

Environmental and Toxic Tort Litigation USA

Recent years have seen companies confronted with a rise in toxic tort litigation, both in the number of cases and the complexity of the cases being instigated. To find out about this growing issue, *Lawyer Monthly* speaks to Colin K. Kelly, a partner in the Products Liability Group of international law firm, Alston & Bird LLP. Colin's practice is focused on the areas of toxic torts, complex commercial/product litigation and corporate crisis management.

Please can you give me an overview of the types of cases within this practice area that you deal with most regularly?

Over the past eleven years, I have helped mostly American-based companies navigate toxic tort litigation in some of the most hostile legal environments in the United States (like South Florida; West Virginia; Madison County, Illinois; Philadelphia; and Baltimore). I have handled toxic tort and general product liability cases for chemical, pharmaceutical and consumer product companies all across the United States and in Ontario, Canada. In the past two years, I have served as trial counsel in more than 10 multimillion-dollar fatal asbestos-related cancer cases for a large international chemical company.

What are the main legal challenges faced by people who operate in potentially hazardous industries?

The biggest challenge is that the definition of what constitutes a "hazardous industry" or a "hazardous product" continues to expand as federal and state regulatory agencies grow and as scientific knowledge evolves. The U.S. Consumer Product Safety Commission (CPSC), as one example, is estimated to have jurisdiction over more than 15,000 consumer products and a staggering number of national and international manufacturers, distributors, importers and retailers. Since the enactment of the Consumer Product Safety Improvement Act of 2008, compliance costs and penalties for companies have increased dramatically. Today, unlike just 10 years ago, a small family-owned toy import company is working in just as "hazardous" an industry as a large multinational toy manufacturer. Both have third party testing and certification requirements that are being actively monitored and enforced by the U.S. CPSC.

Moreover, sophisticated toxic/mass tort law firms (representing injured plaintiffs) have realized that once a government agency deems a chemical component or product "hazardous," it may help tip the scale against manufacturers in civil lawsuits. Not surprisingly, more and more special interest groups (consumer advocates, environmental groups, trial lawyers etc.) are actively petitioning federal and state regulatory bodies (be it EPA, FDA, OSHA, CPSC) to adopt "no safe level" thresholds that directly benefit litigants and further expand civil liabilities for corporations.

Furthermore, in the courts, strict liability theories still dominate tort claims against companies who are perceived as operating in "hazardous industries" or who make "dangerous" products. A number of heavily populated states have adopted the "consumer expectations test" in product liability cases (California being one recent example). Under the test, a designer, manufacturer or marketer of a product can be held strictly liable if a reasonable consumer would find the product defective. The problem with the test is it lacks an objective standard for measuring the risk/utility of a product and imposes liability on a company through the eyes of a Monday-morning quarterback.

In short, the biggest challenge facing companies who are involved in hazardous industries is uncertainty and an increasingly hostile regulatory and civil liability landscape.

How can you help companies to implement preventative measures, or if necessary, effectively defend themselves in court?

The first line of defense against any type of product/toxic tort liability is a good quality assurance/audit program and careful due

diligence in the purchase or merger of companies with legacy liability risks.

The second line of defense is a comprehensive crisis management plan (that includes both a legal and public relations/communications strategy as well). Most companies who distributed peanut butter, spinach, or lettuce products just a decade ago may not have anticipated the rise of foodborne pathogen litigation facing that industry today. Even the most conscientious company and seemingly benign product manufacturer will have a crisis at some point in its lifecycle. The key is having a plan before the crisis and updating it as you tackle bet-your-brand challenges in your industry.

Every CEO or general counsel knows best how their corporate culture deals with crisis, and as outside counsel, I always encourage clients to draft/vet a plan long before it is needed. Whether it is for a routine chemical spill, a large product recall, or a catastrophic fire/explosion, a crisis management plan can help a company mold its litigation landscape prospectively rather than let it spiral out of control.

Have there been any developments in environmental regulation and enforcement that affect your work?

I would like to highlight one example of where major product regulations seem to be heading and focus in on where it is likely to impact my practice 10 years from now (rather than today). California's green chemistry program has implications for all companies that produce consumer products sold in California, regardless of where a company is located. "Green chemistry" is California's not-so-subtle effort to try and export its aggressive environmental standards to the worldwide manufacturing industry. The regulations—created by the California Department of Toxic Substances Control (DTSC)—propose the development of a government-devised "chemicals of concern" list. The list has not yet been released but will likely contain "hazard profiles" for between 1,200-3,000 everyday chemicals.

Combined, the California statutes require the State Department of Toxic Substances to establish final regulations to:

- identify and create a list of chemicals that are toxic and can harm people or the environment;
- prioritize products containing those chemicals, based upon such factors as the volume in commerce, the extent of public exposure and how the product is eventually disposed;
- require manufacturers of those products to perform a detailed "alternatives assessment" to determine if a viable, safer alternative to the chemical exists; and
- establish various regulatory response actions to address any remaining concerns raised by the alternatives selected by manufacturers for implementation, and to move manufacturers toward designing safer products. Potential

actions include requiring labeling, requiring end-of-life management and restricting usage.

Once implemented in full, I expect to see an uptick in litigation against a variety of companies, including those who use only trace amounts of "chemicals of concern" in everyday products. The simple theory will be that these companies should have used or substituted a less-hazardous component of their products.

Again, as stated above, judges and juries are often overly impressed by broad government agency definitions of hazardous products. In a sense, once the government determines a product is hazardous (despite a lack of scientific data or dose determination to support the finding), judges/juries have a natural tendency to throw up their hands and say "what more evidence do we need to put liability on the company?" The government determination effectively reverses the burden of proof at trial.

Do you see the need for any? If so, what changes would you like?

This is a very difficult question to answer. The trend toward more regulation both at the state and federal level in the United States seems to be nearly unstoppable barring a major policy shift in our current bureaucracies. Other than taking an aggressive approach to roll back or stay regulation altogether, small and medium-sized companies should advocate for more of a risk/utility approach to the enforcement of existing regulations. Large companies on the other hand should continue to push for scientifically measured, accepted and data-driven approaches to new regulations. Unfortunately, many agencies are pushing politically-driven rather than science-driven regulations in the toxic tort arena. **LM**

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