



## Client Alert

MACDONALD, ILLIG, JONES AND BRITTON LLP

September 2010

### Ohio Supreme Court Requires Proof Of Physical Discomfort To Recover Damages Under a Nuisance Claim

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In Banford, et al. v. Aldrich Chemical Company, Inc., in 932 NE2d 313, 126 Ohio St. 3d 210 (Ohio 2010), the Ohio Supreme Court held that a plaintiff must present evidence of physical discomfort to recover damages for annoyance and discomfort in a nuisance claim.

In Banford, the plaintiffs were residents that lived within a one mile radius of an Aldrich facility that made nitric acid. In September 2003, there was an explosion at the Aldrich facility which resulted in a 24 hour evacuation of all residents living within a one mile radius of the facility. Plaintiffs filed suit for damages they allegedly sustained as a result of the explosion. One of plaintiffs' claims was based on nuisance.

Nuisance is the wrongful invasion of a legal right or interest, which includes not only property interests, but also personal legal rights and privileges. Damages for nuisance may include diminution in the value of property, costs of repairs, loss of the use of property and compensation for annoyance, discomfort and inconvenience.

At trial, plaintiffs sought to prove damages for annoyance and discomfort based upon the fears they had relating to the explosion; none of the plaintiffs experienced any physical effect from the explosion. The Court, however, gave the jury the following instruction:

A plaintiff may not recover for trifling annoyance and unsubstantiated or unrealized fears. There must be an applicable, substantial, tangible harm resulting in actual, material physical discomfort. However, the plaintiffs need not demonstrate bodily injury to establish physical discomfort. Fear, standing alone, is not an item of compensable damages.

After the jury awarded very little in damages, one of the plaintiffs appealed, arguing that the Court erred by giving the jury this instruction. The Ohio Court of Appeals agreed and reversed the trial court's decision.

The Ohio Supreme Court upheld the trial court's instruction, holding that "in order to recover damages for annoyance and discomfort in a nuisance claim, a plaintiff must establish that the nuisance caused physical discomfort."

This holding is important for environmental nuisance cases. Oftentimes, after an environmental incident, whether it be a spill, discovery of long term environmental contamination or an explosion as in Banford, claims are made seeking damages for injuries. Those claims usually include a nuisance claim. It is now clear in Ohio that there must be some type of physical effect before a plaintiff can recover personal injury damages under a nuisance claim. Although the threshold for that physical effect is low, a claim cannot be based solely on

subjective fears, which can be difficult to challenge.

For more information, please contact attorney Mark J. Shaw or the MacDonald Illig attorney with whom you have worked.

#### **Prior Client Alert Update**

In our last Client Alert, we talked about the Ohio Supreme Court's decision in [Trans Rail America](#), which opened the door to potentially appeal agency permit denials that seek to evade appellate review by unreasonably requesting additional information. On remand to the Court of Appeals, the Court of Appeals held that Trans Rail failed to prove that the agency was seeking to evade appellate review. Thus, the agency action was not final and appealable.

#### **For more information:**



Mark J. Shaw

(814) 870-76607

[mshaw@mijb.com](mailto:mshaw@mijb.com)

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100 STATE STREET, SUITE 700  
ERIE, PA 16507-1459

PHONE: (814) 870-7600  
FAX: (814) 454-4647

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