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Berg/Lumpkin Plaintiffs Newsletter

*Published periodically by the law firms of Short Cressman & Burgess PLLC, Engstrom Lipscomb & Lack, Girardi and Keese, Robinson Calcagnie & Robinson, and the Johnson Law Group.
This update is a general summary of recent events and is not intended to serve as legal advice or an attorney client communication.*

Court of Appeals Issues Important Rulings

On August 14, 2007, the United States Court of Appeals for the Ninth Circuit issued an opinion on the appeals of the bellwether decisions in 2005. Generally, the Court of Appeals affirmed the trial judge's instructions to the jury regarding the law of the case. This means that the court made important decisions agreeing with the Downwinder Plaintiffs that the government contractor defense did not apply and that principles of strict liability did apply.

The Court of Appeals also agreed with the trial court that the "but for" standard of causation would be applied. This was a setback because it sets a higher standard than the "substantial factor" test that the Downwinder Plaintiffs had proposed. If it stands, it will limit the number of Downwinder Plaintiffs who may recover in the case.

The court considered questions specific to the individual cases that were on

appeal. The Court of Appeals reversed the decisions in three cases that were decided against Downwinder Plaintiffs on the grounds that the jury was improperly instructed about specific issues raised in those cases. These cases must now be retried.

The Court of Appeals affirmed the trial court decision against Shannon Rhodes, rejecting her challenges to certain evidentiary rulings and claims of juror misconduct.

In the course of issuing decisions regarding the individual cases, the court made a ruling regarding the applicable statute of limitations. The court held that any plaintiffs who filed individual suits while the class action suit was pending did not have the benefit of tolling of the statute of limitations while the class action claim was pending. Application of the court's ruling on this issue depends on facts specific to individual cases. For that reason the Court of Appeals returned the question to the trial court.

Both sides have now asked the Court of Appeals to reconsider certain key aspects of its rulings. Downwinder Plaintiffs have asked the court to reconsider its rulings on "but for" cause and on the statute of limitations. There is reason to think the court may reconsider its holding on the statute of limitations because a key case relied upon by the panel was reversed by a different Court of Appeals after the *Hanford* decision was written.

Defendants also moved for rehearing on the government contractor defense and the element of strict liability.

The Court of Appeals generally moves very promptly on requests for rehearing and a decision whether to give further consideration to the appeals is expected by the end of November.

Client Newsletter Will Be Updated After Rehearing Process is Complete

As explained above, both sides have asked the Court of Appeals to give further consideration to certain issues in the case. That has been done in the form of a motion asking the panel of three judges who decided the case to reconsider certain parts of their decision and a request that a larger group of Ninth Circuit judges consider these issues. A request for a larger group decision is known as a request for *en banc* hearing. If either a panel rehearing or *en banc* rehearing is granted, a further opinion will issue from the Ninth Circuit. This newsletter will be updated as soon as the court either denies further hearing or issues a subsequent opinion.

Please Remember to Help – Tell Us if You Move

Especially during this long appeal process, it is very important for you to notify us if your name, address or telephone number changes. We cannot effectively represent you if we cannot contact you.

Call Us for Information

If you have any questions about the status of the case or your files, please contact us:

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