POTENTIAL TORT LIABILITY FOR DIESEL EMISSIONS

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The newest legal attacks on the transportation industry are being waged in the form of negligence and nuisance claims against trucking companies, owner-operators, port terminals, shipping lines, and even freight forwarders and brokers. Plaintiffs are seeking recovery for a variety of diseases or medical conditions allegedly caused by the inhalation of diesel emissions. These new "toxic tort" assaults may be made in any state court. Such lawsuits are likely to become more prevalent as populations grow and residential neighborhoods expand into traditionally industrial areas, scientific techniques for tracking particulate matter in emissions improves, physicians' awareness of environmental effects on our health increases, and juries continue to render large awards to injured individuals.

These lawsuits are likely to become even more prevalent because the shift towards off-shore manufacturing and the consequent increase in both exports and imports moving throughout the United States has negatively impacted air quality and increased the yearly number of truck miles. The volume of imports and exports has grown steadily, causing increased congestion at the ports and other entry facilities. For example, the U.S. exported and imported over $2 trillion worth of cargo, or about one-fourth of the global merchandise trade in 2000, as measured in value. See The Transportation Institute, "*Industry Profile*" (www.trans-inst.org/indprofile). The Transportation Institute estimates that the imported and exported tonnage is will almost double by 2020. Over the past 20 years, environmental regulations on fuels and engines have significantly reduced the particulate matter emitted by diesel engines. However, the net environmental benefits of these efforts have, in some areas, been negated by the large increase in truck traffic.

In October 2004, in one of the first cases of its kind, a family filed an unwieldy complaint against more than one hundred transportation industry defendants, asserting claims for nuisance and negligence based on the theory that diesel emissions resulted in personal injuries and diminution in the value of their residence. Plaintiff David Bradfield and his wife bought a home in San Pedro, California, overlooking the Port of Los Angeles ("Port") in 1990. They lived there for sixteen years, raising three children, who are also plaintiffs. Simultaneously, the Port expanded and the number of containers moving through the Port increased exponentially. After significant delays, in late 2006, the court granted the joint demurrers of the trucking company defendants finding that plaintiffs had failed to plead any viable claims, but giving the Bradfields leave to file an amended complaint. The defendants will continue to challenge the Bradfields' right to bring their claims, raising statutory and common law defenses.

It remains to be seen whether the California courts will allow the Bradfield case to go forward, and if so, against which defendants. In any event, this battle provides insight into the claims and defenses that may be raised in these new toxic tort cases. As with other cases alleging exposure to toxins, it is important for defendants to defeat the claims at the outset if they can. If plaintiffs get past the pleading stage, they may also be able to defeat summary judgment – if the claims are allowed to proceed, factual issues will be all that remain to be decided.

In challenging these toxic tort complaints, transportation industry defendants should consider raising the following arguments:

The Plaintiffs Do Not Have Standing to Seek Recovery for Injuries Allegedly Caused by Diesel Emissions

As a threshold issue in any jurisdiction, plaintiffs must demonstrate that they have standing to invoke the judicial process by showing that they have been personally damaged by a particular defendant's conduct. See, e.g. *Lujan v. Defenders of Wildlife* (1992) 504 U.S. 555, 561; *Bourke v. Carnahan* (2005) 163 Ohio App.3d 818; *Hernandez v. Atlantic Finance Co. of Los Angeles* (1980) 105 Cal.App.3d 65, 71. In order to have standing, a plaintiff must have suffered the invasion of a legally protected interest that is actual, particularized, and causally connected to the conduct complained of. *Lujan v. Defenders of Wildlife, supra*. It is simply not enough to claim

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vaguely that "somebody made me feel bad" without explaining who did what to whom, how and when it was done, and what injury proximately resulted from that conduct. *Schmier v. Supreme Court* (2000) 78 Cal.App.4th 703, 707.

Thus, plaintiffs alleging exposure to diesel emissions must allege that he or she each suffered specific injuries as a result of each named defendant's conduct. One problem plaintiffs may encounter in suing for injuries allegedly caused by diesel emissions is that the injuries include several conditions commonly experienced by the population as a whole (e.g., occasional headaches, loss of appetite, fatigue, shortness of breath). For example, the Bradfield plaintiffs complained that they were unable to follow their usual occupations and usual activities for a period of time, but failed to allege that the interruptions were somehow abnormal, or were the fault of the defendants, or any of them. The purpose of standing and pleading requirements is to limit judicial intervention to disputes where actual harm caused by specific, culpable defendants can be redressed. Even in situations where plaintiffs suffer more than the average individual because they live close to a port or other large transportation facility, standing may be difficult to establish.

Defendants' Compliance With Applicable Statutes Shields Them From Tort Liability

Plaintiffs may object to the existence of ports, terminals, warehouses, or other facilities where trucks or trains congregate. However, regardless of their concerns, the target defendants did not create the ports, did not build the facilities at the ports, and did not create the demand for the goods that are shipped. Instead, these facilities merely provide lawful ancillary services to the manufacturing, agricultural, construction, and retail industries. The vehicles, fuel, and engines that are responsible for the diesel emissions are all subject to states and/or federal regulations. Vehicle operators have no choice in the fuel they purchase; they can only buy what is available, and only fuel that complies with the applicable regulations can be sold. It is the same for engines, which are subject to emissions regulations, among other regulations.

Generally, compliance with statutes does not, in and of itself, prevent a finding of tort liability for nuisance or negligence, although certain statutes provide guidelines for determining the standard of care. Rest.2d Torts §§286, 288 com c. Courts generally view statutory requirements to be minimum standards, and require additional precautions where a reasonable man would employ them. See e.g. *New York Central Railroad Co. v. Chernow* (8th Cir. 1960) 285 F.2d 189; *Paolinelli v. Dainty Foods Mfrs.* (1944) 322 Ill. App. 586, 54 N.E.2d 759. Required markings and lights at railroad crossings provide a typical example. Even if compliant with the statute, where there is heavy automobile traffic and other distracting lights, the railroad may be found negligent for not taking additional precautions. See *Southern Pacific Railroad Co. v. Mitchell* (1956) 80 Ariz. 50, 292 P.2d 827.

Regarding harm supposedly caused by diesel emissions, vehicle owners and operators may have more success in shielding themselves from liability based upon statutory compliance than terminal operators or other stationary defendants. There is very little that the owner or operator of a well maintained commercial vehicle can do to reduce emissions. However, large terminal operations arguably have options, such as reducing the hours of operation, reducing the number of commercial vehicles utilizing the facility on a daily basis, or requiring access to the facility by different routes. See *Southwestern Construction Co. v. Liberto* (Ala. 1980) 385 So.2d 633 (granting injunctive relief against a construction company for lawful activities that caused sand to blow off trucks and the deterioration of public roads); *West v. National Mines Corp.* (W. Va. 1981) 285 S.E.2d 670 (granting injunctive relief against a coal mining company to prevent excessive dust from settling in surrounding residential neighborhoods, finding that legal rights must be exercised with due regard for the rights of others, and noting the existence of possible solutions to abate the dust problem while allowing the company to continue its operations).

On the other hand, some courts have held that increased traffic resulting from lawful business operations does not provide grounds for damages or injunctive relief. In *Robie v. Lillis* (1972) 112 N.H. 492, 299 A.2d 155, the court found that additional truck traffic along an access road to a boathouse could not be enjoined as the plaintiffs failed to establish an unreasonable interference with their use of the road. In a case particularly helpful to potential defendants, an Oregon court denied any remedy to a plaintiff whose home was subsiding as a result of vibrations from loaded logging trucks traveling past his home during wet weather. *Jacobson v. Crown Zellerbach Corp.* (1975) 273 Or. 15. The Oregon court noted that the defendant logging company was using the public road in conformance with regulations, and that if an owner of land adjacent to a public highway could sue a member of the traveling public, an unreasonable burden would be placed upon public transportation, commerce, and travel. See also, *Lombardy v. Peter Kiewit Sons' Co.* (1968) 266 Cal.App.2d 599 (dismissing a nuisance case based on construction and operation of a state authorized freeway).

The Plaintiffs Cannot Adequately Plead Causation

Causation is an essential element of all cases, but is critical in toxic exposure cases, regardless of the theory of

liability or the alleged toxin. Plaintiffs must plead and prove a sufficient relationship between a defendant's act or omission and its consequence before that defendant's liability may be established. Rest.2d Torts § 822, com e. While the Environmental Protection Agency has recently linked diesel emissions to cancer, a plaintiff must link his injuries to a particular defendant to maintain a lawsuit. See www.epa.gov/nonroad-diesel.

Causation may be determined by the "but-for" test or the "substantial factor" test. See e.g. *Perkins v. Entergy Corp.* (2000) 782 So.2d 606; *Egan v. Kaiser Aluminum & Chemical Corp.* (1996) 677 So.2d 1027. Where plaintiffs allege concurrent sources of emissions, such as in toxic tort cases against numerous transportation defendants, the substantial factor test may be appropriate. Prosser & Keeton, Torts, § 40, pp. 260 (5th ed. 1984). However, states vary as to which test shall apply. When using this test, plaintiffs must establish that exposure to the particular defendant's diesel emissions was a substantial factor in causing their injuries. See *Johnson v. Owens-Corning Fiberglas Corp.* (2000) 313 Ill.App.3d 230 (analyzing claims of injury due to exposure to asbestos).

In *Bockrath v. Aldrich Chemical Co.*, 21 Cal. 4th 71 (1999), the California Supreme Court set the pleading standard for multi-party toxic tort cases. There, plaintiff named over fifty-five defendants, and alleged that the decedent's cancer arose through exposure to a variety of substances, such as benzene, in their products. The California Supreme Court stated, "[t]he law cannot tolerate lawsuits by prospecting plaintiffs who sue multiple defendants on speculation that their products may have caused harm over time through exposure to toxins in them, and who thereafter try to learn through discovery whether their speculation was well-founded." *Id.* at 81; *Sindell v. Abbott Labs.* (1980) 26 Cal. 3d 588, 597 (asserting that because any one of two hundred companies that manufactured DES might have made the product that harmed plaintiff, there is no rational basis to infer that any one defendant caused plaintiff's injury, or even a reasonable possibility that it was responsible).

Allowing plaintiffs the leeway to plead causation generally would open the floodgates to every person with cancer, respiratory disease, shortness of breath, or asthma to sue every vehicle operator, railroad, port terminal, fuel manufacturer, and vehicle manufacturer that may have crossed, or simply neared, his path. It is unfortunate but undeniable that we are all exposed to carcinogens every day. *See, e.g., Potter v. Firestone Tire & Rubber Co.*, 6 Cal. 4th 965, 990 (1993), noting that "[v]irtually everyone in society is conscious of the fact that the air they breathe, water, food and drugs they ingest, land on which they live, or products to which they are exposed are potential health hazards. Although few are exposed to all, few also can escape exposure to any." The mere exposure to multiple potential toxins does not create legal causation sufficient to obtain an award of damages.

A Nuisance Claim Cannot be Alleged Based Upon Diesel Emissions, Noise, or Vibrations

Plaintiffs may seek to recover damages for nuisance based not only upon the diesel emissions, but also upon the noise and vibrations caused by commercial truck traffic. For recovery of damages on a nuisance theory, plaintiffs must first prove "that the invasion of the plaintiff's interest in the use and enjoyment of the land was *substantial*, i.e., that it caused the plaintiff to suffer "substantial actual damage." Harper et al., The Law of Torts, § 1.23, p. 1:97 (3d ed. 1996); Prosser & Keeton, Torts, § 87, pp. 622-623 (5th ed. 1984); Rest.2d Torts, § 821F. The Restatement recognizes this requirement as the need for proof of "significant harm," which has been variously defined as "harm of importance" and a "real and appreciable invasion of the plaintiff's interests" and an invasion that is "definitely offensive, seriously annoying or intolerable." Rest.2d Torts, § 821F, com. c, p. 105; com. d, p. 106. *See also, Acker v. Protective Life Ins. Co.* (Ala. 1978) 353 So.2d 1150; *Heston v. Ousler* (1979) 119 N.H. 58, 398 A.2d 536.

Moreover, tort liability for a private nuisance requires more than a showing of interference with an individual's interest resulting from human activities carried on by an organized society in populous communities. An action for private nuisance must contain allegations of an injury more serious than "the ordinary damage caused to the public at large by the nuisance." *Venuto v. Owens-Corning Fiberglas Corp.*, (1971) 22 Cal.App.3d 116, 123-24. "It is an obvious truth that each individual in a community must put up with a certain amount of annoyance, inconvenience and interference and must take a certain amount of risk in order that all may get on together." Rest. 2d Torts, § 822, com. g, p. 112. In addressing this issue, the California Supreme Court in *San Diego Gas & Electric Co. v. Superior Court* (1996) 13 Cal.4th 893, 937-938 quoted from Rest.2d Torts, § 822, com. g, p. 112:

> Practically all human activities unless carried on in a wilderness interfere to some extent with others or involve some risk of interference, and these interferences range from mere trifling annoyances to serious harms . . . The very existence of organized society depends upon the principle of 'give and take, live and let live,' and therefore the law of torts does not attempt to impose liability or shift the loss in every case in which one person's conduct has some detrimental effect on

another. Liability for damages is imposed in those cases in which the harm or risk to one is greater than he ought to be required to bear under the circumstances, at least without compensation.

Further, in both pleading and proving nuisance, "interference with the protected interest must not only be substantial, but it must also be unreasonable.'" Prosser & Keeton at § 88, p. 629. For an invasion to be unreasonable, the gravity of the harm must outweigh the social utility of the defendant's conduct, taking a number of factors into account. Rest.2d Torts at §§ 826-831. In determining the social value or utility of a particular defendant's conduct, courts look at whether the conduct or use of land protects or advances the public good. Rest.2d Torts at § 827, com. c; *see also*, *Friendship Farms Camps, Inc. v. Parson* (1977) 172 Ind.App. 73, 359 N.E.2d 280; *Antonik v. Chamberlain* (1947) 81 Ohio App. 465, 78 N.E.2d 752. The standard is objective: the question is not whether the particular plaintiff found the invasion unreasonable, but "whether reasonable persons generally, looking at the whole situation impartially and objectively, would consider it unreasonable." Rest.2d Torts at § 826, com. c, p. 121.

While many people may feel that the decrease or elimination of commercial trucks from the highways would be a positive change, in reality, it would be devastating. The transportation industry is of vital utility to our society. It employs approximately one out of every fourteen working Californians, and represents nearly $40 billion a year in salaries. See Quarterly Census of Employment Wages, California Employment Development Department, 2004. A significant portion of commercial vehicles are owned by individuals, who depend upon it to support themselves and their families. Further, everything bought, sold, worn, consumed, or used travels on at least one truck before reaching consumers. Simply put, without the transportation industry, the county's agricultural, construction, retail, and manufacturing industries would collapse. Thus, there can be no doubt that this industry advances the public good, and any nuisance claim can and should be fought on that basis.

A Negligence Claim Cannot be Alleged Based Upon Diesel Emissions, Noise, or Vibrations

In order to plead and prove a negligence claim, plaintiff must first overcome the arguments made above concerning standing and causation. Further, as discussed above, plaintiffs must establish that the offending conduct (driving commercial vehicles or operating a facility where commercial vehicles congregate) falls below the reasonable standard of care, even though the conduct complies with the applicable statutes.

To present a claim for negligence, a plaintiff must show also that the defendant breached a legal duty owed to the particular plaintiff. Rest.2d Torts, §328B(b). While all motorists have a duty to maintain and operate their vehicles in a lawful and reasonable manner, no known authority supports the novel proposition that the owner of a commercial vehicle owes a duty to the general public to protect it from the allegedly harmful emissions generated by the lawful operation of his vehicle. See 21 A.L.R.2d 7; 27 A.L.R.2d 1040. Instead, negligence claims traditionally involve the failure to comply with a regulation or to meet a standard of care. See *Girdzus v. Van Etten* (1918) 211 Ill.App. 524 (failure to properly light street obstruction); *Wichita & C. R. Co. v. Gibbs* (1891) 47 Kan. 274, 27 P. 991 (failure to fence in railroad).

Even if a potential defendant were able to take actions to reduce the emissions from his commercial vehicle, the law does not impose such a duty to protect others, absent a special relationship. See Rest.2d Torts, § 314; *Yania v. Bigan* (1959) 397 Pa. 316, 155 A.2d 343. Individuals who live or work near ports, highways, or large transportation facilities cannot allege a special relationship merely because commercial vehicles frequent the area, or because the operators of those vehicles owe greater duties to neighboring individuals than they do to others along their routes. Further, even where preparation or precautions are required for the safe use of equipment, liability for negligence will attach only if the defendant unreasonably fails to properly prepare for the use. Rest.2d Torts §300.

As long as members of the transportation industry properly maintain their commercial vehicles, regularly inspects them for defects, and abide by all applicable regulations, a toxic tort complaint based upon diesel emissions may be effectively challenged. If not rigorously challenged, or if settled at a seemingly good price, these cases can breed additional suits by similarly situated neighbors seeking to cash in on a precedent now set. Thus, if attacked, a defendant should aggressively challenge these cases from the outset, and avoid giving any impression that transportation facilities provide fertile ground for recovery.