffs' breach of the implied warranty claim, challenged because of the absence of privity. Although the court expressed doubt as to the viability of this theory in light of plaintiffs' strict liability claim, the court held privity was satisfied because the products at issue were sold to companies for use by their employees.

ANALYSIS:

What is of interest to this reporter is the discussion regarding fraudulent concealment, in particular, because the firm has successfully demurred to this theory in past cases. To ultimately sustain this theory, plaintiffs would have to establish a product manufacturer, acting with the requisite scienter, did not disclose scientifically known toxic properties of chemicals contained in the product. Since concealment, like any other species of fraud, must be plead with specificity, it is submitted that plaintiffs should be required to plead facts demonstrating what was allegedly suppressed and how this conduct resulted in the plaintiff's harm. The court concedes that plaintiffs' allegations are conclusory but allows for this word play because essentially defendants can figure it out. Also problematic is the ignorance of the relationship between decedent's employer and the product manufacturer. What the court is permitting is a third party fraud claim, it ostensibly predicated on the fact that defendants knew their products would be used by employees of their customers. Accordingly, a concealment pleading should contain allegations the employer was deceived, it was ignorant of the deception and that it relied to its detriment, on the alleged fraud.

Richard Finn has practiced law for over 25 years. His experience is informed by the range of cases handled throughout his career. These have included toxic torts, product liability, commercial litigation, catastrophic personal injury, construction defect and medical malpractice. He can be reached at 510.835.6821 or rfinn@burnhambrown.com.