

*April 2018***IN THIS ISSUE**

*Asbestos-related litigation has been a hot spot for companies in France and a legal laboratory for French Courts with, notably, the French Supreme Court recognizing "the anxiety to develop a disease due to a risk of exposure to a dangerous substance". Plaintiffs' counsel are actively pushing for this anxiety damage to be recognized following the exposure to other substances, such as pesticides, meaning that anyone who believes he/she has been exposed could ask for damages for the simple fear of cancer, without actually having to file any scientific evidence proving that such fear can materialize. Companies need to be aware of this litigation exposure which is becoming trendy in the EU.*

**Pesticides: The Rise of Asbestos-Like Litigation****ABOUT THE AUTHOR**

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*\*With thanks to Thomas Helmer for his contribution.*

**ABOUT THE COMMITTEE**

Member participation is the focus and objective of the Toxic and Hazardous Substances Litigation Committee, whether through a monthly newsletter, committee Web page, e-mail inquiries and contacts regarding tactics, experts and the business of the committee, semi-annual committee meetings to discuss issues and business, Journal articles and other scholarship, our outreach program to welcome new members and members waiting to get involved, or networking and CLE presentations significant to the experienced trial lawyer defending toxic tort and related cases. Learn more about the Committee at [www.iadclaw.org](http://www.iadclaw.org). To contribute a newsletter article, contact:

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*The International Association of Defense Counsel serves a distinguished, invitation-only membership of corporate and insurance defense lawyers. The IADC dedicates itself to enhancing the development of skills, professionalism and camaraderie in the practice of law in order to serve and benefit the civil justice system, the legal profession, society and our members.*

These past years, France has been the biggest user of pesticides in Europe. The use of pesticides was even more pronounced last year according to some sources (+6%), despite strong statements by the French Government against these substances. In parallel to this increase in use, litigation also increased, instigated by the same plaintiffs' Counsel as the ones who developed asbestos litigation in France. Needless to say, this trend must be monitored. Indeed, if at first, pesticide manufacturers were the only ones targeted by State investigations and litigation, manufacturers of consumer products containing ingredients treated with pesticides (e.g. cosmetics, textiles) are now on the radar.

Furthermore, if pesticides were to be treated like asbestos, this would mean that the legal exceptions created for the latter could become established principles for all substances for which there is no scientific certainty with respect to their impact on human health. This would become a real issue; asbestos-related cases show that courts find companies liable even when plaintiffs do not prove that the company breached any legislation, that the plaintiffs suffered a loss and that such loss is due to the company's breach. Penalties are becoming increasingly automatic, leading a number of companies to encounter considerable financial difficulties.

## 1. Claims Against Pesticide Manufacturers

The first type of action that has been launched by people having developed an illness they allege is related to the exposure to pesticides is an action before the civil courts against pesticide manufacturers. This type of litigation is bound to develop as most farmers are self-employed and, therefore, do not have an employer against whom they can act (contrary to the plaintiffs who were exposed to asbestos).

The first and most famous case law relates to the decision of the Lyon Civil Court dated February 13, 2012 against Monsanto. The latter company was found "*liable for the loss [sustained by the plaintiff] following the inhalation of the product Lasso*" alleged by the farmer. In this respect, the Lyon Civil Court ordered medical expert opinions to assess the actual loss sustained by the farmer who had inhaled herbicide fumes when he opened a treatment tank on a motorized sprayer<sup>1</sup>.

This decision shows the dilution of the causal link in disputes relating to products containing substances the effects of which are not scientifically proven in various respects.

First, to rule that the fumes that the farmer alleges having inhaled came from Lasso, the Court, which did not have any testimony enabling it to prove that the product

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<sup>1</sup> Lyon Civil Court, February 13, 2012, no. 2012/144.

included in the tank from which the farmer had inhaled the fumes was Lasso, relied on a set of factors including certificates and purchase invoices of the product at stake. While proof can be brought by any means, such a method can, however, seem very permissive in light of the reasoning that is then adopted by the Lyon Civil Court. Indeed, this Court ruled that there was a link between Lasso and the farmer's health in light, notably, of medical expert opinions, which did not follow the adversarial principle. They were, indeed, criticized by Monsanto insofar as they did not include any study enabling the Court to determine the minimum inhalation level necessary to establish the injuries alleged by the plaintiff. Moreover, the Court considered that Monsanto had breached its contractual obligations by selling a dangerous product, with a label that would not show the necessary precautions to be taken when using the product. Yet, this label had been approved by the administration, as well as, in fact, the introduction of Lasso on the market. It clearly appears that companies cannot hide behind the authorizations they would obtain due to compliance with regulatory obligations. One can see, through this reasoning, the application of the precautionary principle.

Finally, the Court did also not consider that the plaintiff's behavior had, in this case, broken the causal chain. Indeed, it was ruled that the plaintiff could not be blamed for not wearing a mask, which was contrary to his

usual behavior, given that "*the sole indication of the necessity to wear protective equipment and eye and face protective equipment refers to the risks of contact with the skin or mucous membranes, but not respiratory risks*". One can here foresee that it might be difficult for companies to prove the fault of the plaintiff to mitigate liability. At the appellate level, the most noteworthy decision is the one handed down on March 21, 2013, by the Nancy Court of Appeal<sup>2</sup>. According to this Court of Appeal:

*"the sale of phytosanitary products without the attention of the user being drawn to the risks inherent in their use and the precautions to be taken constitutes a criminal offense"*.

Even though the Nancy Court of Appeal stated that the burden of proof lay with the plaintiff due to the fact that 1° "*he is suffering from a myeloproliferative disorder*", 2° "*he used phytosanitary products*", 3° "*the exposure to these products results from one or more offenses committed by the manufacturers of the products or the administration*" and such an offense "*presents a causal link with his pathology*", it merely observed that according to a report filed by an Expert Doctor of Pharmacy and toxicologist, the substance in question, namely benzene:

*"is known to cause myeloproliferative disorders"* and that, therefore, "[the plaintiff's] *myeloproliferative disorder*

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<sup>2</sup> Nancy Court of Appeal, March 21, 2013, no. 12/01238.

*may result from his contact with benzene and the products containing it" (emphasis added).*

Since then, a large number of pesticide manufacturers have been found guilty of a fault due to their products' labeling even though they had all obtained authorizations from public authorities to sell the products with the labels in question.

## 2. Claims of Farmers Using Pesticides

Under French law, if an employee develops an illness and wants to receive compensation from Social Security due to the fact that he/she believes that the illness is linked to his/her work, the employee has to prove that the illness in question is work-related. Over the years, French law has tried to facilitate the recognition of the occupational nature of illnesses by, notably, creating tables that list the types of illnesses that may be developed because of the exposure to certain products in the workplace. When an employee develops an illness that is listed in such tables, his/her illness will be presumed to be occupational and it will be much easier to obtain compensation from Social Security and then from the employer through a gross negligence claim.

If, however, the illness is not listed in the tables, the employee will have to request

medical expert proceedings, which take a very long time and rarely provide a positive outcome. This is why, since 2003, farmers and employees working in the pesticide industry have been asking the French Government to list illnesses such as Parkinson's, bladder cancer, leukemia and prostate cancer as illnesses linked to an exposure to pesticides. Until recently, these requests were never successful because scientists, courts and the French Government considered that there was insufficient evidence to link these illnesses to pesticides, relying on a number of reports supporting such a position.

For instance, a National Assembly report dated April 29, 2010 explained that "*the main issue faced by scientists in the assessment of the deleterious effects of the exposure to pesticides is the multiplicity of factors that can lead to identical symptoms*"<sup>3</sup>. Another well-known report in France shows that farmers have a longer life expectancy than the rest of the population<sup>4</sup>. As a consequence of the above, farmers and employees created a national association called Phyto-Victimes<sup>5</sup> and started to exercise pressure on the authorities through demonstrations and documentaries on what they believe is the impact of pesticides on human health. These efforts have had a positive outcome for farmers and employees as, in a Decree dated May 4, 2012, the French Government listed Parkinson's as an

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<sup>3</sup> Report on Pesticides and Health, Parliamentary Office for Scientific and Technological Assessment (*Office Parlementaire d'Evaluation*

*des Choix Scientifiques et Technologiques*), April 29, 2010.

<sup>4</sup> AGRICAN investigation, June 2011.

<sup>5</sup> [www.phyto-victimes.fr](http://www.phyto-victimes.fr).

illness linked to an exposure to pesticides<sup>6</sup>. The conditions listed in this table are the following:

- (i) this disease must be confirmed by a doctor qualified in neurology;
- (ii) the coverage period is 1 year (subject to a 10-year exposure). This one-year period is the maximum period of time between the date of the diagnosis of the disease and the request by the person to be compensated by Social Security; and
- (iii) there must be evidence of the use of pesticides.

This means that if an employee proves that he/she has been exposed to pesticides at some point in his/her career and develops Parkinson's, he/she will be able to receive compensation. The industry should, therefore, be aware that the number of gross negligence claims from employees will increase.

In June 2015, Non-Hodgkin's Lymphoma (NHL) was also listed as a pesticide-related illness by the French Government.

Case law is steadily developing since the recognition by the French Government of a link between Parkinson's disease and pesticides. The unclear positioning of Courts, however, reveals the scientific

uncertainty that still exists around pesticide-induced illnesses.

On April 11, 2013, the Vaucluse Social Security Court acknowledged the occupational nature of NHL developed by a plaintiff and ordered the Agricultural Social Mutual Insurance Fund (*Mutualité Sociale Agricole* – MSA) to cover this illness.

In 2016, the Saint-Brieux Social Security Court awarded 105,000 Euros and 115,000 Euros to two former employees of a farmers' cooperative for developing multiple chemical sensitivity following the use of pesticides with no adequate protection. They had experienced bleeding, vomiting, intense tiredness and headaches.

In a decision dated February 28, 2017 handed down by the Orléans Court of Appeal, it was established that the plaintiff had worked as an agricultural worker for 38 years in contact with phytosanitary products. The Court, however, ruled that the plaintiff did not provide sufficient evidence to substantiate the recognition of the occupational nature of the disease from which he was suffering.

In this case, the plaintiff had submitted his initial medical certificate 5 years after the expiry of the 1-year period mentioned above within which he should have asked for compensation. In that respect, the Court considered that the three different medical certificates the plaintiff had filed to justify

<sup>6</sup> Decree no. 2012-665 dated May 4, 2012 amending and completing the tables on occupational illnesses in the farming industry,

annexed to Book VII of the French Rural and Maritime Fishing Code, JOFR no. 0107 dated May 6, 2012, page 8149.

this delay did not specify the onset date of the symptoms of Parkinson's disease. As a consequence, the Orléans Court of Appeal, after considering that the condition related to the coverage period was not fulfilled, decided that the Parkinson's disease developed by the plaintiff could not be recognized as an occupational disease.

On the other hand, on May 31, 2017, the Poitiers Court of Appeal recognized the occupational nature of a case of Parkinson's disease. In this case, the condition related to the coverage period did not create any issue because the disease had been diagnosed while the plaintiff was still exposed to the risk. The Parkinson's disease was also confirmed by a doctor qualified in neurology. The debate focused more on the duration of the exposure. The Court found that the 10-year-exposure condition was met. To do so, the Court relied on a set of documents (technical data sheets of the products used, accounting documents and different types of statements) proving that works carried out by the plaintiff had exposed him to the risk for at least 10 years. The Court also considered that these documents demonstrated that the plaintiff carried out works that usually trigger exposure to pesticides.

Parkinson's disease is the most common neurodegenerative disorder after Alzheimer's disease. We can, therefore, expect an increasing number of cases in the near future. As such, on April 21, 2016, a French NGO, *Génération Futures*, published a report stating that they had received

information from 180 farmers having developed illnesses allegedly linked to pesticides.

### **3. Claims of Other Users of Products Containing Ingredients Treated with Pesticides**

As mentioned above, on April 21, 2016, a French NGO published a report in which there is a mapping of the use of pesticides in France with the number of potentially exposed people and the number of complaints they received. The NGO states that it has collected 200 testimonies on alleged health issues encountered following the spreading of pesticides. The announced goal is to inform and encourage people living next to fields to file claims. As such, there have been criminal complaints filed against farmers on the ground of an alleged breach of spreading regulations. Plaintiffs' Counsel would also like to start litigation on the ground of anxiety to develop an illness, or fear of cancer. Note that anxiety has been recognized by the French Supreme Court when linked to asbestos exposure. Hundreds of companies have faced thousands of claims of former employees who had not developed any illness but were awarded between 5,000 and 15,000 Euros each for the fear of developing an illness.

More recently, the French market surveillance authorities have published reports on the presence of pesticides in consumer goods such as cosmetics or food products, stating that they will investigate the concentration of these pesticides in

these products and their potential effect on human health.

There is also concern that exposure to pesticides may lead to the application of the newly enacted environment class action.

In any case, scientific debate needs to be activated in Europe by manufacturers and the industries using these substances in order to avoid a situation where too many shortcuts will be used by the plaintiffs' bar to lighten their burden of proof and have the Government implement as many presumptions as it did in the asbestos-related cases, i.e. presumption of breach by the company of its safety obligation, presumption of knowledge by the company that it exposed people to a risk, presumption of damage and presumption of link between the disease or the anxiety and the company's presumed breach... or put differently, impossible defense for companies.

*\*With thanks to Thomas Helmer for his contribution*

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