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Disposal of Toxic Chemicals Held to be an Abnormally Dangerous Activity Mandating Strict Liability

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the rate ceiling in § 334.011 on agricultural loans. Consequently, the highest rate a "most favored lender" state bank could charge pursuant to § 334.011 on agricultural loans would be no more than 4.5% in excess of the federal discount rate.

John Joyce

Editor's Note: On November 7, 1988, the United States Supreme Court denied the petition for writ of certiorari. 57 U.S.L.W. 3333 (U.S. Nov. 7, 1988) (No. 88-591).

DISPOSAL OF TOXIC CHEMICALS HELD TO BE AN ABNORMALLY DANGEROUS ACTIVITY MANDATING STRICT LIABILITY

In *T & E Industries v. Safety Light Corp.*, 227 N.J. Super. 228, 546 A.2d 570 (N.J. Super. 1988), a New Jersey appellate court determined the scope of the liability of a manufacturer who disposed of hazardous waste on its former property. The court found the former property owner strictly liable to the successor in title who purchased the property without knowledge of the danger. The court held the resulting damages were proximately caused by the former owner and foreseeability was irrelevant. Further, the former owner could not rely on the doctrine of *caveat emptor* ("let the buyer beware") to avoid liability.

The United States Radium Corporation ("USRC") owned a plant in Orange, New Jersey. Between 1917 and 1926, USRC extracted from carnotite ore radium which was used for various commercial purposes. The processing yielded a solid waste known as "tailings" which were dumped on vacant areas of the property. Both radium and radium tailings are known carcinogens, posing a threat to human health.

In 1926, USRC closed its Orange plant site. The plant remained vacant until it was leased to commercial tenants in the mid-1930s. In 1943, the property was purchased by one former tenant. The purchaser was aware of the radium deposits at the time of purchase but did not regard the condition as dangerous. Consequently, the purchaser made an addition to the plant over the area contaminated with radium tailings. After a succession of owners, the site was sold in 1974 to the plaintiff, T & E Industries ("T & E").

In March of 1979, the New Jersey Department of Environmental Protection ("DEP") voiced concern about the possibility of an excessive level of radiation on T & E's property. Long-term monitoring equipment revealed radium levels sufficient to constitute a health risk. In response to DEP's request for remedial action, T & E hired a health physicist who implemented a variety of safety measures. In addition, T & E conducted independent testing which revealed that an assembly area worker at the plant would be exposed to the maximum statutory level of radioactive material within 3.18 years. It became clear that removing the contaminated soil under and around the building was the only way to render the building safe. When this measure was rejected as too costly, T & E relocated to a new facility.

T & E sued Safety Light Corporation and other successor corporations of USRC for property damages resulting from radium contamination. The complaint alleged absolute liability, nuisance, negligence, misrepresentation and fraud. T & E sought compensatory and punitive damages, as well as reimbursement for the cost of decontaminating its property. USRC was charged with originally dumping the radioactive waste on the property.

The trial court granted T & E's pretrial motion for partial summary judgment, holding that USRC had in fact placed the radium tailings on T & E's property. T & E proceeded to try its case relying on the court's apparent decision that the issue of absolute liability was decided in its favor. However, after T & E presented its evidence the trial court granted USRC's motion to dismiss T & E's absolute liability claims, contrary to its previous order. In addition, the trial court dismissed T & E's claims of fraud, misrepresentation, reckless conduct, and punitive damages, leaving only the negligence claim.

The court instructed the jury to determine, among other things, whether USRC was negligent in its failure to warn T & E of a potential health risk, and whether that negligence was a proximate cause of T & E's damages. The jury found that USRC had been negligent and that this negligence had proximately caused T & E's damages. However, the trial judge granted USRC's motion to set aside the jury verdict on the ground that the doctrine of *caveat emptor* barred T & E's claim.

On appeal, the Superior Court of New Jersey, Appellate Division, noted that "many of today's problems due to toxic waste are a result of yesterday's mistakes... for which yesterday's perpetrators must be held responsible." 546 A.2d at 575. Of the five issues raised by T & E on appeal, the court addressed only the issue of absolute or strict liability. Under traditional tort doctrines,

(continued on page 28)

TOXIC CHEMICALS (from page 27)

the exercise of utmost care will not free one from liability for damages resulting from an abnormally dangerous activity. Section 520 of the Second Restatement of Torts lists six factors which determine whether an activity is abnormally dangerous:

> (a) existence of a high degree of risk of some harm to the person, land or chattels of another; (b) likelihood that the harm that results from it will be great; (c) inability to eliminate the risk by the exercise of reasonable care; (d) extent to which the activity is not a matter of common usage; (e) inappropriateness of the activity to the place where it is carried on; and (f) extent to which its value to the community is outweighed by its dangerous attributes.

3 Restatement, Torts 2d, § 520 at 36 (1976).

The appellate court determined that the handling and disposal of toxic waste is an "abnormally dangerous" activity and that the risk of harm should not fall on the victim. Because radium tailings are toxic waste, USRC's dumping constituted an abnormally dangerous activity for which it could be held strictly liable.

Next, the court considered USRC's knowledge of the health risks associated with radium, noting that whether USRC had knowledge that radium tailings were an abnormally dangerous substance was relevant to a determination of absolute liability. In a 1943 letter, USRC's president cited four incidents in which employees had died from exposure to radium. Both the letter and an informational pamphlet prepared in part by USRC revealed the company's knowledge of the hazards of radioactive compounds. Moreover, between 1917 and 1943, the plant employee who measured radon wore a lead-lined apron and numerous signs warned employees not to sharpen brushes of luminous paint with their mouths, as this procedure was known to cause cancer. Exposure to radiation had rendered one plant engineer sterile. When radon became impacted under his fingernail, the company president voluntarily cut off his entire finger.

The appellate court disagreed with the trial court's conclusion that the doctrine of *caveat emptor* barred T & E's suit. The appellate court considered the doctrine outdated, widely abandoned and inapplicable. Because T & E did not knowingly accept the radium-contaminated property, the court refused to allow USRC to escape liability by claiming that T & E bought the property at its own risk.

The court characterized USRC's conduct as a "continuing tort" because the dangers associated with the decaying radium were continuous even though the dumping had occurred many years earlier. Because the law provides that liability for a continuing tort falls on the party originally responsible for the contamination, the innocent successors in title who did not dump radium tailings on the property did not share in the liability. The appellate court noted that " '[t]hose who poison the land must pay for its cure.' " 546 A.2d at 578, citing cases. The court reversed the judgment in favor of USRC, directed the trial court to enter judgment on the issue of liability in favor of T & E, and ordered a new trial on the issue of damages.

Debbie Williams

ILLINOIS APPELLATE COURT HOLDS COCA-COLA NOT CAUSE OF ILLNESS SUFFERED IMMEDIATELY AFTER CONSUMPTION

In *Warren v. Coca-Cola Bottling Co.*, 166 Ill. App. 3d 566, 519 N.E.2d 1197 (Ill. App. 1988), the Appellate Court of Illinois, First District, held that a plaintiff presented no genuine issue of material fact to support her allegation that bacteria present in the soft drink she consumed caused her illness. Consequently, the court affirmed the trial court's order granting summary judgment in favor of defendants Coca-Cola Company ("Coca-Cola") and Coca-Cola Bottling Company of Chicago ("the Bottling Company").

Background

Warren purchased a can of Coca-Cola at Litt's Cut Rate drug store. The can appeared clean and the soft drink was carbonated as usual. Warren took one large gulp of the soda, which tasted terrible. Within five minutes she became ill. Warren immediately went to a hospital where her condition worsened. She informed the emergency room physician that she became sick after consuming the cola. Consequently, he listed the diagnosis on the emergency room report as "acute gastritis" caused by ingestion of coca-cola, and admitted her as a patient.

Warren remained in the hospital for six days during which time she experienced stomach cramps, diarrhea and vomiting. Her treating physician failed to pinpoint the exact cause of her illness. He advised her that the soft drink