
THE APPEAL OF BIG BAD NEWS

1. Ticking Troubles Pre-Trial

You represent SumFun, an overnight summer camp in a lawsuit by fifty former campers who claim to have contracted Lyme disease while at camp. They allege the camp failed to require the prudent practice of full body inspections for tick bites. Your client explains they had worried about liability for alleged unwanted touching, in these paranoid times.

Some plaintiff campers allege they exhibited symptoms during the camp session, but the infirmary (operated by Camp Docs, a medical provider company) failed to recognize Lyme disease and failed to treat it with early antibiotics. Others reported no symptoms at camp, but did so after returning home, and their pediatricians failed to catch it. Many affected campers were not diagnosed until much later, when the disease was in its second or third phase. For some, neurological and motor effects have been profound and permanent. There may be a statute of limitations defense for some of these, if their exposure was long ago. They will argue that they filed in a timely fashion after their Lyme disease diagnosis: a characteristic of the disease is its lengthy dormancy periods.

The camp maintains that, in every opening day dinner announcements, the director told campers to watch for ticks and self-inspect. They were informed of common symptoms to watch for. Campers were advised to wear long pants and long-sleeved shirts while in the woods. (Unfortunately, bunk counselors failed to enforce this.) You will also argue that Camp Docs' negligence, if any, was a superseding cause of the campers' injuries. They were responsible for campers' health and should have been proactive about reducing Lyme disease risks. Camp Docs was an independent contractor. And, if campers' parents and personal physicians failed to recognize and test for the symptoms, that was also a superseding cause.

If summary judgment is denied and a verdict rendered, the damages could be catastrophic – in the \$50 million to \$100 million range, or higher.

Trial counsel is optimistic. You believe unduly so. You think it highly unlikely summary judgment will be granted in SumFun's favor, or that you could successfully appeal its denial later. Explain it to your client.

2. Tuna Tales

You are handling an appeal of summary judgment in favor of your client, Total Tuna, which is a canned tuna processing company. Plaintiff is a minor who claims that Total Tuna sold tuna cans with elevated mercury levels, which plaintiff's mother ate during pregnancy. Apparently, the plaintiff's mother ate quite a lot of tuna for its high protein and omega 3 fatty acids. At deposition, she testified that she favored the Total Tuna brand above all others. Now 7 years old, the plaintiff has been diagnosed with brain damage, hearing loss, and vision problems, all known to be possible consequences of exposure to high levels of mercury in the womb.

The trial court agreed with our theory on summary judgment that plaintiff's claims are barred by language in the six-year statute of limitations for prenatal injuries, found in Code of Civil Procedure section 340.4. The statute specifically states the "minority tolling" for injuries to minors (CCP section 352) does not apply to prenatal claims. Based on that statute, we told the client that we have a strong legal position; the six-year period should be a bright line cut off.

The plaintiff has argued that the shorter two-year statute of limitations in Code of Civil Procedure section 340.8 (a) (2) should apply instead, because it specifically governs toxic exposure claims. Section 340.8 does not expressly bar minority tolling, so plaintiff argues the lawsuit is timely if filed within two years of the plaintiff's 18th birthday.

Unfortunately, at oral argument, the justices' hostile questioning makes it clear they think "minority tolling" should apply. They made pointed references to the toxic exposure statute's more recent enactment, and its language encompassing prenatal injury.

We had not anticipated this. Now, we must explain to the client that summary judgment is likely to be reversed and the case set for trial. There would be other factual and causation defenses at trial. But you can see that a plaintiff's verdict would be high, likely in the \$10 million to \$20 million range, if not higher. Break the bad news to your client.