Monday, December 17, 2012

THE DAILY RECORD

WESTERN NEW YORK'S SOURCE FOR LAW, REAL ESTATE, FINANCE AND GENERAL INTELLIGENCE SINCE 1908

Environmental LAW

Is an increased risk of disease actionable?

Picture claimants living near an old factory which used large quantities of solvents, including trichloroethylene, classified as a human carcinogen. Over the years, TCE seeped into the ground and groundwater, forming an underground solvent pool, from which the vapors have apparently intruded into some of the claimants' homes.

There is evidence that the claimants have been exposed to a toxic chemical, and that the factory owner did not exercise due care in the handling of TCE, even applying the standards of the time. But there is a major problem with the claimants' case, if not with the claimants themselves.

By ROBERT B. KOEGEL
Daily Record Columnist

No one is sick. There is no medical proof that any of the claimants has cancer, has any disease, has any cellular changes, or has any bodily TCE. They may all have an increased risk of injury, but is that actionable in New York?

Not according to the Supreme Court of Broome County. In a pair of decisions issued last month, the trial court found that an increased risk of disease, without any manifestation of disease, does not support a negligence action in New York, and that even if it did, the increased risk of disease in this case, as calculated by the plaintiffs' expert, was so low as to defeat any such claim as a matter of law, *Ivory v. Intl. Bus. Mach. Corp.*, 2012 N.Y. Misc. LEXIS 5229 (Sup. Ct. 2012). The court also found that the plaintiffs could not recover any damages for medical monitoring, because there must be a reasonable certainty that a disease will eventually arise before any award is warranted, *Id.*, 2012 N.Y. Misc. LEXIS 5526.

Both decisions were heavily influenced by the following single fact: The highest increased lifetime cancer risk calculated by plaintiffs' own expert for all of the plaintiffs exposed to TCE was .00607 percent, or about six thousandths of one percent. The court compared this figure to a person's background risk of developing cancer in a lifetime, which it said is about 40 percent, and concluded that such a small increase is too insignificant to be actionable or warrant medical monitoring.

Only a year or so ago, the Fourth Department reached a different conclusion in *Baity v. Gen. Elec. Co.*, 86 A.D.3d 948 (4th Dept. 2011), on similar facts. There, plaintiffs sought damages for negligence and medical monitoring based on exposure to TCE from drinking contaminated water from their own wells. They, too, did not claim to have any disease, but rather an increased risk of disease.

But when the defendant moved for summary judgment to dismiss the case, it did not rely on any evidence that the increased risk of disease was too small to be actionable or to warrant medical monitoring. Instead, the defendant simply argued that plaintiffs had insufficient evidence that the TCE exposure would eventually cause them disease.

The court rejected the defendant's position, and allowed plaintiffs' claim for medical monitoring to stand because defendant had not shown that the costs of medical monitoring were not reasonably likely to be incurred as a result of plaintiffs' exposure to TCE.

Seizing on this language in *Baity*, that the costs of medical monitoring might reasonably be incurred, the plaintiffs in *Ivory* argued that they only had to show that the costs of incurring medical monitoring were reasonably certain, not that the chance of incurring disease was reasonably certain. The trial court in *Ivory* properly rejected this argument.

As the court observed, the reasonable certainty of the expenses must flow from the reasonable certainty of the disease in the first place; otherwise, medical monitoring expenses would be available for the asking without regard to their actual need.

Continued ...

Monday, December 17, 2012

THE DAILY RECORD

WESTERN NEW YORK'S SOURCE FOR LAW, REAL ESTATE, FINANCE AND GENERAL INTELLIGENCE SINCE 1908

Continued ...

Moreover, other portions of the *Baity* decision make it clear that a claim for medical monitoring is based on the assumption that the toxic exposure sets in motion forces that will eventually result in disease. Thus, the *Baity* decision should not be read to allow an award of medical monitoring without proof of future disease.

An appeal of the *Ivory* decisions is expected, as the court wrote them expressly anticipating an appeal. Perhaps an appeals court will uphold the result of the lower court, based on the facts showing such a low probability of increased risk of disease, but allow such claims when the probability is greater. Or perhaps the court on appeal might agree with the court below that there can be no claim for damages or medical monitoring without some kind of present harm. We will just have to wait and see.

Robert B. Koegel is senior counsel in Underberg & Kessler's Litigation, Environmental and Municipal practice group. He concentrates his practice in the areas of environmental law, business litigation, land use and municipal law.