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THE INDUSTRIAL PERSPECTIVE ON CLASS ACTION SUITS

JOHN E. CARLSON*

My name is John Carlson. I am an attorney from San Francisco, California, and like George Van Cleve¹, who preceded me in his comments, I represent industrial clients. I believe, according to the symposium founders, the reason for my being on this panel is because I have represented my industrial clients in these environmental justice lawsuits, and to bring to you some of my practical concerns when these lawsuits are filed.

But before I turn into the body of my remarks, I would like to remind you that since Mr. Van Cleve and I, as well as Ms. Hazel Johnson² and others, live in the real world of where "the rubber meets the road," as they say in the television advertisement, you will find that my remarks are less polemic, less polarized, than those we heard earlier this morning. This is because those of us who are in litigation and handling these matters, often have to make accommodations in the real world of litigation and balance the competing demands between the parties, which are often equally meritorious.

Our panel moderator here asked us at the beginning to consider the question and to give you our impressions of her question to us, and that is: Does industry have a social responsibility? Does industry have an obligation to the community to do more than merely act in compliance with the laws that are on the books? I would submit that the answer to that question is yes. I would also submit to you at the same time that, like Mr. Van Cleve's clients,

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Mr. Carlson's area of expertise is in the trial of complex sensitive environmental and toxic tort cases involving multiple plaintiffs and substantial punitive damages exposure, as well as management of large complex litigation. He has tried 20 toxic tort cases to jury verdict and has over 100 weeks of jury trial experience. Several of the cases he has tried involved major underground storage tank and water pollution litigation.

¹ See George Van Cleve, *Equal Enforcement for All*, 9 ST. JOHN'S J. LEGAL COMMENT. 525 (1994)

² See Hazel Johnson, *A Personal Story*, 9 ST. JOHN'S J. LEGAL COMMENT. 513 (1994).

my clients try to do that. They are members of the community. They try to put something back in the community in which they live. The reason they do that is because it is good business to do so. One other issue I want to take up briefly in dealing with this social responsibility question is the entire concept behind the title of this afternoon's panel, "Industry and Social Responsibility."

We have focused this morning and during this panel discussion on the private industry such as my clients and George's clients; and obviously Ms. Johnson spoke to you about a particular company with whom she had had some experiences. But I think it is important for all of us to remember that the minority communities of which we speak, and the peoples of color that we are legitimately and profoundly concerned about are being impacted not only by industrial America, or what is left of it, but more importantly, those people and those communities are being directly affected by the public sector.

Specifically, one of the questions posed by a member of the audience at the end of this morning's panel concerned a sewage treatment plant in Brooklyn. You will find that communities are affected by public facilities to a far greater degree than they are affected by private facilities. Witness the almost indiscriminate placing of freeways in the 1960's and the 1970's. You did not find freeways being plotted and built through upper income and middle-class white areas. You found them generally being built through minority communities. Likewise, those minority communities, even to this day, continue to bear the brunt and burden of the pollutants from those facilities, as well as the noise and the congestion that often goes along with them.³

I think then that our task here today is to recognize that the communities of which we speak, and the peoples with whom we are concerned are being impacted on a multitude of levels by a multitude of facilities. All too often a single facility or a single industry is singled out and made to be the whipping boy for a multitude of problems which come from a variety of sources. I think it is important for all of us to bear in mind that pollution from all sources has to be reduced. As Dr. Bullard put it so eloquently at the end of his remarks this morning, "prevention has to be the

³ See Steven Paul McSloy, *Breaking the Power of the Power Brokers*, 9 ST. JOHN'S J. LEGAL COMMENT. 669 (1994)

overarching theme."⁴ I think that he touched upon a very important point, and I would add to that. Prevention, from all sources, has to be our overarching theme. Furthermore, as Professor Lazarus told us this morning, we are dealing here with a shifting of risks.⁵ We are dealing with the distribution of risks, and we have to recognize where all those risks point and what all those risk sources are, and from where they emanate.

During the course of my representation of my industrial clients, I represented companies who had been sued with allegations that the plaintiffs in those actions had been discriminated against by my clients, primarily under the authority of 42 United States Code, sections 1983⁶ and 1985.⁷ Even though my clients were private parties—and as many of you know, private parties cannot be sued under those statutes unless they acted under authority of state law and act as a state actor—those actions have proceeded.

My concern and my focus here, however, is for a particular procedural device in which these lawsuits are teed up. I speak specifically of class actions under Rule 23 of the Federal Rules of Civil Procedure,⁸ and their state analogues, because I think that many practitioners in this area and community activists like Ms. Johnson, Dr. Bullard, and others, obviously work with outside attorneys to bring suits on behalf of the affected community. I think it is important for all of us and in everyone's, including my clients', self-interests, to understand that while there are benefits that flow from class action lawsuits to the members of the community who are bringing those lawsuits, there are certain risks associated with class actions. Specifically, what I draw your attention to is the fact that often, class actions are filed on behalf of an entire community of affected people, a community that is affected by one or more sources of pollution.

As all or many of you may know, class actions are filed by two or three or perhaps as many as ten class representatives for a community of people, many of whom are not even aware that, first,

⁴ See Robert D. Bullard, *The Legacy of American Apartheid and Environmental Racism*, 9 ST. JOHN'S J. LEGAL COMMENT. 445 (1994).

⁵ See Richard J. Lazarus, *Distribution in Environmental Justice: Is There a Middle Ground?*, 9 ST. JOHN'S J. LEGAL COMMENT. 481 (1994).

⁶ 42 U.S.C. § 1983 (1988) (permitting civil action for deprivation of rights).

⁷ 42 U.S.C. § 1985 (1988) (allowing civil action for conspiracy to interfere with civil rights).

⁸ FED. R. CIV. P. 23 (permitting and classifying class actions).

someone is suing on their behalf, second, they are represented by counsel, or third, most importantly, they suffered any injury. I know in California,⁹ New Jersey,¹⁰ and other states,¹¹ the filing of a case of this magnitude and this order requires homeowners who are affected by the class action to make a disclosure of the filing of this lawsuit to any prospective buyers of their property. What frequently happens is that this lawsuit is being filed on behalf of individuals who are unaware that a lawsuit has been filed in which there is a claim of a diminution of their property value as a result of the pollutants coming out of a particular facility. Consequently, they fail to make a disclosure. Or, if they do know about the lawsuit, they disclose it, and the impact on all of this is that the mere filing of the lawsuit creates a certain stigmatic effect around the properties that heretofore had never existed. So it is not the pollution up the hill that is necessarily causing the problem, but the mere filing of the lawsuit that will often cause a problem.

I have taken the depositions of many class members and class representatives. Often I will hand them a copy of the complaint during the deposition, and I will say, "have you ever seen this complaint before, sir?"

He will say, "no, I have not."

"Are you aware that someone is suing on your behalf?"

"No, I was not."

"Do you think there has been any diminution in the property value of your home?"

"No, I do not believe there has been any diminution in the property value of my home until this lawsuit was filed."

"Do you believe you have been injured personally as a result of the pollutants from this facility?"

He says, "No, I do not."

This is a fairly common type of reaction that I get out of depositions. If you live in a community where the average price of a home is \$500,000 and the filing of a lawsuit will reduce the value

⁹ See CAL. CIV. CODE § 1102.6 (West Supp. 1994). This broad statute has been interpreted to require disclosure of any negative facts which can reasonably be foreseen as having a depressionary effect on property value. *Alexander v. McKnight*, 9 Cal. Rptr. 2d 453, 456 (Cal. Ct. App. 1992).

¹⁰ Real Estate Sales Full Disclosure Act, 45 N.J. STAT. ANN. §§ 15-16.3 to 15-42 (West 1978 & Supp. 1994).

¹¹ See, e.g., *Johnson v. Davis*, 449 So. 2d 344, 349 (Fla. Dist. Ct. App. 1984); *Van Camp v. Bradford*, 623 N.E.2d 731, 736 (Ohio Ct. C.P. 1993).

of your home by \$25,000, that is not a big problem. If you live in a community, though, where the average value of the homes is \$75,000 and you file a lawsuit and the property value as a result of just filing that lawsuit is reduced by \$25,000, that is a big deal. That is a very big deal.

Moreover, these lawsuits are now being filed increasingly by plaintiff class action lawyers who, heretofore, have primarily practiced in the securities regulation and securities stock price field. They are moving into the toxic tort and environmental arenas because, with the run-up of the prices in the stock market, until recently, they are seeking new avenues to file lawsuits. They frequently wander in, file a lawsuit with absolutely no preparation or thought given to it, and all they manage to do is disproportionately and adversely affect the rights and the property values of the people that they are ostensibly supposed to be protecting.

I have also been involved in environmental disasters in which a lawsuit was filed within thirty six hours of the event. I would submit to you that nobody knows enough about the effects of that event to be able to walk into court and at least under Rule 11 of the Federal Rules of Civil Procedure,¹² be able to make a good faith showing that, in fact, they have done the diligent, necessary, and now statutorily required investigation in order to satisfy the requirements of good faith in filing that lawsuit.

In sum, I want to impress upon you that we are entering into an area of uncharted waters, but there are several things that we have learned already about the environmental justice and equity programs that are currently in place. No one is going to dispute, as you have heard today so eloquently from others, the fact that even today there may be disproportionate effects on minority communities as a result of siting decisions or currently operating permitting decisions. But having said all that, I think it is equally important to recognize that we should not lose sight of the fact that our concern for those communities should not serve as a vehicle to wander into areas in which we do more harm than good.

¹² FED. R. CIV. P. 11 (requiring attorney to certify that documents submitted to court are based on sufficient evidentiary support).

