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Get Ready, Get Set, Litigate

Establishing liability in a toxics case is relatively easy. But that's only the beginning.

By Michael D. Meadows

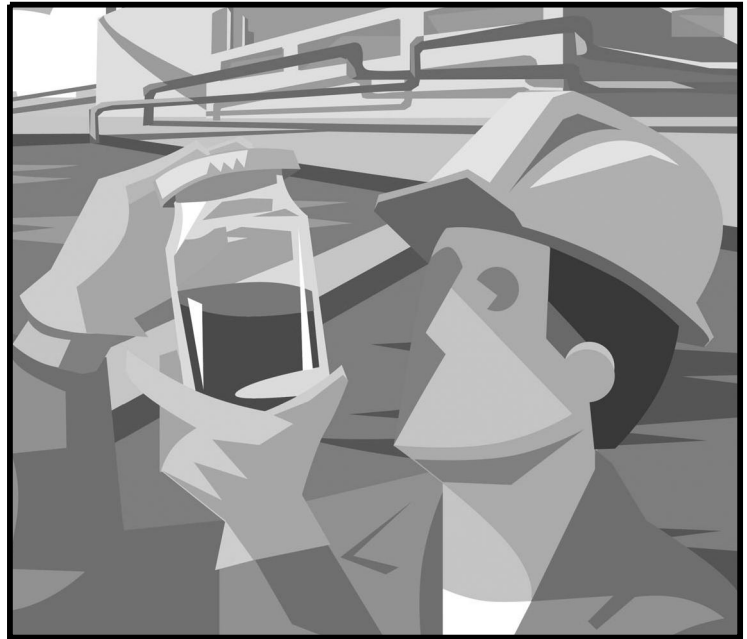
From the north side of my office building in Walnut Creek, I can see several refineries and chemical plants that stretch along the shores of San Francisco Bay and the Carquinez Strait between Richmond and Antioch, part of what's been called the "Cancer Crescent."

I can also recall lawsuits brought at different times against nearly every one, following some toxic calamity. Some of these cases had successful outcomes while others ended disastrously, literally driving some previously profitable firms to bankruptcy. Anyone with experience handling toxic torts cases understands that they are expensive. They also know that oil companies and chemical manufacturers are formidable and resolute adversaries that have been emboldened further by several recent pro-industry appellate rulings.

Establishing liability for a refinery or chemical plant catastrophe is comparatively easy. In my experience, every toxic release has resulted from a succession of astoundingly bad decisions and indifference to maintenance requirements, leading almost inevitably to a foreseeable disaster. Usually, the liability picture is clear just from the Cal-OSHA report. The only remaining questions concern whether the conduct of the plant was sufficiently reckless to support punitive damages and to what extent the profit motive determined the decisions that led to the explosion, spill, leak or other accident. In short, refinery or chemical plant disasters don't result from acts of God but rather from the determination to keep the plant running at all costs.

Of course, there is more to successful toxic tort lawsuits. Of particular concern are causation and damages. Establishing both requires experts and tests, which in turn requires money – lots of it. To establish damages caused by exposure to toxic material, you have to prove:

- The identification of the toxins and their chemical makeup.
- The toxic properties of the materials released. Material safety data sheets, which the plants are supposed to keep on file, provide a good



starting point.

- The area of dispersion, whether in the air or into the water supply, and the levels of concentration.
- The injuries and their causal nexus to the release.

Proving all of this involves extensive medical documentation, along with a variety of testing, research and computer models. A plume study (or, more formally, an air dispersion model) to establish the path traveled by a toxic gas cloud and determine the concentration levels of the toxins within can easily cost \$50,000. Given these and other expenses, the economics of toxic tort litigation almost always precludes litigation on behalf of small numbers of victims. Even when the injuries seem severe, questions about why only a handful of persons were injured when so many were exposed to whatever material was released make these types of cases extremely risky.

A more common scenario involves a toxic release triggering an array of transient symptoms among thousands, or even tens of thousands, of people in the affected area. Until the mid-1980s, these cases were overlooked because they were evaluated like typical tort cases, with the damages too small to justify going up against large oil or chemical companies.

Things changed, however, after an astute lawyer figured out that, while a single case involving one victim with \$5,000 worth of damages wasn't worth pursuing, 10,000 cases worth \$5,000 each definitely were. If word got out about the potential for recovery, residents in areas adjacent to refineries or chemical plants would now be ready to come forward and fight.

Not surprisingly, one \$50 million settlement was about all it took for other lawyers to catch on. These days, immediately after the first news reports of flames and billowing dark clouds emanating from some refinery, hordes of attorneys with briefcases stuffed with fee agreements (dubbed "parachute lawyers" in some media accounts) sign up thousands of clients, sometimes without regard for whether they sustained

actual injuries. At that point, it becomes a race to the courthouse to get the first complaint on file. Doing so also helps to ensure press coverage, which can help bring in even more clients.

With so many plaintiffs and attorneys involved, the court has to gain control. Obviously, all of these lawyers cannot conduct their own discovery or argue motions. Instead, leaders must be appointed. Typically, an executive committee will be established, which in turn will appoint lead counsel to head the litigation. A method for compensation of lead counsel and members of the executive committee should be worked out. Similar to federal court, a case management order will usually place limits on discovery, and consideration will be given to the appointment of a discovery referee.

The court will often authorize the filing of a "model complaint" on behalf of 10-20 carefully screened plaintiffs. The allegations in the complaint can then be used by other claimants simply by filing a notice of adoption of the model complaint. Pleading requirements particular to toxic tort cases are set forth in a unanimous 1999 ruling from the California Supreme Court, *Bockrath v. Aldredge Chemical Company, Inc.*, 21 Cal.4th 71. In that ruling, Justice Stanley Mosk said each plaintiff:

- Must allege exposure to each of the toxic materials claimed to have caused a specific illness. An allegation of exposure to "most and perhaps all" of the substances is inadequate.

- Must identify each product that allegedly caused the injury. It is insufficient to allege, more generally, that the toxins in defendants' products caused the injury.

- Must allege that toxins entered the plaintiff's body as a result of the exposure.

- Must allege suffering from a specific illness and that each toxin entering the plaintiff's body was a substantial factor in bringing about, prolonging or aggravating that illness.

- Must allege that each toxin absorbed was manufactured or supplied by the named defendant.

If the pleading requirements are met and the case proceeds to discovery, it is likely that major issues will develop that require a discovery referee to resolve. Such issues might include the number of plaintiffs the defense should be allowed to depose and whether or not time limits should be imposed. Regardless of the total number of plaintiffs in the case, the defense will usually take the position that it is entitled to depose everyone and that it intends to do so. This is usually a bluff because only a handful of plaintiffs will actually go to trial; all that's really needed is a sufficient number of plaintiff depositions to provide for a realistic assessment of damages.

Because form and special interrogatories are a cumbersome means to acquire pertinent information, a case questionnaire that is tailored to the specific case in terms of symptoms, location during exposure, medical history and health habits should be agreed upon. The questionnaire can serve as the primary source of information about the individual plaintiffs.

Plaintiffs' discovery should concentrate initially on the search for meaningful documents and the identification of those responsible for the decisions that led to the underlying incident. Plaintiffs' attorneys should not be surprised by the lack of cooperation from defense counsel in document discovery. Expect to file numerous motions to compel. This is another area where a forceful discovery referee is essential.

Depositions should usually start with the line workers and then

move up the corporate ladder towards the ultimate decision maker. Keep searching for financial factors to explain the decision-making process in the plant. Expect those being deposed to display varying degrees of loyalty to the company, which will affect their level of cooperation during the deposition. They will be thoroughly drilled – and probably thoroughly intimidated – and will try to provide only minimal information. However, persistence and skillful use of documents during the deposition should eventually yield results.

The sheer number of plaintiffs in mass toxic torts cases precludes trials for everyone. Otherwise, the judicial system would be overwhelmed. An exemplar trial will be necessary to determine liability and provide a sufficient sampling of damages to establish a basis for resolving the remaining cases. If the trial court orders an exemplar trial, the numbers and means of selecting the plaintiffs will have to be decided. In my experience, compromise in this area is not realistic. Within any large group of plaintiffs in a toxics case, there will be some, with proven injuries, who will elicit sympathy. Others, with no ascertainable injuries, will appear as if they are just along for the ride. The stakes in selecting plaintiffs are enormous because juries see liability through the prism of their perception of the plaintiffs. As a result, liability determinations that can apply to everyone in the case can be affected by this selection process.

With negligence or recklessness almost a given in this area of litigation, cases are won and lost on causation. The jury must believe that a plaintiff has legitimate symptoms caused by exposure to chemicals released in a particular incident. Furthermore, *Cottle v. Superior Court*, 3 Cal.App.4th 1377, requires that "causation must be proven within a reasonable medical probability based upon competent medical testimony." Unfortunately, those most likely to be affected by a toxic release live in areas that have been regularly bombarded by toxic chemicals. Those same people, therefore, are likely to have developed a lengthy medical history of toxic reactions. Given this history, it can be difficult to correlate symptoms with a particular release.

Besides the usual personal injury damages, successful plaintiffs are entitled to recover for medical monitoring costs even without suffering a physical injury. This requires proof that the plaintiff is more likely than not to develop a disease in the future. However, a plaintiff may not recover damages based on the fear of developing a more serious condition, such as cancer, without proof that the fear "stems from a knowledge, corroborated by reliable medical or scientific opinion, that it is more likely than not that he or she will develop the condition in the future due to the toxic exposure." *Potter v. Firestone Tire & Rubber Co.* 6 Cal. 4th 965 (1993). A plaintiff may also recover for actual property damage, but can only recover for diminution of property value if property is actually sold.

Finally, cases in which global settlements are reached require procedures to determine distribution of the funds. Factors such as proximity to the release, the period of exposure and documented symptoms are usually considered to decide how the funds will be allocated. Normally, a settlement is conditioned upon near-unanimous acceptance by the plaintiffs. Because defendants in these cases want closure, a system of allocation of the settlement funds that appears fair is essential to avoid an excessive number of opt-outs, which can jeopardize the settlement.

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