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ADMINISTRATIVE LAW AND ENVIRONMENTAL LITIGATION

- Summary adjudication of CERCLA liability was not immediately appealable, but summary adjudication of state law claims was immediately appealable and properly granted (p. 107); Eleventh Amendment immunity did not apply to a court-appointed receiver (p. 109)

WATER QUALITY CONTROL

- Uranium mill tailings are not "pollutants" under the Clean Water Act for purposes of NPDES permit requirements (p. 110)
- A Special Topics Column discusses the regulation of smaller construction sites by EPA's storm water permit system (p. 112)

INSURANCE

- The "sudden and accidental" pollution exclusion barred coverage for contamination from liquid waste disposed of at a municipal landfill (p. 115)

LAND USE AND ENVIRONMENTAL PLANNING

- An inverse condemnation claim following the electorate's rejection of a general plan amendment was not ripe for adjudication (p. 119)

Exxon Valdez Class Actions—An Update: "Spillionaires" in The Making?

by Alex Moghaddam*

A total of 18 class actions were filed in the wake of the 1989 EXXON VALDEZ oil spill. Sixteen of the class actions were initially filed in the Alaska state court and 15 of those were consolidated into five separate classes; the five classes consisted of (1) commercial fishermen alleging loss of fishing harvests, (2) sport fishermen alleging damages resulting from the loss of use and enjoyment of natural resources, (3) Alaska natives claiming loss of fishing harvests and "cultural damages" to their "communal way of life," (4) area businesses alleging economic losses, and (5) landowners claiming various property damages. In time, all of these actions were removed to federal court, where most were summarily adjudicated in favor of the defendants.

A state court class action was also filed by cannery workers for lost wages. This action was in due course also removed to federal court.

Moreover, in late 1993, on Exxon's motion, the federal court created a "mandatory punitive damages class." All of the plaintiffs' punitive damages claims were thus consolidated into one class action.

Finally, a class action was filed in California state court (and then removed to the federal court in Los Angeles) on behalf of persons in California seeking recovery of the difference between gasoline prices before and after the spill.

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What follows is a brief summary of each of these class actions.¹

I. Commercial Fishermen

The fishermen's class action represented the largest private action for compensatory damages. The fishermen sought recovery of \$900 million in both lost fishing harvests (salmon and herring) and lost income resulting from a decline in the price of Alaskan salmon allegedly resulting from buyers' (primarily Japanese) concerns about the quality of the salmon.

At trial, in the summer of 1994, the jury awarded plaintiffs approximately \$287 million — \$147,673,000 for lost fishing harvests, \$129,639,000 for the decline in the price of salmon and herring, and \$9,400,000 for the loss of the value of fishing permits. However, the defendants received an offset of \$267 million against that award, which represented the total amount of payments Exxon (\$168 million) and the Alyeska Pipeline Service Co. (\$99 million) had already made to individual members of the class.

Exxon has appealed various parts of the verdict; its opening brief was filed in June 1997.

II. Sportfishers

The Alaska Sportfishing Association brought a class action against Exxon on behalf of an estimated 130,000 recreational sportfishers, seeking recovery for the loss of use and enjoyment of natural resources. Exxon in due course moved for summary judgement on the ground that the action was precluded by the Settlement Agreement and Consent Decree it had entered into with the U.S. Government and the State of Alaska, pursuant to which Exxon agreed to pay \$900 million (and possibly an additional \$100 million) for natural resource and other damages. The state and federal governments had in turn agreed to release Exxon from any further civil claims for natural resource damages.

The district court granted Exxon's motion for summary judgement in January 1993, and the Ninth Circuit Court of Appeal affirmed in August 1994. The Ninth Circuit agreed with the district court's reasoning that the class action was precluded under the doctrine of *res judicata*. Under that doctrine, a judgment in a prior suit bars a subsequent suit involving (1) the same parties or their privies and (2) the same cause of action. Here, the court concluded, the state and



federal governments, in settling with Exxon, acted in their "parens patriae capacity as representatives for all their citizens. . . ." [Alaska Sport Fishing Ass'n v. Exxon Corp. (9th Cir. 1994) 34 F.3d 769, 773]. As such, the Consent Decree included the sportfishers' interests, and the first element of res judicata was thus satisfied [Alaska Sport Fishing Ass'n v. Exxon Corp. (9th Cir. 1994) 34 F.3d 769, 773]. Moreover, the Consent Decree expressly covered the sportfishers' alleged damages — lost public use — and thus the second element of the doctrine was also satisfied [Alaska Sport Fishing Ass'n v. Exxon Corp. (9th Cir. 1994) 34 F.3d 769, 773-774].

III. Alaska Natives

A class action was brought by 3,455 Alaska natives, seeking recovery of both economic and non-economic damages. The economic damages consisted of the loss of fishing harvests and other subsistence wildlife and "lost economic multiplier damages," which essentially consisted of claims for lost wages by everyone else in the native villages (e.g. butchers) whose livelihood depended on the fishermen and hunters.

The non-economic damages claims consisted of alleged injuries to the natives' "subsistence way of life, archeological sites and artifacts . . . natural resources and property upon which [plaintiffs] depend and/or which are part of their natural habitat and lives" [Alaska Native Class v. Exxon Corp. et al. (9th Cir. 1997) 104 F.3d 1196, 1997 CELR 64].

The fishing harvests and other wildlife damages claims were settled on the eve of trial in the summer of 1994 for approximately \$22 million. The claims for lost economic multiplier damages were excluded as non-recoverable damages by the District court at trial. The Alaska natives filed their appeal in August 1997.

As for the natives' non-economic, cultural damages claims, Exxon successfully moved for summary judgment before trial in 1994, and the district court's decision was affirmed by the Ninth Circuit in January 1997. The plaintiffs' primary theory of liability was that the oil spill gave rise to a cause of action for public nuisance for non-economic damages under the general maritime law. The district court disagreed, observing that "a private litigant cannot recover damages for a public nuisance unless he or she can show a special injury different in kind from that suffered by the general public" [Alaska Native Class v. Exxon Corp. et al. (9th Cir. 1997) 104 F.3d 1196, 1197, 1997 CELR 64 (quoting district court order)].

The Ninth Circuit affirmed, noting that "while the oil spill may have affected the Alaska natives more severely than other members of the public, 'the right to obtain and share wild food, enjoy uncontaminated nature, and cultivate traditional, cultural, spiritual and psychological benefits in pristine natural surroundings' is shared by all Alaskans" [Alaska Native Class v. Exxon Corp. et al. (9th Cir. 1997)

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conduct discovery, citing Fed. R. Civ. Proc. 56(f) (should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other orders as is just). The court noted that to obtain a continuance, defendants had to show (1) that they had set forth in affidavit form the specific facts they hoped to elicit from further discovery; (2) that the facts sought did exist; and (3) that those facts were essential to resist the summary judgment motion.

The court stated that it appeared from the record that defendants did not submit affidavits setting forth the evidence they hoped to elicit from further discovery, but that defendants only implicitly moved for further time to conduct discovery. The court stated that defendants' apparent noncompliance with the terms of Rule 56(f) was an adequate ground for affirmance of the district court's denial of defendants' request for more discovery. The court further stated that denial of a Rule 56(f) application is proper when it is clear that the evidence sought is almost certainly nonexistent or is the object of pure speculation. The court stated that here, defendants wanted more time to discover the source of the contamination of the well water. Defendants argued that the contamination came from another property located between the 20th Street property and the contaminated wells (the "L-P property"). The court observed that there was undisputed evidence that workers at the 20th Street property had dumped trichloroethylene on the property for almost 20 years, that groundwater under that property was contaminated with trichloroethylene, that water in a well between the 20th Street property and the L-P property was contaminated with trichloroethylene, that the L-P property was not contaminated with trichloroethylene, and that the groundwater was flowing from the 20th Street property toward the contaminated wells. The court stated that in light of these undisputed facts, evidence that the 20th Street property was not the source of the contamination was almost certainly nonexistent or was the object of pure speculation.

The court also held that the facts defendants hoped to elicit during discovery were not essential to resist the summary adjudication motion. To succeed on its motion, the state did not have to show that property other than the 20th Street property was contaminated, because the pollution at the 20th Street property constituted a public nuisance and violated state environmental laws.

Issues of Material Fact. Defendants also contended that summary adjudication was improper because there were

genuine issues of material fact as to who polluted the groundwater at offsite locations. The court observed that the relevant inquiry in a summary judgment adjudication motion is (1) is there a genuine issue; (2) is that issue about a material fact; and (3) is the moving party entitled to a judgment as a matter of law, citing Fed. R. Civ. Proc. 56(c) and *Anderson v. Liberty Lobby, Inc.* [(1986) 477 U.S. 242]. The court stated that an issue of fact is genuine if the evidence is such that a reasonable jury could return a verdict for the non-moving party, citing *Liberty Lobby*.

Defendants argued that the district court erred by rejecting the testimony of defendants' expert witness and contour maps prepared by their expert that allegedly showed trichloroethylene contamination radiating from the L-P property. The court stated that the maps did not create a genuine dispute because undisputed facts mandated a different interpretation of the maps: that contamination flowed downhill from the 20th Street property and accumulated at the bottom of the incline, which happened to be the edge of the L-P property. The court also held that defendants failed to show that there was a dispute as to any material facts. The court stated that all the alleged disputed facts pertained to how the trichloroethylene ended up at the offsite locations, and facts pertaining to offsite pollution were not material to the state's summary adjudication motion. Under California law, polluted water is a public nuisance, and any person who creates or helps maintain a nuisance is liable for its abatement and damages. Furthermore, parties responsible for a release or threatened release of hazardous substances may be ordered to take remedial action [Health & Safety Code § 25358.3]. Thus, to state a claim under California law the state did not have to prove that trichloroethylene migrated from the 20th Street property to other areas, and the cause of contamination at off-site areas was immaterial to the state law claims.

Liability of Defendants. Defendants, who were executors of the plant owner's estate and trustees of his trusts, argued that the state was not entitled to judgment as a matter of law because defendants were not owners or operators of the property when the hazardous chemicals were disposed there. The court observed that this argument might go to the CERCLA liability issue, because CERCLA imposes liability on "owners" and "operators." However, the court observed that California law imposes liability on any person who maintains a nuisance, regardless of whether that person has an interest in the land. The court stated that defendants maintained a nuisance by administering property where hazardous chemicals were polluting the water and therefore they were liable under California law regardless of whether they were owners or operators under CERCLA.

The action was first filed in the California Superior Court and then removed to federal court. The district court applied the Robbins Dry Dock rule and dismissed the action. The Ninth Circuit affirmed [*Benefiel v. Exxon Corp.* (9th Cir. 1992) 959 F.2d 905, 906].

Endnotes

¹ This article is based on a review of the reported decisions relating to the EXXON VALDEZ class actions, as well as extensive telephonic conversations with counsel for both plaintiffs and defendants.

ADMINISTRATIVE LAW AND ENVIRONMENTAL LITIGATION

Cases

Summary Adjudication Properly Granted State on State Law Nuisance and Environmental Claims

State of California v. Campbell
No. 93-16754, 9th Cir.
3/10/98 Daily J. D.A.R. 2299
March 9, 1998

The district court's order granting the state summary adjudication on its state law nuisance and environmental claims was immediately appealable because the district court had issued an injunction requiring defendants to abate the public nuisance, and thus the order came within a provision allowing immediate appeal of orders "granting, continuing, modifying, refusing or dissolving injunctions." However, the district court order granting the state summary adjudication on its CERCLA claim was not appealable. Summary adjudication was properly granted the state on its state law nuisance and environmental claims.

Facts and Procedure. For almost 20 years, workers at a metal tube and can manufacturing plant (the "20th Street property") disposed of trichloroethylene by dumping it on the ground. Testing revealed trichloroethylene and other

hazardous substances in the soil and in the groundwater. Contamination was found in wells located about a mile downgradient from the plant. The state filed an action in federal district court to require the defendants to cleanup the contamination and to recover its costs. The state moved for summary adjudication on a federal environmental claim under CERCLA [42 U.S.C. § 9601 et seq.], a state law public nuisance claim, and a claim under the California Hazardous Substance Account Act [Health & Safety Code § 25300 et seq.]. As a remedy for the state law violations, the state requested a permanent injunction requiring abatement of the public nuisance. The district court granted the state's motion in its entirety. Defendants appealed. The Ninth Circuit dismissed the appeal as to the CERCLA claim and affirmed as to the state law claims.

CERCLA Order Not Appealable. The court noted that federal courts of appeals have jurisdiction only over final decisions of district courts. The court further noted that an order that determines liability but not damages or adjudicates less than all claims is not a final decision, and it stated that both the state law and CERCLA orders were precisely such orders. The court concluded that neither order came within an exception to the final judgment rule for appealable collateral orders because neither would be unreviewable on appeal from the final judgment in the action. The court further stated that the CERCLA order did not fall under any statutory provisions allowing immediate appeal of interlocutory orders. However, because the district court had issued an injunction requiring defendants to abate the public nuisance, the court determined that the state law order came within a provision allowing immediate appeal of orders "granting, continuing, modifying, refusing or dissolving injunctions" [28 U.S.C. § 1292(a)(1)].

Pendent Appellate Jurisdiction. Defendant contended that the CERCLA order was appealable because it was "inextricably intertwined" with the injunction, citing *Swint v. Chambers County Com.* [(1995) 514 U.S. 35]. The Ninth Circuit observed that in *Swint* the Supreme Court criticized the concept of pendent jurisdiction but left open a loophole for "inextricably intertwined" rulings. The circuit court concluded that this exception should be narrowly construed, *and that under such a construction, the CERCLA order was not inextricably intertwined with the injunction.* The court stated that defendants' state law liability could easily be discussed without addressing defendants' CERCLA liability; *simply because the same facts were involved in both issues did not make the two issues inextricably intertwined.*

Continuance for Additional Discovery. Defendants argued that the district court should not have adjudicated their liability under state law without giving them more time to