

## **Explosion litigation takes an odd turn**

### **Plaintiffs, defendants appear to trade arguments, with defense telling court their client may be at fault and plaintiff saying no duty owed**

By Janet L. Conley, Associate Editor

Nearly seventeen months after a deadly explosion at a sugar refinery near Savannah, a strange phenomenon has appeared in the resulting wave of litigation: Lawyers for the plaintiffs and defendants look as if they have traded arguments.

One example is in a recent notice filed by attorneys for Sugar Land, Texas-based Imperial Sugar Co. and its related entities—which plaintiffs have sued claiming their negligence caused the ignition of sugar dust that killed 14 workers and injured dozens of others.

The defense informed the court that Imperial-Savannah LP, the entity which employed most of the injured workers, “may be partially or wholly at fault, according to the allegations set forth in Plaintiff’s complaint.”

Not so, responded a plaintiff’s lawyer in a 19-page motion to strike the defense notice. He assured the court that because “Imperial-Savannah LP owed no duty of reasonable care to Plaintiff ... it cannot be considered ‘at fault’ under Georgia law.”

These odd arguments don’t represent some kind of kinder, gentler form of legal battle that is sweeping the country. They are, rather, the result of some novel legal jousting launched by Savannah plaintiffs lawyer Mark A. Tate of the Tate Law Group, furthered by plaintiffs lawyer Jonah A. Flynn of Flynn Law Firm, who filed the motion to strike and countered by David A. Dial of Weinberg Wheeler Hudgins Gunn & Dial, who is the primary outside counsel to the sugar companies.

At issue are their clients’ relative positions with regard to the state’s workers’ compensation laws, which prevent suits by workers against their employers, and part of the 2005 Georgia legislation that made it harder for plaintiffs to win suits. The law was part of a package pushed by the new Republican majority in the General Assembly and bitterly opposed by the plaintiffs bar.

Tate believes he’s found a multimillion-dollar Achilles’ heel in one of the sugar company’s primary defenses. The defense is this: Under Georgia law, a company that employs workers hurt on the job is protected from further liability because its workers’ compensation payments are deemed to be full compensation for the injuries.

So Tate and other plaintiffs lawyers are taking on parent company Imperial Sugar by aiming at its multi-layered corporate structure. While one of its entities, Imperial-Savannah, employed most of the workers injured in the blast, it is owned by two other companies. A fourth company, Imperial Distributing Inc., employed the managers and executives who had the responsibility and budget to implement safety measures at the refinery. And a fifth company, Savannah Foods Industrial Inc., owns the refinery and the property on which the refinery rests (although the defense has disputed this language in some pleadings).

According to Tate, Imperial-Savannah may qualify for the workers' compensation ban against further liability, but its related companies do not.

Dial, naturally, disagrees. "If the courts were to ... refuse to apply the workers' comp immunity to all the Imperial entities, it would essentially undermine the entire public policy behind having workers' compensation insurance," he said. "It would make the immunity a sham, and I believe it would do great damage to all the employers in the State of Georgia."

To defeat Tate's argument, Dial has filed the notice of potential fault by his own client, Imperial-Savannah, which employed most of the injured workers but has not been sued by its employees because of the workers' compensation rules. That notice is important because it has the potential to get Imperial-Savannah listed on the verdict form in a case that makes it far enough to be tried before a jury.

At issue is O.C.G.A. 51-12-33, which abolished joint and several liability and replaced it with a comparative fault regime. The law requires that jurors assign a percentage of fault to every entity found to have responsibility for the injuries, even if some entities are not defendants.

So in cases against individual entities of Imperial Sugar's corporate labyrinth, any blame against non-party Imperial-Savannah essentially would reduce the liability of the other defendants.

So far, Dial has filed this non-party notice of fault in only a few of the suits against his clients. But it already has elicited pleadings bristling with legal indignation from plaintiffs lawyers.

One of those lawyers is Flynn, who along with Bryant A. Fitts and Ryan H. Zehl of Houston, represents four of the plaintiffs. He wrote in his motion to strike the notice of fault that the 2005 law, if interpreted as Dial argues, was "hastily drafted and poorly written," and is "in derogation of common law."

The comparative negligence requirement, Flynn argues in his motion, is an "unconstitutional" reading of the statute, one which violates the equal protection rights of plaintiffs and defendants alike.

Comparative fault, Dial notes in his response to Flynn's motion, has been recognized by the courts of 14 other states.

Tate, the plaintiffs attorney, points out that Imperial Sugar has not raised this defense in all of its cases, adding, "I believe that they are not confident that it would be successful."

14 killed, dozens hurt

The events giving rise to this litigation occurred in the early evening of Feb. 7, 2008, when part of the Imperial Sugar Co. refinery in Port Wentworth, about seven miles outside Savannah, exploded, killing 14 workers and injuring dozens more.

Brent J. Savage of Savage, Turner, Pinson & Karsman in Savannah, who represents five of the injured workers and representatives of seven of the dead, estimates that some \$50 million in workers' compensation benefits for medical expenses and lost wages already have been paid, and that total liability outside of the workers' comp arena may rise to \$100 million.

Imperial Sugar's most recent 10-Q, filed with the Securities and Exchange Commission for the quarter ended March 31, lists more than \$92 million in costs and damages associated with the explosion, \$14.8 million of which are identified as legal and consulting fees. About \$57 million of that total amount, according to the 10-Q, has been offset by insurance recoveries.

The explosion has prompted a re-evaluation of the practices, procedures and safety mechanisms in sugar refineries and triggered an Occupational Safety and Health Administration investigation of Imperial Sugar's Port Wentworth refinery and another refinery in Gramercy, La. OSHA issued a scathing report about safety violations at the refineries and imposed \$8.7 million in fines, which the sugar company is contesting.

To date, at least 46 lawsuits are pending or stayed in four courts: 41 are in the State Court of Chatham County, two in the State Court of Fulton County and one each in the State Court of Effingham County, the District Court of Harris County, Texas, and the Philadelphia Court of Common Pleas.

There are more than 70 plaintiffs, although some appear both in their individual capacity and as representatives of the estates of the deceased.

More than 20 companies outside the Imperial corporate structure have been named as defendants, including MacAljon Engineering LLC; Custom Technical Solutions Inc.; Zurich Services Corp.; American Institute of Baking; Kerby Enterprises Inc.; and Aerobelt Conveyors, which, among other things, provided mechanical, janitorial or maintenance services to the sugar refinery.

Imperial Sugar's CEO, John Sheptor, as well as 10 current and former executives and members of the board of directors, have been named as defendants in shareholder derivative actions alleging that Imperial Sugar executives knew of dangerous conditions that existed at the company's sugar refineries due to combustible sugar dust, failed to take corrective action and as a result, caused the company to incur massive economic damages.

At least 76 lawyers—most from Georgia, but others from states including Texas, South Carolina, New York and Pennsylvania—are or have been involved in some part of the dispute.

#### Explosive dust

The facts and the injuries, as laid out in the plaintiffs cases, are riveting. Most turn on the allegation that Imperial Sugar or contractors it hired to maintain its plant and equipment allowed sugar dust, which can explode upon ignition under certain circumstances, to accumulate to dangerous levels.

The ignition of sugar dust, according to a suit filed by Savage on behalf of plaintiff Paul Seckinger against American International Recovery Inc., a division of American International Group Inc., and other insurance companies, caused his client's body to become "enveloped in flames."

The complaint goes on, "[H]e was essentially a human torch."

Seckinger spent six months in a burn hospital in Augusta, underwent approximately 60 separate surgeries and accrued more than \$8 million in medical expenses, according to the complaint.

Anthony F. Constant of Corpus Christi, Texas, and Thomas C. Bordeaux Jr. of Savannah, attorneys for plaintiff Lawrence Manker Jr., argue in one of their complaints that Imperial Sugar allowed sugar dust to lie an inch deep on some exposed surfaces in the plant. They tell of piles of sugar dust rising to "mid-leg" height and of inadequate safety procedures.

"Sugar dust was allowed to become so thick in the air that workers had trouble seeing each other. Electrical connections were left wide open and completely exposed to the sugar dust with wires twisted together for a connection and without insulation or any effort made to prevent them from becoming an ignition source," alleges the complaint.

"I know this sounds cold," says Dial, Imperial's attorney, but "you're moving incredible amounts of sugar in that facility every day."

Anytime there is a minor spill, he adds, there's going to be a pile of sugar until someone comes to clean it up, a situation he calls "essentially unavoidable" and "essentially irrelevant," because granulated sugar is not combustible.

"It is our position that the plant was operated consistent with the standards in the sugar manufacturing industry at the time," he said. "This action didn't happen from any breach of industry standards."

Turning from the facts to the law, Dial said, "We start with the legal defense that the workers' compensation immunity is an absolute defense on behalf of all the Imperial companies."

That's exactly the defense plaintiffs lawyer Tate wants to topple with his attack on what he called Imperial's "bizarre corporate structure." That structure, he says, was set up to offer the company certain tax advantages related to its intellectual property and purchase of sugar products.

"There's nothing real secret about it," Dial counters. "There's nothing evil about it."

He says the company is set up with its various entities to minimize taxes, preserve trade names and centralize administrative operations. If workers' compensation doesn't provide protection from liability throughout the corporate structure, he says, "It would essentially undermine the entire public policy behind having workers' compensation insurance."

How the workers' comp bar applies to a corporate structure such as Imperial's is by no means settled law.

"It hasn't come up as much as you would think, strangely. ... It's been sparsely addressed in the state and federal courts of Georgia," Dial, acknowledges, adding that whatever the outcome, it will have major ramifications for the state's corporations and the liability they face. "I think it's going to go all the way up to the Georgia Supreme Court."