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DuPont, Chemours, ARCO Can't Dodge CERLCA Claims

By **Juan Carlos Rodriguez**

Law360, New York (July 27, 2017, 8:04 PM EDT) -- An Indiana federal judge on Thursday tossed nuisance claims lodged against DuPont, The Chemours Co. and a BP PLC unit by putative class members who say their health is at risk from pollution at a Superfund site, but left Comprehensive Environmental Response, Compensation and Liability Act claims intact.

The USS Lead Superfund site was designated in 2009 as one of the worst contaminated sites in the U.S. due to the lead and arsenic pollution, according to the U.S. Environmental Protection Agency. Residents are suing DuPont and Chemours — which was spun off from DuPont in 2015, and Atlantic Richfield Co. in an effort to obtain relief from the health risks and property damage they say they have suffered. The companies moved to dismiss the suit.

According to the plaintiffs' complaint, the nuisance claims were supported because they cannot use the property outside their homes for recreation, gardening or other things, and "must constantly wash themselves and their shoes, clothing and toys." But U.S. District Judge Theresa L. Springmann disagreed.

She said that Atlantic Richfield's predecessors operated their businesses and sold the property "long before any residential buildings were contemplated at the site." The judge rejected the plaintiffs' argument that although they never purchased or owned the polluted property, there is no authority that prevents tenants from "recovering for a nuisance created by the property's prior owner."

"The overwhelming weight of authority in Indiana supports defendant Atlantic Richfield's position. A later purchaser of property cannot sue a prior owner of that same property for nuisance, as the latter owes no duty to the former," Judge Springmann said.

DuPont and Chemours also escaped the nuisance claims, successfully arguing that contamination of the plaintiffs' property ended years ago and is no longer "ongoing," as required.

A negligence claim against Atlantic Richfield, based on its alleged failure to "promptly respond" to the release of toxic substances and warn neighbors, was also dismissed by the judge.

"There was no relationship between the plaintiffs and defendant Atlantic Richfield, as it was not reasonably foreseeable that the land would be converted into a residential housing complex at the time that defendant Atlantic Richfield was operating its plant there," Judge Springmann said.

DuPont and Chemours, however, failed to persuade the judge to toss the negligence claims against them. The judge said that the plaintiffs' allegations "plausibly suggest" that the companies may be a "proximate cause" of the contamination.

"Unlike defendant Atlantic Richfield's operation of its facility, the allegations in the complaint plausibly suggest that defendant DuPont owed a duty to the plaintiffs," the judge said.

And neither Atlantic Richfield nor DuPont and Chemours could dodge the plaintiffs' CERCLA claims. Under Section 107(a) of the act, a party may sue another to recover "necessary costs of response incurred by any other person consistent with the national contingency plan."

Judge Springmann said that the plaintiffs adequately explained the specific response costs that they incurred, including the investigation of whether their homes are contaminated and of temporary housing options.

The judge rejected the companies' argument that the plaintiffs may not recover costs incurred from their own investigations. Although costs incurred related to investigations that duplicate ones carried out by the EPA are not recoverable, the judge said that based on the allegations in the complaint, "it is plausible that the plaintiffs' incurred investigative costs were not duplicative of the EPA's work."

The companies also couldn't convince the judge to toss the CERCLA claims because the plaintiffs may not recover relocation costs, since they are not necessary or consistent with the national contingency plan.

Thomas Zimmerman Jr. of Zimmerman Law Offices PC, who represents the plaintiffs, said he is pleased that the judge allowed some of the claims to proceed.

"The class consists of more than 1,000 residents, including 680 children, living in the West Calumet Public Housing Complex in East Chicago, Indiana," Zimmerman said. "Under the CERCLA claims, we will recover the preliminary investigation costs and temporary relocation costs incurred by the class members. Under the negligence claims, we will obtain compensation for a variety of damages including the aggravation, panic and disruption associated with the class members' daily exposure to lead and arsenic contamination, and having to permanently move out of the area."

Representatives for the companies did not immediately respond to requests for comment on Thursday.

The plaintiffs are represented by James D. Brusslan and Jason B. Hirsh of Levenfeld Pearlstein LLC, and Thomas A. Zimmerman Jr. and Sharon A. Harris of Zimmerman Law Offices PC.

DuPont and Chemours is represented by Kathleen Taylor Sooy and Tracy A. Roman of Crowell & Moring LLP, and Dina M. Cox of Lewis Wagner LLP.

Atlantic Richfield is represented by Sean O. Morris, Kathryn W. Hutchinson, Nancy G. Milburn and Shreya A. Fadia of Arnold & Porter Kaye Scholer LLP, and Kathleen A. DeLaney of DeLaney & DeLaney LLC .

The case is LeRithea Rolan et al. v. Atlantic Richfield Co. et al., number 1:16-cv-00357 in the U.S. District Court for the Northern District of Indiana.

--Editing by Stephen Berg.

Update: This story has been updated to include comment from the plaintiffs' attorney.
