LITIGATING THE OBLIGATION TO REPORT SUBSTANTIAL RISK INFORMATION AND PAY PENALTIES UNDER TSCA SECTION 8(E)

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On December 9, 2016, four major chemical manufacturers filed a motion to dismiss the Toxic Substances Control Act (TSCA section 8(e) claims filed against them by a law firm (Kasowitz) under the False Claims Act (FCA). Under the *qui tam* provision of the FCA, individuals may pursue claims against any person who "knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government." (30 U.S.C. § 3730(b)(1); 30 § U.S.C. 3729(a)(1)(G).) In this case, Kasowitz asserts that BASF, Bayer (now Convestro), Dow, and Huntsman failed to pay penalties allegedly owed under the U.S. Environmental Protection Agency's (EPA) TSCA section 8(e) Compliance Audit Program (CAP). The case was originally filed in the U.S. District Court, Northern District of California in May 2015. In November 2016 the case was transferred to U.S. District Court for the District of Columbia, and a status hearing was held December 1, 2016.

EPA's Compliance Audit Program (CAP)

In the early 1990s, EPA used the CAP to encourage companies to come into compliance with TSCA section 8(e) requirements regarding the immediate reporting of "new information that reasonably supports a conclusion that a chemical substance or mixture presents a substantial risk of injury to health or the environment" (substantial risk information). In the *Federal Register* notice announcing the program, EPA explained that section 8(e) is very important to the agency's ability to obtain information needed to set priorities and perform risk assessments. More than 100 companies participated in the program.

The CAP invited companies to enter into agreements with EPA to audit their past compliance with section 8(e). Companies entering into CAP agreements with the agency were assured that the agency would pursue only limited penalties and that it would forgo late and/or nonreporting TSCA section 8(e) civil penalties. This could represent substantial savings to companies; in its Enforcement Response Policy, EPA asserts that a section 8(e) violation is a continuing violation. That is, the violation continues from the date when the substantial risk information should have been disclosed through every day on which it has not been disclosed. There is no "statute of limitations" for continuing violations. Although the CAP provided significant protections to participants, EPA reserved its rights to take appropriate enforcement action if the agency later determined that a company was required to submit a study or report under the CAP but failed to do so.

Litigation

While pursuing personal injury litigation against the chemical manufacturers over exposure to certain isocyanate chemicals, Kasowitz identified information that led to filing this lawsuit. The isocyanates involved are methylene diphenyl diisocyanate (MDI), polymeric MDI (PMDI), and toluene diisocyanate (TDI). Isocyanates are used in the manufacture of polyurethane materials including liquid coatings, paints, and adhesives, flexible and rigid foam, and elastomers.

This complaint alleges that the defendants withheld substantial risk information regarding respiratory injury when inhaled at levels below applicable inhalation exposure limits and from de minimis dermal contact. According to Kasowitz, none of the substantial risk information at issue in the case was published in the scientific literature or otherwise available to EPA.-

Arguing that the violations began as early as 1980 and continued up until the complaint was filed, Kasowitz claims that the defendants owe billions in penalties under section 8(e). In addition, penalties under the FCA can more than triple. The *qui tam*

provisions of the FCA grant up to 30 percent of any settlement to the private plaintiff.

Kasowitz has put forth a complex legal argument positing that, while BASF, Bayer, Dow, and Huntsman participated in the CAP, they had substantial risk information which section 8(e) obligated them to submit to EPA; were contractually obligated to submit all previously unreported substantial risk information through the CAP; knowingly concealed or knowingly and improperly avoided a contractual obligation to transmit civil penalties for their failure to comply with section 8(e) reporting requirements in violation of the FCA; and made, used, or caused to be made or used, a false record or statement material to an obligation to pay or transmit money to the U.S. government in violation of the FCA.

The complaint is voluminous, comprising nearly 400 pages plus exhibits. Its description of BASF, Bayer, Dow, and Huntsman's behavior is very unfavorable. The allegations include assertions that the companies:

- Refused to report the substantial risk information to EPA, even as they continued to obtain and/or develop separate and additional substantial risk information that corroborated the previously obtained or developed substantial risk information

- Refused to report the substantial risk information to EPA, even as they reported the results of animal studies that they claimed showed a less certain causal relationship between isocyanate skin contact and respiratory response.

- "Interfered with EPA's hazard identification and risk assessment activities" when EPA prepared its "Toxicological Review of MDI" in 1998 and its "MDI Action Plan" in 2011 by concealing substantial risk information.-

- Demonstrated their intention to conceal the substantial risk information when they issued health effect disclosures in their Material Safety Data Sheets (MSDS) and product labels.

None of these points is addressed by the defendants' motion to dismiss. The defendants instead argue that Kasowitz has failed to meet the required elements of claim under the FCA. Specifically, they explain that penalties not assessed by EPA do not comprise an "obligation to pay" under the FCA. Kasowitz's response to the motion is due on February 7, 2017.

Implications

The enrollment period for the CAP expired more than 20 years ago. Today, companies interested in addressing liability for failing timely to submit substantial risk information to EPA must seek the protection of the Audit Policy, using the agency's new eDisclosure system.

If this case is successful, companies defending toxic tort litigation may see discovery expanded in search of similar substantial risk information.

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