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EMERGING TOXIC TORTS

In this Special Report, top plaintiffs and defense counsel unveil their vision of what the future may hold for toxic tort practitioners as they detail their assessment of the most significant and interesting emerging issues.

The emerging issues, environmental attorneys told BNA, will include climate change suits and cases involving Chinese drywall. In addition, attorneys predict an increase in water pollution suits filed on behalf of state and local governments, and cases involving the quality and marketing of food. Other possible sources of increased litigation include nanotechnology, nuisance suits over animal feeding operations, mining waste, and diesel exposure.

Practitioners may also want to keep an eye on the use of outside counsel in suits filed on behalf of states, as well as claims filed by foreign nationals in U.S. courts alleging exposure that occurred abroad.

Lawyers Look to the Future of Toxic Torts, See New Claims, New Plaintiffs, New Defendants

Whether the contaminant is in the air, in the water, or on the walls or between them, common law toxic tort claims are at the top of plaintiffs' attorneys tool boxes as they launch litigation initiatives on everything from climate change and water pollutants to diesel exposure and Chinese drywall.

And don't forget food. In addition to going after what animal producers are doing with the waste they generate, another area ripe for litigation is what the food in-

dustry is telling, or not telling, consumers about what's in Big Macs, hot dogs, fruits, and vegetables they're buying and eating, according to practitioners.

While many of these suits will have the usual suspect as clients—private individuals alleging personal injury or property damage—a new subset of clients is on the rise as more and more claims, particularly those alleging public nuisance, are being filed by some of the na-

tion's best known plaintiffs' counsel on behalf of states, counties, and cities alleging harm to the general public.

"You have new plaintiffs and the plaintiffs are government agencies," said Arthur Bryant, executive director of the public interest law firm Public Justice.

Climate Change. Perhaps no other single area of toxic torts in recent years has garnered the kind of attention that a pair of federal appeals court rulings is now drawing to climate change litigation.

On Sept. 21, the U.S. Court of Appeals for the Second Circuit held in *Connecticut v. American Electric Power*, 2d Cir., No. 05-5104 (24 TXLR 1124, 9/24/09), that a group of states and land trusts could sue a half dozen electric power providers under federal public nuisance law for the damage to public health and the environment allegedly caused by defendants' emissions.

In a lengthy analysis, a two-judge panel rejected the utility companies' arguments that the courts are an inappropriate forum for climate change disputes, that regulatory and legislative activity on global warming displaced federal common law, and that the states and environmental groups had not sustained the requisite injury to establish standing to pursue their claims.

"Climate change litigation has been given a springboard to grow even more by the Second Circuit overturning the dismissal of a federal common law nuisance claim to abate greenhouse gas emissions in the *American Electric Power* case," said Bill Hall, a defense attorney and chair of Winston & Strawn's environmental department in Washington, D.C., a firm that represents clients in litigation, legislative, and regulatory matters involving climate change.

Following close on the heels of the Second Circuit, a three-judge panel of the Fifth Circuit held Oct. 16 in *Comer v. Murphy Oil Co.*, 5th Cir., No. 07-60756 (24 TXLR 1214, 10/22/09), that a group of coastal Mississippi property owners could go forward with a proposed class action alleging that the emissions of a number of oil, gas, and coal companies contributed to global warming, which in turn increased the ferocity of Hurricane Katrina, which wiped out their homes and damaged nearby beaches.

Gerald Maples, the lead plaintiffs' attorney in the *Comer* suit, said the two suits mark the most significant climate change rulings since the U.S. Supreme Court held in 2007 that the Environmental Protection Agency must regulate greenhouse gases under the Clean Air Act, or explain why it wouldn't be doing so, in *Massachusetts v. EPA*, 549 U.S. 497 (2007) (22 TXLR 329, 4/5/07).

Lawyers on both sides of the aisle said the two opinions are expected to lead to a number of new filings: Public entities will see opportunities for requested abatement orders under *American Electric Power*, and, thanks to *Comer*, private parties will see the possibility of both significant compensatory relief and punitive damages.

"The federal courts are now saying that certain rights, such as individual property rights are paramount to issues such as politics, and these rights will be protected by the courts."

GERALD MAPLES, F. GERALD MAPLES PA

As Maples told BNA after the Fifth Circuit ruled his way, "This case is unique in that it is the first case of its kind that seeks to protect individual property rights in regard to the effects of man-made climate change."

But, the case is more than that, he said, as it's also likely a "precursor" to many similar claims to come.

"If you believe the science, and it's pretty dim, an increased risk will be posed with each passing year, and I believe that the federal courts are now saying that certain rights, such as individual property rights are paramount to issues such as politics, and these rights will be protected by the courts," Maples said.

R. Trent Taylor, an environmental defense attorney with McGuireWoods in Richmond, Va., agreed that more filings are in the forecast. "It's one thing to get injunctive relief," Taylor said, "but now that there's property damages and punitive damages too, I would expect a lot more plaintiffs' attorneys to get involved."

In addition to a number of expected new filings, much attention and litigation will be focused on the appeals of both *Comer* and *American Electric Power*, and any U.S. Supreme Court action in those cases. Power companies filed petitions for rehearing in *American Electric Power* on Nov. 5. Petitions for rehearing in *Comer* are due Nov. 30.

Observers are also keeping an eye on the appeal of *Native Village of Kivalina v. ExxonMobil Corp.*, N.D. Cal., No. 08-1138, to the Ninth Circuit. In that case, the district court dismissed Sept. 30 an Eskimo village's similar property damages suit on political question grounds (24 TXLR 1216, 10/22/09). The village filed an appeal of the dismissal Nov. 5.

Water Pollution. Another area of toxic torts where both sides of the bar expect to see a great deal of activity over the next year or so is water pollution, with claims being filed on behalf of states, counties, cities and other public agencies. As with the climate change litigation, public nuisance will factor in these suits.

"There's a whole set of another kind of cases where we are going to have to expect lawsuits brought on behalf of government agencies, and those are over the pollution of water systems," said Bryant.

The model for these, said Bryant, is the ongoing and high-profile litigation over the gasoline-additive methyl tertiary butyl ether (MTBE).

"MTBE litigation has been enormous," said Bryant.

A bellwether trial, in the federal multi-district litigation in the U.S. District Court for the Southern District of New York, ended on Oct. 19 when a jury held that ExxonMobil, one of only a few large companies that didn't enter into a \$422 million settlement over MTBE-related water contamination claims, was liable to New York City for \$105 million in damages for polluting sev-

eral city drinking wells (*In Re: Methyl Tertiary Butyl Ether (MTBE) Products Liability Litigation*, S.D.N.Y., No. 00-1898) 24 TXLR 1217, 10/22/09).

While the attorneys involved in the MTBE suits will be busy with the appeal ExxonMobil is expected to file of the \$105 million verdict, and with a number of other cases percolating along in the federal MDL and elsewhere against the oil giant and others, other water contamination lawyers will be looking for other pollutants to focus on.

One pollutant that Bryant said could be the subject of a great deal of litigation by public water providers and others is atrazine, a commonly-used agricultural herbicide that's been banned in the European Union and has been discovered in drinking water across the country.

The Environmental Protection Agency announced Oct. 7 that it will begin looking into the weed killer's potential for causing cancer as well as other alleged negative health effects such as birth defects, low birth weight, and premature birth.

"There's been a whole uprising of litigation involving atrazine because it allegedly gets into surface water when it's applied to agricultural lands," said Richard O. Faulk, a defense attorney with Gardere Wynne Sewell in Houston. "It's another example of a very sensitive water question that will be litigated," said Faulk.

One high-profile proposed class action over atrazine currently underway in an Illinois trial court is *Holiday Shores Sanitary District v. Syngenta Crop Protection Inc.*, Ill. Cir. Ct., 3d Jud. Dist., No. 04-L-710. In *Holiday Shores* and five related cases filed in Madison County, Ill., a public water provider alleges that the herbicide has polluted its water supply as well as other water systems, and is seeking compensatory and punitive damages, including funding for water filtration.

The suit, filed against Syngenta and other atrazine manufacturers, is expected to include other Illinois water providers. The would-be class is being represented by Stephen M. Tillery of Korein Tillery in St. Louis, Mo., and Scott Summy of Baron & Budd in Dallas, Texas.

Baron and Budd, along with Weitz & Luxenberg in New York, were two of the lead firms in the MTBE litigation.

Faulk said defense attorneys should be concerned that during the course of the federal MTBE proceedings, Shira A. Scheindlin, the federal judge overseeing the MDL, "has attempted to resolve every single possible issue that could be raised involving a groundwater or civic contamination lawsuit and some of those decisions have been very profound."

One of the most significant rulings, Faulk said, was one setting the standard governing divisibility of harm and apportionment of liability. Scheindlin borrowed the rule embodied in the federal superfund law and applied it in New York City's tort suit, he said. The standard, Faulk said, put "an extremely difficult" and "very vague" burden of proof on ExxonMobil.

"There are several large plaintiffs' firms that have water liability teams operating and they have proven themselves to be very aggressive and in many circumstances successful and I think it's going to be a challenge to everyone because water is a hot-button issue in modern environmental law," said Faulk.

"They are also showing us now that they are able to capture the most strict of the standards from CERCLA and other things and import them into common law lawsuits where they really are rather alien and that's a very dangerous trend in my view."

RICHARD O. FAULK, GARDERE WYNNE SEWELL

"They are also," Faulk said, "showing us now that they are able to capture the most strict of the standards from CERCLA and other things and import them into common law lawsuits where they really are rather alien and that's a very dangerous trend in my view."

Outside Counsel, Animal Waste, and Paint. Another trend that should be worrisome to defense attorneys, both Faulk and Hall said, is the increasing use of private contingency fee-based counsel in water and other contamination suits filed on behalf of states and governmental agencies.

"There's a huge trend and a huge dispute that's going on all over the country involving the controversy about the alliance of public authorities and private contingency fee counsel to pursue these large claims, whether they be environmental or product related or whatever," said Faulk.

In times of increasingly tight state and local budgets, states and public agencies have out-sourced environmental tort suits such as those involving MTBE and lead paint. Outside counsel is also being engaged in another set of cases that commentators said attorneys should keep their eyes on: the effect of animal waste on water quality.

Fidelma L. Fitzpatrick, a plaintiffs' attorney with Motley Rice in Providence, R.I., was an out-sourced attorney hired by government plaintiffs as one of the lead counsel in two closely watched public nuisance suits filed over the last couple of years over lead paint—*Rhode Island v. Lead Industries Association*, R.I., No. 2004-63 (24 TXLR 903, 7/30/09); and *Santa Clara County v. Superior Court (Atlantic Richfield)*, Cal., No. S163681. Such arrangements, according to Fitzpatrick, are "critical" to the ability of governments to bring complex toxic tort suits.

"It simply is not feasible for a state or a public entity to undertake this kind of litigation on its own," said Fitzpatrick. "It's absolutely critical," she said, "that the states and public entities have available to them the same quality and quantity of legal representation that these defendants have in order to go toe to toe with them."

Bryant agreed. "It makes all the difference" in these cases, Bryant said. "If they [local governments] can't hire private contingency fee counsel, then they can't afford to do it. This is why the defense wants to challenge these fees so much."

The defense has dug in to fight the arrangements and two big battles are looming.

Santa Clara County, a lead paint nuisance suit brought by several California local governments, and *Pennsylvania v. Janssen Pharmaceutica Inc., Pa.*, No. 24 EAP 2009 (24 TXLR 903, 7/30/09), a drug marketing case filed by the Pennsylvania Attorney General, are both currently pending before the state supreme courts in California and Pennsylvania respectively. The defense in both cases is arguing it's inappropriate to allow private counsel to receive pecuniary gain via contingency fee arrangements in suits purportedly brought on behalf of states and others in the public interest.

"The argument is that the use of a private contingency fee counsel with a stake in the case is inappropriate in a *parens patriae* action being brought by the state," said Faulk, who filed a brief opposing the arrangements in *Santa Clara County* on behalf of the American Chemistry Counsel and the National Association of Manufacturers. "It's one thing, I guess, if you're trying to collect taxes but it's quite another thing if you're trying to advance the public interest and make claims on behalf of the public themselves for environmental and other issues," said Faulk.

But Fitzpatrick, who is representing San Francisco in *Santa Clara County*, dismissed Faulk's and other defense attorneys' criticisms. She said the defense bar is not concerned with whether a public official's "neutrality" is somehow jeopardized through the use of contingency fee arrangements with outside counsel; instead, she said, they just want to sever government agencies' ability to bring these suits altogether.

"If they can make contingency fee counsel go away, they can make these environmental public nuisance cases go away."

FIDELMA L. FITZPATRICK, MOTLEY RICE

"It takes an incredible amount of human resources—lawyering, paralegals—tremendous expenditures to do this work in the appropriate way and defense counsel is very aware of that," Fitzpatrick said. "If they can make contingency fee counsel go away, they can make these environmental public nuisance cases go away," she said.

Fitzpatrick, who also represented Rhode Island in *Rhode Island v. Lead Industries Association*, a closely watched suit against lead pigment makers that sought statewide lead paint abatement, said that while public officials lost that suit on the merits in 2008 (23 TXLR 561, 7/3/08) the state won on the contingency fee question.

She also said the contingency fee argument was also raised by defense counsel, but rejected by the court, in Oklahoma's ongoing water contamination suit against numerous poultry producers over chicken waste (*Oklahoma v. Tyson Foods Inc.*, N.D. Okla., No. 05-329).

Motley Rice is also serving as counsel in the *Tyson Foods* case, which is currently in a bench trial in federal district court in Oklahoma (24 TXLR 903, 7/30/09).

Faulk said the *Tyson Foods* suit is yet another example of how active local governments are in litigating water-related contamination.

The *Santa Clara* suit has been fully briefed and is pending before the California Supreme Court. The Pennsylvania top court heard oral arguments Oct. 21 in *Janssen*.

Chinese Drywall. Another toxic tort that is expected to continue its acceleration in the near and long term is contaminated drywall imported from China. Unlike some of the other environmental suits, the Chinese drywall suits involve mostly private litigants.

Allan Kanner, a plaintiffs' attorney with Kanner & Whiteley in New Orleans, said property damage and personal injury suits over gasses that allegedly emanate from the drywall installed in some 300,000 new and rebuilt homes throughout the southeast is expected to take up a great deal of his own and many of his colleagues' time and attention. (See Kanner's article in this issue, *The Evolving Crisis Over Defective Chinese Drywall: An Overview of Legal Claims and Legislative Efforts*).

"Hundreds of cases have been filed," Kanner said, "and tens of thousands more are expected."

The suits name more than 30 defendants, including leading drywall maker Knauf Plasterboard Tianjin Co., as well as home builders, drywall distributors, and others.

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ALLAN KANNER, KANNER & WHITELEY

"It really is a brand new tort and it's a pretty mendacious and interesting one," said Kanner. "There's an urgency with Chinese drywall litigation that I haven't seen since property pollution cases where people literally built on top of contaminated landfills or polluted properties," Kanner said. "Every day people are getting exposed so there's a real urgency here that you may not see in other cases."

Kanner, who is representing homeowners in more than 400 cases mostly in Florida, said the litigation is also unusual in that the litigation "doesn't quite fall into a pattern" that he or other toxic tort litigators have seen before.

"You know it's not like, well, here we have another non-steroidal drug that doesn't work well. We have a pretty good idea how that's going to shake out based on Vioxx, Bextra, Celebrex, etc.," said Kanner. "These cases are a lot tougher to cubbyhole or predict," he said. "There's not a lot of toxicologic data on drywall and it just kind of burst on the scene relatively quickly."

In addition to noxious sulfur-like odors coming off drywall and metal corrosion problems, Kanner said his homeowner clients are complaining of "short-term acute reactions" including nose bleeds, nausea, and headaches. But there are questions about what, if any, long-term repercussions homeowners might face from their exposures.

"Chinese drywall is basically pollution between two pieces of paper," said Kanner. "Whether there is or isn't enough data to tie in longer term health injuries is

a forensic question that still remains to be answered," he said.

Kanner also said, "You've got a whole host of spin-off litigation. You have insurance coverage issues—that would be either the contractor, the distributor, or the manufacturer. Are their insurers going to pay? Was it intentional or not? Was it negligence? How about homeowner's insurance? Can you get coverage under your homeowner's policy? Yes, no, maybe, the courts haven't decided."

Still other issues, Kanner said, include, "What is the appropriate level of cleanup? Do you just pull out the drywall and call it a day? Or, if it corrodes metals, do you have to remove the electrical wiring and copper pipes? So we don't even know what the right remedy is, a consensus hasn't emerged on that."

"We also don't have a consensus on product identification issues or even how to test for airborne levels of contaminants," said Kanner.

Other complications, Kanner said, exist for homeowners seeking medical monitoring because of states' varying treatments of that issue. "In Louisiana you must have some manifestation of injury to sue for medical monitoring," he said. "Bloody noses, for example, I think would qualify for a manifestation for Louisiana law," Kanner said. "On the other hand," he said, "in Florida, you cannot have manifest injuries if you want to sue for mass medical monitoring—it has to be pure monitoring. So do people walk away from the short-term manifest injuries and just go for monitoring or what?"

Bryant, with Public Justice, agreed that litigation around Chinese drywall "is going to be enormous" and "it will go on for years."

"Everybody knows it's huge and it directly impacts peoples lives," Bryant said. But, beyond that, he said, "we still don't even know the sheer numbers. How big is this problem really?"

"We also don't know basic information about it," Bryant said. "What is really causing this? Is it limited to Chinese drywall. I've heard some people suggesting it could be American drywall too. No one knows yet."

In addition to state suits filed in Florida, Louisiana, and elsewhere in the southeast, federal multi-district litigation over Chinese drywall is underway in the U.S. District Court for the Eastern District of Louisiana (*In re: Chinese-Manufactured Drywall Products Liability Litigation*, E.D. La., No. 09-md-02047).

More than 100 suits have already been consolidated for pre-trial proceedings in MDL No. 2047.

Food Quality, Marketing. Still another area of toxic tort litigation expected to see a boom are suits related to what's in, or what's left out of, the foods people consume and what sellers are saying about the healthiness of their products.

Fitzpatrick, with Motley Rice, said, "Knowledge and information are going to be central to lots of lawsuits, certainly with food, with drugs, with environmental pollutants.

"There's going to be accountability for giving consumers the information they need to make their own decisions," Fitzpatrick said. "That's kind of a theme I see emerging in some of the cases, for example the food cases being filed around the country. What kind of information is really being provided to the consumer to

allow the consumer to really make a very educated decision about what is and isn't appropriate?"

Some of these types of suits, Fitzpatrick said, include those related to false advertising, misleading or inaccurate warnings, and what the labels "natural," "organic" and "certified" mean.

D. Alan Rudlin and George P. Sibley III, defense lawyers with Hunton & Williams in Richmond, Va., agreed that these kinds of suits, which also involve such food ingredients as trans fats, sugars, and sodium, could be on the upswing (See article this issue by Rudlin and Sibley, *Toxic Torts Minus Toxicity: An Analysis Of Consumer Fraud Claims Relating to Food*).

"This area has been on my radar screen since about 2003," said Rudlin, "when I saw a couple of failed efforts by plaintiffs' lawyers for undisclosed health risks by purveyors of food products to consumers."

"It was interesting that the court went to the trouble of articulating that they saw a colorable claim here."

D. ALAN RUDLIN, HUNTON & WILLIAMS

One of the early food cases Rudlin remembers taking note of was a proposed class action in a federal court in New York against McDonald's over the nutritional aspects of the retailer's hamburgers.

Although Rudlin said the court dismissed the suit, which tried to link obesity to the company's fast food, Rudlin noted that the court "went out of its way to point out how courts could envision how a claim could be stated."

"It was interesting that the court went to the trouble of articulating that they saw a colorable claim here and, second, as I read what the court was saying," Rudlin said, "it struck me as having something that might have legs too it."

In fact, while the McDonald's suit, *Pelman v. McDonald's Corp.*, S.D.N.Y., No. 02-07821, was dismissed, not once but twice by a federal district court, some of its claims under New York state law were reinstated by the U.S. Court of Appeals for the Second Circuit in 2005 (20 TXLR 176, 2/17/05).

Samuel Hirsch, the New York attorney representing Ashley Pelman and the suit's other named plaintiffs, who were all minors when they ate at McDonald's, said Oct. 30 that *Pelman* is still active in federal court and that he is currently awaiting a decision on class certification. Hirsch is with Samuel Hirsch & Associates.

Rudlin said he could easily imagine an increased number of similar suits being filed over the alleged healthy or non-healthy aspects of various foods for several reasons. One reason being, he said, "plaintiffs lawyers have seen the difficulty in pursuing health-related claims, certainly on a class basis but also on an individual basis, where causation is going to be a central component of the claim."

But a consumer action, Rudlin said, class or otherwise, "premised on a form of fraud or misrepresentation doesn't require any such causation evidence so that's a huge burden taken off a plaintiff's shoulders."

Sibley concurred. “Proving as a matter of law that the Big Mac that you ate caused your heart disease is a very high burden given all the other potential causes” of that disease, Sibley said. “But cases a decade ago that would have tried to attack these products on a health basis, alleging actual injury, are now attacking them on a consumer-fraud type of basis,” he said.

The argument goes, Sibley said, “I would not have bought this had you told me about the fatty or other alleged problems.”

Nanotechnology and Other Emerging Issues. Both plaintiffs and defense attorneys identified numerous other toxic tort issues as up and coming. Below are some other items they flagged and who mentioned them.

■ **Nanotechnology.**

It is too soon to tell whether nanotechnology toxic tort litigation will take off as only one or two studies about potential adverse health effects related to the new area have come out, Winston & Strawn’s Hall said.

“The way categories of toxic tort litigation typically emerge is based on an initial study or two that demonstrate an alleged link between the substance at issue and a particular disease,” said Hall. “Once those studies emerge they are tested, peer-reviewed, and otherwise evaluated both in the scientific community and in the courts.”

“So it really takes studies and the testing of their validity as an important first step to determine whether a new toxic tort category will emerge and become widespread. It will be interesting to see what happens in the area of nanotechnology,” Hall said.

■ **Animal-Related Odors.**

Stewart D. Fried, a defense attorney with Kilpatrick Stockton in Washington, D.C., said he sees a rise in nuisance and other claims by property owners living near concentrated animal feeding operations (CAFOs).

“They are increasing in quantity mainly because of consolidation of the industries,” said Fried, who noted that over the last many years, a relatively small number of very large cattle, pork, and poultry producers has displaced the much greater number of family farms that once produced animals for domestic food consumption.

“A lot of neighboring landowners are objecting to these operations even when they are duly operated under state law,” said Fried, who recently represented a pork producer in Illinois against trespass and odor-related nuisance claims. “You’re seeing a lot more of these cases certainly in the Midwest but also in places like North Carolina,” he said.

■ **Diesel Exposure.**

Rudlin said diesel exposure claims may be on the rise and these are of a different sort than the ones that have most commonly been seen filed on behalf of railroad workers.

Attorneys may also want to look for possible health-related claims being filed by public transportation workers (like bus drivers)—not against their employers but against diesel suppliers—and also claims being filed by those living in industrialized areas where substantial amounts of diesel fumes can be found.

One example of the latter suit was a class action being pursued in Long Beach, Calif. While that suit ended up being dismissed, Rudlin said, “it’s going to be interesting to watch and see if one of those cases takes hold.”

These claims can involve not just diesel combustion but also diesel-related fine particulates, an area that Rudlin said has been the focus of significant scientific concern recently.

■ **International Exposure Claims.**

Still another burgeoning area, Rudlin said, are toxic tort claims being brought by foreign nationals in domestic courts against U.S.-based companies for exposures that took place outside the United States.

“They’ve been going on for a little while but only in the last couple of years have you seen a blossoming of these types of suits and they’re still testing the waters,” said Rudlin.

Some closely-watched examples of these kinds of suits are the thousands of claims being pursued in California courts on behalf of fruit workers in Central America, West Africa, and elsewhere who allege sterility and other personal injuries from exposure to the pesticide dibromochloropropane (DBCP). The suits are against the Dow Chemical Co., the Dole Food Co., and others (24 TXLR 557, 4/30/09).

■ **Mining Waste, Air Pollutants.**

Bryant said to also look out for coal ash and other mining-related contamination suits.

Much more broadly, Bryant said, “entire new areas of toxic tort litigation will be affected as the government revises its damages estimates of how dangerous toxins are.”

For example, he noted, the EPA finalized a new national ambient air quality standard for lead in 2008. The revision of more such standards are in the works. “Given that the Bush administration abandoned science, the Obama administration is revising these” air standards for certain major pollutants, and there could be a significant impact on toxic tort litigation, Bryant said.

BY STEVEN PATRICK