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Toxic Tort Claims From Train Derailment: Fear of Cancer and Satisfaction of the Amount in Controversy Requirement

Transportation Legal Update

On August 28, 2017, the Third Circuit in *Breeman v. Everingham (In re Paulsboro Derailment Cases)* 2017 U.S. App. LEXIS 16393, dismissed the plaintiff's fear of cancer toxic tort claims arising out of an alleged injury from a chemical spill resulting from a train derailment. Although the Court's decision is unpublished, the opinion raises important considerations for challenging the underlying facts alleged to support diversity jurisdiction.

The Train Derailment Causes a Vinyl Chloride Spill

On November 30, 2012, a southbound Consolidated Rail (Consolidated) corporate freight train partially derailed, sending several cars off track and causing a significant chemical spill. One of the derailed tank cars carrying vinyl chloride ruptured, spilling approximately 20,000 gallons in the immediate vicinity. The chemical release formed an immediate vapor

cloud witnessed by residents, first responders and others in the area — all of whom experienced some level of exposure to the toxic cloud. Vinyl Chloride is a known carcinogen. Long-term exposures, such as in the occupational setting, are linked to various forms of cancers, including a rare form of liver cancer. As with all toxic exposures, the poison is in the dose.

On the day of the incident, Plaintiff-Appellant Alice Breeman, along with her children, drove through the vapor cloud multiple times. Additionally, first responders on the scene were also exposed to the vapor cloud.

Plaintiff Files Federal Court Fear of Cancer Lawsuit Against Consolidated

Plaintiff Breeman, one of many Paulsboro residents and first responders to file suit, alleged that she suffered ongoing coughing, wheezing and shortness of breath as a result of her acute exposure. The district court consolidated many of these cases, including that of Plaintiff Breeman. The district court next addressed whether Plaintiff Breeman met the *amount in controversy* requirement for diversity jurisdiction pursuant to 28 U.S.C. § 1332(a). After several interlocutory rulings, including the exclusion of Breeman's medical causation expert, the district court dismissed her claims on the basis that the allegations failed to meet the threshold requirements.

District Court Holds That Plaintiff's Claims Do Not Satisfy the Amount in Controversy Requirement

At the time she filed suit, Breeman alleged damages in excess of \$150,000 for each of her alleged claims, including physical injury and fear of cancer. During the course of briefing before the district court, however, the record reflected that Breeman was merely engaging in holistic cancer preventive practices and that she did not provide meaningful substantive detail regarding her injury. Further, Breeman's own experts did not establish a record that her alleged injuries at filing would meet the threshold *amount in controversy* requirement of damages of \$75,000. Furthermore, New Jersey state law (the applied substantive law of the forum), requires that "a person who sustains physical injury because of exposure to toxic chemicals may recover damages for emotional distress based on a reasonable concern that he or she has an enhanced risk of future disease." *Theer v. Phillip Carey Co.*, 259 N.J. Super. 40, 611 A.2d 148, 153

(N.J. Super. Ct. App. Div. 1992). Breeman’s own expert, whom the district court excluded, opined that as a result of her exposure she was only at a 1 in 10,000 increased risk for developing cancer. Based on that information, which demonstrated the extent of her alleged damages at the time of filing, the Court held that Breeman’s allegations failed to meet the necessary threshold for damages and the *amount in controversy* in excess of \$75,000.

Second, punitive damages claims can independently satisfy the *amount in controversy* requirement of diversity jurisdiction. The court determined, however, that merely alleging that the conduct was “malicious” or “willful,” without detailing the precise factual basis to support that contention, will not satisfy the rigorous test for opening the door for punitive damages. Consequently, under that framework, alleging punitive damages alone will meet the amount in controversy threshold. In this matter, although Consolidated may have known about the faulty circumstances that contributed to the derailment, the undisputed evidence showed the Conrail engaged in multiple efforts to fix faulty rail lines. The fact that the efforts to fix were not successful is not sufficient to establish “willful” or “reckless.”

Third Circuit Affirms Dismissal of the Claims Because Diversity Jurisdiction Requirements Were Not Met

The Third Circuit accepted appellate review to address the specific issue whether diversity jurisdiction existed pursuant to 28 U.S.C. §1332(a). The court affirmed the dismissal of the claims without prejudice on the basis that the plaintiffs simply could not show to a legal certainty that the requisite amount in controversy pursuant to 28 U.S.C. §1332(a) was at issue. The holding is of particular importance to those transportation entities such as rail, trucking and automotive that find themselves in high stakes toxic tort litigation. On the surface, the facts of this case are alarming — train derailment, 20,000 gallons of Vinyl Chloride spilled, a vapor cloud covering the scene, and first responders and area residents claiming cancer related illnesses from a known carcinogen. However, just because plaintiffs allege facts does not make it so. Courts should and will still require plaintiffs to meet their burden through a common sense analysis of the alleged facts to determine if plaintiffs’ claims can meet the

diversity jurisdiction pleading requirements. If the evidence is not present at the time of filing, jurisdiction is not proper.