

Cement Kiln Dust Can Give Rise to Private Nuisance or Negligence Claim

The United States District Court for the Eastern District of Michigan has held that the emission of cement kiln dust (CKD) from a cement manufacturing facility and subsequent accumulation of the CKD on private property did not give rise to a trespass or public nuisance claim, but could form the basis for a private nuisance or negligence claim. The court additionally declined to abstain from hearing the case on the grounds that it might interfere with state proceedings, and held that the suit could properly be brought as a class action.

Facts

The Defendant, LaFarge Corporation, has owned and operated a cement plant in Alpena, Michigan since 1987. The plant is subject to the requirements of several federal and Michigan environmental statutes, as well as the terms of a consent order between LaFarge and the Michigan Attorney General concerning several violations of Michigan environmental law.

CKD is a fine powder that is a byproduct of the cement manufacturing process. As a result of its operations, LaFarge's plant emits some CKD into the air, which can cause a bad odor and cover vehicles, homes, and outdoor vegetation with a "white film" when it settles. Additionally, the CKD allegedly cause damage to vinyl siding and had killed rose bushes on at least one occasion.

The Plaintiffs, several Alpena residents who were affected by the CKD accumulation, filed a class action suit, claiming damages, requesting injunctive relief, and requesting court-ordered medical programs resulting from "the loss of use and enjoyment of home and property, mental and emotional anguish, diminution of market value of their property, and injury to personal and real property." The residents based their claims on the theories of trespass,

nuisance, and negligence. Although the CKD emissions from LaFarge's plant were identified as the cause of all the residents' injuries, the extent of those injuries, and the amount of damages claimed, varied among the different residents.

LaFarge argued that the residents' claims should be dismissed because the residents did not set forth the factual basis necessary to support their claims. Additionally, LaFarge asked the court to abstain from deciding the case, and attacked the certification of the residents as a class, instead claiming that the residents' suits should be brought individually.

The court first noted that, in federal cases based on diversity jurisdiction such as the one brought by the residents, the court was required to apply state law. Thus, the court would evaluate the residents' claims under Michigan law.

Trespass

Trespass is an "unauthorized invasion upon the private property of another." The residents were claiming that, by emitting CKD that later accumulated on their property, LaFarge was causing the CKD to trespass on their property. The court observed, however, that "[i]f the invasion is 'ambient dust, smoke, soot, or fumes,' then the remedy sought should be nuisance" rather than trespass. Because CKD was essentially "ambient dust," the court dismissed the residents' trespass claim.

Nuisance

In evaluating the residents' nuisance claim, the court first observed that two basic types of nuisance claims exist in Michigan: private and public nuisance. A public nuisance is "unreasonable interference with a right common to the general public," whereas a private

nuisance is “an interference with the use and enjoyment of” private land. Additionally, “[p]ollution of the air by the release of contaminants can constitute a private or public nuisance.”

The court held that the residents did not set forth facts supporting a claim for public nuisance because they did not allege that any kind of “right common to the general public” had been interfered with. Instead, the residents claimed that they and their personal property had been harmed.

However, the court held that a claim for private nuisance was supported by the facts. To state a claim for private nuisance, the residents had to show that: (1) a physical invasion interfered with their property rights; (2) significant harm occurred as a result of that invasion; (3) LaFarge caused the invasion; and (4) LaFarge’s conduct was either (a) intentional and unreasonable or (b) negligent, reckless, or ultrahazardous. The residents alleged that LaFarge had caused CKD to physically invade their “persons and property, causing a substantial and unreasonable interference with [their] use and enjoyment of their property.” Thus, the residents had pleaded the elements of a private nuisance.

In passing, the court additionally noted that Michigan recognizes the doctrine of nuisance “per se,” which is “an act, occupation, or structure which is a nuisance at all times and under any circumstances.” Without examining whether LaFarge’s plant could be a nuisance per se, the court summarily held that the residents had not made such a claim, and, thus, did not state a claim for nuisance per se.

Negligence

To state a claim for negligence, the residents had to show four elements: (1) that LaFarge owed a duty to the residents; (2) LaFarge breached that duty; (3) the breach caused an injury to the residents; and (4) the residents suffered damages from the breach. In their complaint, the

residents alleged that LaFarge “breached its duty to exercise ordinary care and diligence when it improperly constructed, maintained, operated, engineered, and/or designed the facility and it knew, or should have known, that such actions would cause [the residents’] person and property to be invaded by toxic pollutants and air contaminants, including but not limited to the emission of particulate.” The above allegations encompassed all four elements of a valid negligence claim. Thus, the court held that the residents had stated a claim for negligence.

Abstention Under The *Burford* Doctrine

LaFarge asked the court to abstain from deciding the case pursuant to the *Burford* doctrine, which allows a court to do so when federal court review of a state-regulated actor would lead to “[d]elay, misunderstanding of local law, and needless federal conflict with the State policy,” to “protect complex state administrative processes from undue federal interference.” More specifically, LaFarge claimed that a decision in the case could conflict with LaFarge’s duties under its consent judgment concerning violations of Michigan law, and thus, would result in “second guessing a state agency’s conclusions in the state’s efforts to implement a consistent and coherent state policy with regard to quality of air and emissions standards.”

The court began its examination of LaFarge’s argument by noting that “[a]bstention is the exception, not the rule.” Furthermore, abstention can only apply to injunctive or other discretionary relief; it does not apply to claims for damages. Additionally, *Burford* abstention is appropriate only when: (1) timely and adequate state review, performed in a centralized forum with special competence in the matter, is available; and (2) the case involves difficult questions of state law or a federal decision would disrupt state efforts to form a consistent policy on the matter.

The court then rejected LaFarge's request, first observing that LaFarge failed to show that the Michigan Circuit Court with jurisdiction over the residents' claim for injunctive relief was a forum with "specialized" competence regarding environmental liability. Additionally, the court stated that although the "potential" for interference with the consent judgment existed, in light of the residents' "common law entitlement to injunctive relief if they prove the existence of a public nuisance," such interference would not be "undue." Thus, the court declined to abstain from hearing the case.

Class Certification: Typicality And Adequate Representation

The residents could only bring their suit as a class action if they showed, among other things, that the injuries alleged in the complaint were "typical" of the injuries affecting the various residents. LaFarge alleged that this "typicality" requirement was "not met because of the great variance in damages sought by the named class members."

The court cited the rule that "[a] claim is typical if 'it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory.'" The residents' claim involved the same event or practice or course of conduct, as they were all claiming that LaFarge's emissions caused their injuries. Furthermore, the legal theories involved, negligence and nuisance, were the same with respect to all the residents' claims. Thus, the court held that, despite the residents' varying claims for damages, the claims were "typical" for the purposes of class certification.

Additionally, the residents were required to show that the class members would be "adequately represented" by the class representatives. Such adequate representation is not possible if the representative "class members have interests that are antagonistic to the other

class members.” LaFarge argued that antagonistic interests existed between the representative class members because the members wanted different injunctive remedies. For example, one member merely wanted the CKD emissions to stop, while another wanted that plus reimbursement for damages to his house caused by the CKD, and a third representative sought the ultimate goal of closing down LaFarge’s plant for good.

The court held that the class interests would be adequately represented notwithstanding the differences between the class representatives, because the representatives all focused on stopping the CKD emissions, and claims for damages were not at odds with claims aimed towards stopping CKD emissions.

LaFarge also argued that class certification was inappropriate because individualized defenses were available against some of the class members. The court observed, however, that “[t]he mere existence of individualized defenses does not bar class certification,” and such certification is inappropriate only if such defenses ““overshadow the primary claims’ by diverting the attention of the class representatives away from fairly representing the class.” As the court ultimately held that class certification was proper in this case, the court must have concluded that the individualized defenses available to LaFarge did not overshadow the class claims.

Olden v. LaFarge Corporation, 203 F.R.D. 254, Oct. 24, 2001

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