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HIGHLIGHTS

BNA INSIGHTS: Environmental Class Actions After *Dukes*

The U.S. Supreme Court in *Wal-Mart Stores v. Dukes* announced a more stringent test for evaluating commonality in all putative class actions, no matter the subject area. In the context of environmental class actions, the increased focus on commonality, along with the need to establish commonality using reliable expert evidence, has led to fewer environmental class actions being certified, say attorneys Douglas A. Henderson, William M. Droze, and Steven J. Hewitson in this BNA Insight. But not all courts follow *Dukes*, the authors note, and *Dukes* does not prohibit certification of all environmental class actions. **Page 1076**

Dismissal Affirmed in Alaskan Village's Global Warming Nuisance Suit

Alaska's Village of Kivalina may not sue energy companies under a federal common law claim of public nuisance for global warming caused by greenhouse gas emissions, the U.S. Court of Appeals for the Ninth Circuit affirms. The Clean Air Act and Environmental Protection Agency actions taken under the statute ''displace'' a claim by the native village and city of Kivalina for damage from greenhouse gas emissions by energy producers, the appeals court says. The native village—a federally recognized Native Alaskan tribe—and the city asserted that greenhouse gas emissions and resulting warming have diminished sea ice formation on the coastline, exposing the land where the city is situated to erosion. **Page 1057**

Circumstantial Evidence Sufficient to Proceed With Superfund Claim

Circumstantial evidence of disposal of a hazardous substance is sufficient to proceed with a superfund contribution action against a former owner of a contaminated site, a federal court in Washington state holds. A shipbuilder being sued under the superfund law for disposing hazardous waste on a property it once owned may therefore pursue a contribution claim against a subsequent owner, the court says. **Page 1064**

Contaminated Property, Adjacent Lot Not Part of Same CERCLA 'Facility'

Owners of properties contaminated by toxic releases from an adjacent church property are not responsible for part of the response costs under the superfund law because their properties are not part of the same ''facility'' as the church property, a federal court in New York rules. **Page 1064**

'Popcorn Lung' Trial Ends in $7.2M Verdict; $5M Is Punitive

A Colorado consumer wins a $7.2 million jury award, including $5 million in punitive damages, in a suit against the manufacturers and retailers of the microwavable popcorn he ate, which contained a flavoring ingredient that allegedly caused him to develop a rare lung disease. **Page 1058**

ALSO IN THE NEWS

CLEAN WATER ACT: The latest effort by federal agencies to define Clean Water Act jurisdiction contains distinct improvements or pitfalls, depending on perspective, environmental attorneys say. **Page 1069**

CLEAN AIR ACT: Reheater replacements at a Louisiana power plant do not qualify for a ''routine'' maintenance exception under the Clean Air Act, a federal trial court rules. **Page 1066**

CLEAN AIR ACT: Community service requirements for a convicted defendant cannot include monetary contributions to charity if the amount of those contributions exceeds the maximum fine for the offenses, a federal trial court rules in an air pollution case. **Page 1067**

SUPERFUND: The ''timing of review'' provision of the federal superfund law bars a citizen suit to compel a gas company to eliminate hazardous waste allegedly endangering human health and the Anacostia River, a federal trial court rules. **Page 1065**

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Climate Change

Global Warming Nuisance Case Can't Proceed; Dismissal Affirmed in Suit By Alaskan Village

Alaska's Village of Kivalina may not sue energy companies under a federal common law claim of public nuisance for global warming caused by greenhouse gas emissions, the U.S. Court of Appeals for the Ninth Circuit ruled Sept. 21 (*Native Village of Kivalina v. ExxonMobil Corp.*, 9th Cir., No. 09-17490, 9/21/12).

The Clean Air Act and Environmental Protection Agency actions taken under the statute ''displace'' a claim by the native village and city of Kivalina for damage from greenhouse gas emissions by energy producers, the appeals court said.

The native village—a federally recognized Native Alaskan tribe—and the city asserted that the greenhouse gas emissions and resulting warming have diminished sea ice formation on the coastline, exposing the land where the city is situated to erosion. The village is being forced to relocate due to flooding and erosion residents allege is the result of climate change.

Kivalina filed the action against the energy producers in the U.S. District Court for the Northern District of California.

The defendants, 22 energy companies, moved to dismiss the action for lack of subject matter jurisdiction. They include oil companies such as ExxonMobil Corp., BP Plc, Chevron Corp., and Shell Oil Co., and electricity generators such as American Electric Power Co. and Duke Energy.

''They argued that Kivalina's allegations raise inherently nonjusticiable political questions because to adjudicate its claims, the court would have to determine the point at which greenhouse gas emissions become excessive without guidance from the political branches,'' the appeals court wrote.

The companies also asserted Kivalina lacked Article III standing to raise its claims because it alleged no facts showing that its injuries are ''fairly traceable'' to the actions of the energy companies.

The California district court held that the political question doctrine precluded judicial consideration of Kivalina's federal public nuisance claim (24 TXLR 1216, 10/22/09).

Executive or Legislative Branch Attention. Issues raised by Kivalina ''were matters more appropriately left for determination by the executive or legislative branch in the first instance,'' the appeals court said.

Additionally, the district court held that Kivalina lacked Article III standing to bring a public nuisance suit because Kivalina could not show a ''substantial likelihood'' the defendants' conduct was causing the plaintiffs' injury. Further, plaintiffs could not show that the ''seed'' of its injury could be traced to any of the energy producers.

The district court declined to exercise supplemental jurisdiction over state law claims.

The federal appeals court invoked the Supreme Court's 2011 ruling in *American Electric Power Co. v. Connecticut*, 131 S. Ct. 2527 (2011), which asked whether such a theory is viable under federal common law and, if so, whether any legislative action has displaced it.

In that opinion, the Supreme Court held that similar claims made by states were displaced by the Clean Air Act (26 TXLR 707, 6/23/11).

James R. May, a law professor at Widener University in Wilmington, Del., told BNA in a Sept. 21 email the decision is ''an unfortunate continued curtailment of common law remedies that have existed for hundreds of years. The plaintiffs deserved their day in court.''

Ninth Circuit follows Supreme Court. The Ninth Circuit followed the reasoning of the Supreme Court in the 2011 case.

''In sum, the Supreme Court has held that federal common law addressing domestic greenhouse gas emissions has been displaced by Congressional action,'' the appeals court wrote.

''That determination displaces federal common law public nuisance actions seeking damages, as well as those actions seeking injunctive relief,'' the court said.

The appeals court affirmed the dismissal by the district court.

''Our conclusion obviously does not aid Kivalina, which itself is being displaced by the rising sea,'' the appeals court concluded. ''But the solution to Kivalina's dire circumstance must rest in the hands of the legislative and executive branches of our government, not the federal common law.''

The opinion was authored by Circuit Judge Sidney R. Thomas and joined by Circuit Judge Richard R. Clifton. District Judge Philip M. Pro of the U.S. District Court for the District of Nevada sat on the case by designation. Pro concurred with the majority opinion.

BY ROBERT C. COOK

The opinion of the U.S. Court of Appeals for the Ninth Circuit in Native Village of Kivalina v. ExxonMobil Corp. is available at http://op.bna.com/env.nsf/r?Open=maln-8ycsny.

Product Liability

Food

'Popcorn Lung' Trial Ends in $7.2M Verdict For Popcorn Eater and Wife; $5M Is Punitive

A Colorado consumer obtained a $7.2 million jury award Sept. 19, including $5 million in punitive damages, in a suit against the manufacturers and retailers of the microwavable popcorn he ate, which contained a flavoring ingredient that allegedly caused him to develop a rare lung disease (*Watson v. Dillon Cos.*, D. Colo., No. 1:08-cv-00091, *verdict rendered* 9/19/12).

Jurors in the U.S. District Court for the District of Colorado unanimously found the popcorn manufacturer, Gilster-Mary Lee Corp., 80 percent responsible for damages to plaintiffs Wayne and Mary Watson. Two supermarket companies, The Kroger Co. and Dillon Cos., respectively, bore 15 and 5 percent of the fault, the jury said.

Wayne Watson's disease, bronchiolitis obliterans, sometimes called ''popcorn lung,'' has been found in workers at popcorn plants and was associated with exposure to diacetyl in the flavoring liquid added to the popcorn.

Consumer popcorn lung suits are rare. A case in the U.S. District Court for the Eastern District of Washington was thrown out on a challenge to experts—a decision that the U.S. Court of Appeals for the Ninth Circuit affirmed in June 2011 in *Newkirk v. ConAgra Foods Inc.*, 9th Cir., No. 10-35643, 6/17/11) (26 TXLR 716, 6/23/11).

Some of the same experts testified in this case. Although the district court in this suit largely rejected a challenge to the plaintiffs' experts, the judge expressed concerns about the expert testimony on the eve of trial (27 TXLR 1007, 9/13/12).

Nevertheless, the trial proceeded, lasting about two weeks.

The jury found that Wayne Watson did not prove his strict liability claims against any of the defendants. But it found all three defendants liable for negligence, a failure to warn, and violations of a deceptive trade practices law. Watson himself was not negligent, the jury said.

Jurors calculated economic damages to Wayne Watson to be $667,961, and noneconomic damages at $1 million. They determined damages for physical impairment separately, arriving at a figure of $450,000. The jury also found $100,000 in damages to Mary Watson for loss of consortium, for total compensatory damages of $2,217,961.

The claim for punitive damages was against Gilster-Mary Lee only. The jury found the company liable for punitives and assigned a $5 million penalty.

Watson alleged he ate two to three bags of microwaved popcorn daily for a period of seven years.

Attorneys for the plaintiffs could not be reached for comment. An attorney for the defendants declined to comment.

Kenneth B. McClain, Andrew Kelley Smith, and others at Humphrey, Farrington & McClain PC in Independence, Mo., represented the Watsons.

Brett Marshall Godfrey and Paul Joseph Rupprecht of Godfrey & Lapuyade PC in Englewood, Colo., along with Jason D. Melichar and Suzanne Marie Meintzer of Wilson Elser Moskowitz Edelman & Dicker LLP in Denver, represented the defendants.

BY MARTINA S. BARASH

Zometa

Novartis Wins Judgment in ONJ Case; Plaintiff's Expert Excluded as Unreliable

Novartis Pharmaceuticals Corp. won summary judgment in an osteonecrosis case Sept. 18 as a federal trial court in Texas said a woman attempting to link the company's bone-strengthening drug Zometa to her jawbone decay failed to support her design defect claim with evidence of a safer alternative design (*Conklin v. Novartis Pharmaceutical Corp.*, E.D. Texas, No. 11-178, 9/18/12).

The U.S. District Court for the Eastern District of Texas rejected the opinion of plaintiff's expert Dr. Robert E. Marx that a lower dosage of the drug would have been less prone to causing osteonecrosis (ONJ)—jawbone death.

The court found too great an analytical gap between the expert's data and his opinion: He said a lower dose would result in a lower incidence of ONJ, but offered no evidence concerning its efficacy as a treatment for cancer-related bone damage, the court said.

Absent evidence of a safer alternative design that does not compromise efficacy, plaintiff Beulah Conklin cannot prevail on her design defect claim, the court said. The court also tossed Conklin's claims of negligence per se and breach of implied warranty, saying those assertions merely repackaged the design defect claim.

Cancer Diagnosis in 2004. Zometa and Aredia, a related product, belong to a class of drugs known as bisphosphonates. They work by slowing bone breakdown, increasing bone density, and decreasing the amount of calcium released from the bones into the blood. Bisphosphonates are often used along with cancer therapy to treat or prevent bone damage.

Conklin's cancer was diagnosed in 2004. Shortly after the diagnosis, she had seven teeth extracted from her bottom jaw. Conklin received her first dose of Zometa in November 2005 and then had three more doses before discontinuing the treatment in February 2005.

At that time, Conklin's oncologist noticed she had mouth sores and referred her to an oral surgeon for evaluation. She started treatment with Aredia, another Novartis bisphosphonate, in May 2005, and had her final Aredia dose in February 2006.

Conklin later developed ONJ. She sued Novartis in 2006. Conklin's suit was transferred to federal multidistrict litigation in the U.S. District Court for the Middle District of Tennessee. The MDL court summarily dismissed her failure-to-warn and breach of express warranty claims in 2008 based on a Texas law creating a presumption of adequacy for federally approved drug warnings.

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In 2011, Conklin's case was remanded to the Eastern District of Texas. At issue were her design defect, negligence per se, and breach of implied warranty claims.

Conklin offered Marx as a causation expert. Novartis sought to strike Marx's report.

Marx Deemed Unreliable. The court addressed the admissibility of Marx's testimony in a separate opinion. At the outset, the court questioned his credentials. Marx is an oral surgeon, not an oncologist or a pharmacologist, the court said.

''There is no evidence in the record that based on his own experience or education he is qualified to opine that a regimen with a decreased dosage and/or frequency of Zometa administration would efficaciously treat cancer-related bone damage,'' the court said.

Marx had to rely on studies or opinions of other experts to address the efficacy of his ''safe alternative design,'' the court said.

Marx cited two studies: One was a 2006 article by the Mayo Clinic relating to bisphosphonate use in patients with multiple myeloma. But the Mayo Clinic article did not state that a lower medication dose would produce the results seen with a higher one, the court said.

Second, Marx cited an article that described studies conducted by Novartis on the dosing schedules for Zometa. According to Marx, this study indicated Novartis was still exploring greater intervals between doses, the court said.

However, ONJ is never mentioned in this article, and it draws no real conclusions about the efficacy of one dosage/frequency regime over another, the court said.

Based on the articles, Marx concluded the standard dosage schedule could be altered without reducing efficacy, and that a lower dose or frequency would result in a reduction of ONJ.

Court Finds Too Great a Gap. The court found too great an analytical gap in Marx's testimony and deemed it unreliable under Fed. R. Evid. 702 and *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 509 U.S. 579 (1993).

''It is not helpful to the finder of fact for Dr. Marx to state that a drug used to fight cancer-related diseases has a particular negative side effect, and that reducing the dosage and/or frequency of that drug will reduce the occurrence of the negative side effect,'' the court said.

Marx must also provide factual support that reducing the dosage or frequency will also be effective at fighting cancer-related conditions. ''Unfortunately, Dr. Marx offers no evidence as to the efficacy of a reduced Zometa regimen, and he does not explain from where he draws his naked conclusion regarding efficacy—certainly, it is not in either of the articles he cites.''

Additionally, Marx did not explain what specific dosage or frequency schedule would achieve similar results for fighting cancer-related diseases, the opinion said.

The court also rejected the reports of two other experts, Dr. James Vogel and Dr. Keith Skubitz. The experts relied on studies that offer guidelines or recommendations for treatment lengths but did not discuss efficacy, the opinion said.

There are 454 cases pending in the Zometa/Aredia MDL, according to a Sept. 5 statistics report.

Judge Ron Clark wrote the opinion.

Conklin was represented by Jeffrey Charles Bogert of the Law Offices of Jeffrey C. Bogert in Santa Monica, Calif.

Novartis was represented by Michael Byron Bennett of Baker Botts in Houston; and Donald R. McMinn and Katharine R. Latimer of Hollingsworth LLP in Washington, D.C.

BY JULIE A. STEINBERG

The opinion on the motion to strike is at http://op.bna.com/pslr.nsf/r?Open=jstg-8ybhfb.

The summary judgment opinion is at http://op.bna.com/pslr.nsf/r?Open=jstg-8ybhe9.

Pain Pumps

Judgment Denied for Pain Pump Maker; Warning Might Have Prevented Injuries

A man alleging he suffered painful cartilage deterioration from a pain pump raised a fact question regarding whether a warning to his surgeon would have prevented his injuries, a federal trial court in Minnesota held Sept. 18 (*Bonander v. Breg Inc.,* D. Minn., No. 09-2795, 9/18/12).

The surgeon admitted he had not read the product's package insert before the procedure. But he stopped using pain pumps for administration of anesthetic directly into the shoulder joint after he read a scientific article addressing the risk of chondrolysis (cartilage deterioration), the U.S. District Court for the District of Minnesota said. Therefore, whether the doctor would have listened to a warning from manufacturer Breg Inc. remains an unresolved issue.

The court denied summary judgment to Breg.

Plaintiff Undergoes Surgery in 2003. Michael B. Bonander underwent shoulder surgery in December 2003. Following the procedure, Bonander's surgeon, Dr. Peter A. Looby, inserted the tip of a Breg PainCare 3200 pump into Bonander's shoulder to infuse anesthetic directly into the shoulder joint.

Bonander alleged the pump caused him to develop chondrolysis, and contended Breg failed to provide adequate warning of this risk.

The manufacturer asserted summary judgment was warranted on causation grounds. Breg argued Bonander will not be able to show the alleged failure to warn of the risk of cartilage damage caused Looby to use the pump for delivery of anesthetic directly into his shoulder joint.

Doctor First Used Pumps in 2000. Looby testified he first used pain pumps intra-articularly—directly into the joint—in 2000 or 2001 after seeing a presentation by another doctor. He began using them specifically to treat post-operative shoulder pain in 2003.

The doctor had limited communications with Breg about the pumps, the opinion said: He testified he had never read the instructions for the pump until his deposition, and said his decision to use pain pumps was the result of his ''clinical experience'' rather than any sales pitch by Breg representatives.

Looby further testified his knowledge of how to use pain pumps did not come from a Breg sales representative. He said he did not expect medical device sales representatives to inform him of the risks or benefits of their products, the court said.

Doctor Would Have Responded to Science. However, Looby implied he would have been responsive to scientific evidence that suggested pain pumps were not safe. In fact, the court said, Looby stopped using the pain pumps for shoulder surgeries once the medical evidence supported a link between pain pump use and chondrolysis.

Looby said a 2007 article in the *American Journal of Sports Medicine* indicated that intra-articular placement of a pain pump was the leading risk factor for chondrolysis. He testified he no longer uses pain pumps in shoulder joints because of this risk, the court said.

Breg argued the surgeon's admission that he did not read the package insert doomed the plaintiff's claim. But the court found a question of fact concerning whether Dear Doctor letters, communications from sales representatives, or other warnings would have changed the doctor's practices, preventing Bonander's injuries.

Looby never foreclosed the possibility that he would have listened to such a warning from a medical device company, the court said.

''Although Dr. Looby did not rely on medical device companies to provide such information, he may still have responded to a warning—particularly a forceful one—they actually communicated to him,'' the court said.

''There is a particularly significant question about whether Dr. Looby would have heeded warnings from Breg since he stopped using pain pumps intra-articularly in shoulders in 2007 when he became aware of the risk involved,'' the court said. ''Thus, the Court cannot say as a matter of law that a warning from Breg would not have had the same effect.''

Judge John R. Tunheim wrote the opinion.

Steven B. Seal, Leslie W. O'Leary, Thomas B. Powers, and Michael L. Williams of Williams Love O'Leary & Powers PC in Portland, Ore.; Matthew E. Munson of Beasley Allen Crow Methvin Portis & Miles PC in Montgomery, Ala.; Laura B. Kalur of the Kalur Law Office in Portland, Ore.; and Yvonne M. Flaherty of Lockridge Grindal Nauen PLLP in Minneapolis represented Bonander.

John D. Sear, Molly J. Given, and Willian N.G. Barron IV of Bowman & Brooke LLP in Minneapolis represented Breg.

BY JULIE A. STEINBERG

The opinion is at http://op.bna.com/pslr.nsf/r?Open=jstg-8y9pxu.

Medical Equipment

Dialysis Equipment Maker Sued in Georgia; Products Allegedly Caused Injury, Death

Two Georgia plaintiffs recently filed separate suits in federal court against Fresenius USA Manufacturing Inc. and related companies, alleging the defendants' peritoneal dialysis and hemodialysis products caused severe personal injury and death (*Yancey v. Fresenius Medical Care Holdings Inc.,* N.D. Ga., No. 12-3199, *complaint filed* 9/12/12; *Bishop v. Fresenius USA Inc.,* S.D. Ga., No. 12-86, *complaint filed* 9/14/12).

Ken Yancey, who underwent home peritoneal dialysis, asserts he developed peritonitis in 2009, caused by defective Fresenius Liberty Cycler sets that were later recalled. Yancey filed suit Sept. 12 in the U.S. District Court for the Northern District of Georgia.

Waddell Bishop alleges in a suit field Sept. 14 in the U.S. District Court for the Southern District of Georgia that his father, Frances Carol Bishop, died following a cardiovascular event caused by the hemodialysis products GranuFlo or NaturaLyte.

Fresenius is the world's largest provider of products and services for individuals undergoing dialysis, according to Bishop's complaint. The Fresenius products division ''sells'' products not only to its own dialysis clinics, but also to competitors' clinics, the complaint says.

There are two different types of dialysis—hemodialysis and peritoneal dialysis. In hemodialysis, a dialysis machine and a special filter called an artificial kidney, or a dialyzer, are used to clean the blood with dialysate, a cleansing fluid.

Peritoneal dialysis uses the peritoneum, the membrane lining to the abdominal cavity, to perform dialysis treatments. Dialysate is put into the patient's abdomen through a small, flexible tube called a PD catheter. The dialysate pulls the waste and extra fluid from the patient's blood into the peritoneal cavity. It is then drained and replaced with fresh dialysate. Peritoneal dialysis may be done at home.

Cycler Sets Recalled for Leakage. Fresenius Liberty Cycler sets for home kidney dialysis include tubing and other components. The cycler sets are disposable: A new cycler set, which attaches to the Liberty Cycler dialysis machine, is required for each treatment. Fresenius recalled some lots of Liberty Cycler sets in September 2010 because of leakage concerns, Yancey's complaint says.

Leakage can cause the dialysis fluid to become contaminated, potentially resulting in peritonitis—an inflammation of the peritoneum usually caused by infection. Peritonitis can be life-threatening, the complaint asserts.

Yancey alleges Fresenius knew of complaints about the risk of leaks from the defective Liberty Cycler sets, yet waited too long to issue a recall.

The Food and Drug Administration sent a warning letter to Fresenius Sept. 15, 2010. The letter said FDA determined that the defendants: investigated 118 complaints concerning the product that caused Yancey's injuries, or a similar product; received reports of leakage including two confirmed cases of peritonitis; and failed to act promptly to recall the products, the complaint says.

Yancey asserts claims of strict liability, inadequate warning, failure to conform to representations, negligence, and breach of implied warranty. He demands compensatory and punitive damages.

Hemodialysis Products Allegedly Caused Death. Frances Carol Bishop underwent hemodialysis treatment at a clinic in September 2010. He died Sept. 16, 2010, the complaint says. His treatment included GranuFlo or NaturaLyte.

Both GranuFlo and NaturaLyte are dialysis products that become part of the dialysate, which is used to clean the blood of patients undergoing hemodialysis. GranuFlo is a dry formulation; NaturaLyte is a liquid. The products are intended to help maintain the proper balance of acidity to alkalinity in the blood.

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However, use of these products places patients at an increased risk of cardiac arrest because they could cause a bicarbonate overload (too much alkalinity), according to the complaint. The labeling and packaging for the products failed to provide an adequate warning concerning patient monitoring in light of this risk, Bishop asserts.

Defendants knew of the risks yet failed to properly warn decedent, patients, and the public about the increased risks associated with GranuFlo and NaturaLyte, Bishop says.

An internal memo from Fresenius dated Nov. 4, 2011, indicated that the company had knowledge of a significant increased risk of cardiac arrest and death associated with GranuFlo and NaturaLyte, the complaint says.

On March 27, 2012, Fresenius received an inquiry from the FDA about the risks associated with GranuFlo and NaturaLyte. Only after this inquiry did Fresenius provide information to its non-Fresenius customers, the complaint says.

Bishop seeks damages under theories including strict liability, negligence, and failure-to-warn. He also demands punitive damages.

Bishop is represented by James Carter of Hurt, Stolz & Cromwell LLC in Athens, Ga., and Kristian Rasmussen, Jon C. Conlin, and Alyssa Daniels of Cory, Watson, Crowder & DeGaris PC in Birmingham, Ala.

C. Andrew Childers of Childers, Schleuter & Smith LLC in Atlanta and Douglas J. Suter of Hahn Loeser & Parks LLP in Columbus, Ohio, represent Yancey.

BY JULIE A. STEINBERG

The Yancey complaint is at http://op.bna.com/pslr.nsf/r?Open=jstg-8ycl86.

The Bishop complaint is at http://op.bna.com/pslr.nsf/r?Open=jstg-8ycl6v.

Occupational Exposure

Asbestos

Widow of Pipe Layer Adequately Alleged Asbestos Supplier Was Not 'Innocent Seller'

The widow of a pipe layer who died of mesothelioma from exposure to asbestos cement pipes may proceed with her wrongful death and conspiracy claims against the supplier of the pipes, a federal court in Colorado held Sept. 16 (*Church v. Dana Kepner Co.*, D. Colo., No. 11-cv-2632-CMA-MEH, 9/16/12).

The plaintiff adequately alleged that the supplier had actual knowledge that the pipes were defective, so the supplier is not shielded by Colorado's innocent seller statute, the U.S. District Court for the District of Colorado said, denying the supplier's motion to dismiss.

Pipe Layer Allegedly Exposed to Asbestos Dust. William Church worked with asbestos cement pipes as a pipe layer in the 1970s and 1980s. His exposure to asbestos dust on the job allegedly caused his mesothelioma and eventual death.

Dana Kepner Co. supplied about 90 percent of the asbestos piping Church used, and all of it was manufactured by Johns Manville Corp. Johns Manville is not subject to liability due to bankruptcy.

In 2001, Church's wife sued Dana Kepner in her personal capacity and as personal representative of her husband's estate for negligence, strict liability, conspiracy, and wrongful death. Dana Kepner moved to dismiss.

Sufficient Allegations of Actual Knowledge. Dana Kepner argued that the plaintiff did not allege sufficient facts to establish jurisdiction over it under Colorado's innocent seller statute.

Under the statute, ''no product liability action shall be commenced against any seller of a product unless said seller is also the manufacturer of said product.'' Manufacturer is defined to include ''any seller who has actual knowledge of a defect in the product.''

Colorado law also provides that ''if jurisdiction cannot be obtained over a particular manufacturer of a product . . . alleged to be defective, then that manufacturer's principal distributor or seller over whom jurisdiction can be obtained shall be deemed . . . the manufacturer of the product.''

The court concluded that the plaintiff's allegations ''easily satisfy'' her burden of pleading that Dana Kepner had knowledge of a defect in the product it sold.

Specifically, the plaintiff asserted that Johns Manville informed Dana Kepner of the risks of the asbestos pipe it sold and distributed on Johns Manville's behalf before 1977 when Church's exposure began. The plaintiff further alleged that Johns Manville continued to transmit information about the hazardous characteristics of the pipe to its sellers and distributors until 1981, giving Dana Kepner ''actual knowledge of the unreasonably dangerous characteristics'' of the pipe.

The court rejected the defendant's argument that ''Plaintiff has not demonstrated that Dana Kepner had actual knowledge of the defects that form the basis of this lawsuit.''

The court emphasized that ''at the motion to dismiss stage, Plaintiff is not required to demonstrate, nor would it be feasible for her to do so in the absence of any discovery, that Defendant actually knew of defects in the product it sold.'' The court concluded that the plaintiff met the requisite burden of adequately alleging that the defendant had actual knowledge that the pipes were defective.

Sufficient Allegations of Civil Conspiracy. Dana Kepner argued that even if the plaintiff can bring suit against it, she failed to state a civil conspiracy claim under Colorado law, and thus that claim should be dismissed.

In Colorado, to establish a civil conspiracy a plaintiff must show ''(1) two or more persons; (2) an object to be accomplished; (3) a meeting of the minds on the object or course of action; (4) an unlawful overt act; and (5) damages as to the proximate result.''

The court found that the plaintiff's allegations of conspiracy were sufficient.

As to an ''object to be accomplished'' and an ''unlawful act,'' the plaintiff alleged that Dana Kepner sought to conceal, and did conceal, the health risks of asbestos by selling the pipes without adequate warnings, even though it had actual knowledge of the unreasonably dangerous characteristics of the pipes, the court said.

The plaintiff showed at least ''some indicia of an agreement'' between Dana Kepner and Johns Manville by alleging that the defendant entered and maintained distribution agreements with Johns Manville to sell asbestos pipes without warnings, even though Johns Manville had told the defendants about the defects.

Judge Christine M. Arguello wrote the opinion.

Scott Martin Hendler and Sean Michael Lyons, of HendlerLaw P.C. in Austin, Texas, and Deirdre Elizabeth Ostrowski and Michael O'Brien Keating, of Keating Wagner Polidori & Free PC in Denver, represented Barbara Church.

Elizabeth Harris Getches, of Moye White LLP in Denver, represented Dana Kepner Co.

BY PERRY COOPER

The opinion is at http://op.bna.com/txlr.nsf/r?Open=pcor-8yfk2p.

Outside the Courtroom

Chinese Drywall

House Passes Bill to Require CPSC Rule On Sulfur Content, Labeling for Drywall

The House of Representatives passed a bipartisan bill establishing standards and requirements for domestic and imported drywall by a voice vote Sept. 19.

The bill, which passed under suspension of the rules, would require the Consumer Product Safety Commission to limit sulfur content in drywall and to create a labeling requirement to improve traceability. CPSC could accomplish these objectives through rulemaking or the adoption of voluntary standards, which would then become enforceable as agency rules.

The legislation would also give CPSC the flexibility to ''include any provision relating to the composition or characteristics of drywall that the Commission determines is reasonably necessary to protect public health or safety.''

The bill, H.R. 4212, would also require CPSC to help keep contaminated drywall from being recycled or reused by revising its guidelines on remediation. Some homeowners have reported that contractors may be installing used contaminated drywall in new homes and renovations, according to the office of the bill's sponsor, Rep. E. Scott Rigell (R-Va.).

Additionally, the bill sets forth a ''sense of Congress'' that Chinese drywall manufacturers, including state-owned businesses, should meet with U.S. government representatives about providing recompense to affected homeowners and should submit to the jurisdiction—and judgments—of U.S. courts.

Rigell's office said in a press release that H.R. 4212, called ''The Drywall Safety Act of 2012,'' represents ''the culmination of nearly two years of work by the Contaminated Drywall Caucus, which Rigell co-chairs with Democrat Ted Deutch of Florida.''

''We're very optimistic that the Senate will recognize how important this bill is to American families, and that they will move it as soon as possible,'' a member of Rigell's staff told BNA Sept. 20.

A comparison between the bill's final text and an earlier version shows that the legislation passed with amendments that changed the approach of the previous version, which was largely structured around the Federal Hazardous Substances Act.

Thousands of homeowners have sued manufacturers of drywall—primarily two sets of Chinese companies—along with distributors and home builders (27 TXLR 1001, 9/13/12). During the reconstruction following Hurricanes Rita and Katrina in 2005, which also coincided with a housing boom, builders turned to imported drywall. But homeowners later complained of foul smells, property damage, and health problems, which they blamed on sulfuric and other emissions from the drywall. Many homes required significant rebuilding.

BY MARTINA S. BARASH

The text of the bill is available at http://rigell.house.gov/uploadedfiles/h_r__4212_amended.pdf.

In Brief . . .

Widow May Seek Punitives in Chantix Suicide Suit

A widow alleging the smoking cessation drug Chantix caused her husband's suicide in November 2007 may seek punitive damages from manufacturer Pfizer Inc. in the first bellwether trial, the federal court overseeing multidistrict litigation held Sept. 18.

Under the governing Minnesota law, a complaint may not be filed with a claim for punitive damages. Rather, a plaintiff must move to amend the pleadings to assert such a claim. The U.S. District Court for the Northern District of Alabama determined plaintiff Judy Whitely stated a prima facie case for punitive damages, stemming from the death of her husband, Mark Alan Whitely. Jury selection is scheduled to start Oct. 22.

She asserts facts and offers documents that ''could support a finding that the defendant knew or intentionally disregarded facts that demonstrated a high probability of injury to the rights or safety of others,'' the court said.

In essence, the plaintiff's evidence reflects that since Chantix was approved in 2006, questions concerning the drug's safety have arisen because of reports of depression and suicidal behavior in those taking the medication, the court said. She also presented evidence ''which arguably establishes defendant's cognizance of such reports.''

In July 2009, the Chantix labeling was updated with a black box warning that provided in part, ''Serious neuropsychiatric events, including, but not limited to depression, suicidal ideation, suicide attempt, and completed suicide have been reported in patients taking Chantix.''

Earlier this year, the MDL court said this black box warning is legally adequate to warn doctors about the risk of neuropsychiatric injuries in Chantix patients (27 TXLR 851, 8/2/12).

But cases such as Whitely's, concerning psychiatric injury occurring before that date, were not affected by that ruling. There are 2,622 actions in the Chantix MDL,

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according to a Sept. 5, 2012, statistics report (*In re Chantix (Varenicline) Products Liability Litigation,* N.D. Ala., No. 10-1463, 9/18/12). The opinion is at http://op.bna.com/pslr.nsf/r?Open=jstg-8ybhcq.

Suit Goes on Over Allegedly Toxic Wheelchair Armrest

A man alleging injury from toxic chemicals in the armrests of a custom-designed wheelchair may proceed with his suit against Phoenix Seating Systems LLC, which designed the armrests and supplied them to the company that sold the wheelchair, a federal trial court in Illinois held Sept. 9.

Adam Smith and his guardian, Virgil Smith, bought a wheelchair and the armrests from Apria Healthcare Group Inc. The gel-filled armrests arrived at the Smiths' home separately from the wheelchair and emitted such a strong odor that Virgil Smith had to air them out for nearly two weeks before he could attach them to the chair, according to the U.S. District Court for the Southern District of Illinois.

Adam Smith developed blisters on his arms after using the chair for less than two weeks, the court said. The Smiths asserted strict liability claims against Phoenix, and negligence claims against Apria. Both defendants sought summary judgment.

The armrests were manufactured by companies that were not parties to the plaintiffs' suit. The court denied Phoenix's motion, rejecting the company's argument that it could not be liable because it did not manufacture the armrests. Under Illinois law, all defendants in a product's distribution chain may be strictly liable for defects, the court said.

The court also rejected Phoenix's argument that it could not be strictly liable to Adam Smith because he had suffered an allergic or idiosyncratic reaction. The court found unresolved questions regarding whether Smith's injuries arose from an idiosyncratic reaction or because of a defect in the armrests.

But the court granted judgment for seller Apria. The court found insufficient evidence Apria participated in the manufacture or design of the armrest, or knew of any other reactions to the armrests. Plaintiffs failed to show Apria had knowledge that would trigger a duty to warn about alleged dangers associated with the armrests, the court said (*Smith v. Phoenix Seating Systems LLC,* S.D. Ill., No. 09-568, 9/10/12). The opinion is at http://op.bna.com/pslr.nsf/r?Open=jstg-8ybjn2.

Manufacturer Removes Suit Over Lead in Glucosamine

The maker of a glucosamine supplement for relieving joint pain removed to federal court Sept. 14 a putative consumer class suit by a New Jersey man who alleges the supplement was tainted with lead.

In the suit, removed from a state court to the U.S. District Court for the District of New Jersey, plaintiff Harold M. Hoffman asserts that Neutraceuticals Corp. represented in nationwide marketing materials that its KAL Glucosamine Chondroitin was pure, unadulterated, and of the highest quality.

However, independent laboratory analysis revealed the product contained lead, according to Hoffman's Aug. 14 complaint.

Neutraceuticals significantly misrepresented its product, and the plaintiff, and others like him, suffered an ascertainable loss because the supplement failed to live up to their reasonable expectations of quality and purity, the complaint says.

''Defendant, in marketing a purportedly salutary nutritional supplement, containing specific ingredients—and only those ingredients—has affirmatively misrepresented and mislabeled its product,'' Hoffman alleges.

Hoffman seeks to represent a nationwide class of individuals who purchased KAL Glucosamine Chondroitin for the six-year period preceding the filing of the proposed class action.

The plaintiff asserts Neutraceuticals violated the New Jersey Consumer Fraud Act and seeks treble damages plus pre- and post-judgment interest, costs, attorneys' fees, and civil penalties. Hoffman also alleges counts of common law fraud, unjust enrichment, breach of express warranty, and breach of implied warranty.

Neutraceuticals asserts federal jurisdiction is proper. The supplement maker says although the complaint does not plead a particular amount, the suit meets the $5 million amount-in-controversy requirement for jurisdiction under the Class Action Fairness Act.

The plaintiffs, in addition to treble damages under the New Jersey consumer law claim, want reimbursement of money spent over a six-year period and punitive damages for fraud, Neutraceuticals says (*Hoffman v. Neutraceutical Corp.,* D.N.J., No. 12-5803, *removal* 9/14/12). The notice of removal is at http://op.bna.com/pslr.nsf/r?Open=jstg-8ycgzb.

Hazardous Waste Law

Superfund

Contribution

Circumstantial Evidence of Disposal Sufficient To Proceed With CERCLA Contribution Claim

Circumstantial evidence of disposal of a hazardous substance is sufficient to proceed with a superfund contribution action against a former owner of a contaminated site, a federal court in Washington held Sept. 18 (*Iron Partners LLC v. Maritime Administration*, W.D. Wash., No. 3:08-CV-5217, 9/18/12).

A shipbuilder being sued under the superfund law for disposing hazardous waste on a property it once owned may therefore pursue a contribution claim against a subsequent owner, the U.S. District Court for the Western District of Washington said.

Site Contaminated With Hazardous Substances. In the 1940s, Kaiser Co. (later known as Kaiser Steel Corp., Kaiser Ventures LLC, and KSC Recovery Inc.) owned three adjacent parcels in Vancouver, Wash., and buried a significant amount of hazardous waste accumulated from its shipbuilding and decommissioning operations. Gilmore Steel Corp. (predecessor-in-interest to Evraz Oregon Steel Mills Inc.) owned a portion of the property between 1960 and 1972.

The current owner, Iron Partners LLC, sued Kaiser when it discovered the hazardous material. Kaiser filed a third-party claim against Evraz, seeking contribution for the cleanup costs under the Comprehensive Environmental Response, Compensation, and Liability Act and the Model Toxics Control Act if Kaiser is held liable to Iron Partners.

Evraz moved for summary judgment, arguing that there is no evidence that Gilmore disposed or released any hazardous substances on the Iron Partners property and, therefore, it cannot be liable as a potentially responsible party under CERCLA or MTCA.

Circumstantial Evidence Permissible. To prevail on its third-party claim, Kaiser must establish that hazardous substances were released or disposed at the property while Gilmore owned it, the court said.

Evraz argued that Kaiser failed to support its claim with admissible evidence or permissible inferences because the debris site was capped in 1945. Evraz also argued that Kaiser cannot produce any evidence that Gilmore buried anything in the landfill.

Kaiser responded that there is evidence that Gilmore added to the buried debris because Gilmore removed at least 19 World War II-era buildings from the site, aerial photographs show a pattern of disposal between 1960 and 1971, and an environmental assessment found hazardous substances in the debris site where debris was disposed during the period.

Although Evraz suggested that Kaiser provided only circumstantial evidence, ''the evidence in this case is necessarily circumstantial, as the alleged disposal occurred 50 years ago,'' the court said. ''More importantly, there is no requirement for 'direct' or 'empirical' evidence in order to defeat summary judgment.''

The court found Kaiser's evidence ''fairly thin,'' but said it presented an issue of material fact as to whether Gilmore disposed of hazardous substances while it owned the land.

Judge Ronald B. Leighton wrote the opinion.

Steven G. Jones and Svend A. Brandt-Erichsen, of Marten Law Group in Seattle, represented the Kaiser entities.

Howard F. Jensen, of Veris Law Group in Seattle, represented Evraz.

BY PERRY COOPER

The opinion is at http://op.bna.com/txlr.nsf/r?Open=pcor-8yclbg.

Contribution

Contaminated Church Property, Adjacent Lot Not Part of Same 'Facility' Under CERCLA

Owners of properties contaminated by toxic releases from an adjacent church property are not responsible for part of the response costs under the superfund law because their properties are not part of the same ''facility'' as the church property, a federal court in New York held Sept. 13 in an unpublished opinion (*Alprof Realty LLC v. Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints*, E.D.N.Y., No. 1:09-CV-5190, *unpublished opinion* 9/13/12).

The U.S. District Court for the Eastern District of New York dismissed the church's counterclaims for superfund response costs and the landowners' claims for restitution. The plaintiffs' other claims under the superfund law, state oil spill law, and common law theories of nuisance and negligence are still viable.

Counsel for the plaintiffs, Alan J. Knauf of Knauf Shaw LLP, told BNA in a Sept. 20 email that the court made the right decision. ''The claim by the Mormon Church would have turned environmental law on its head, and held victims responsible for a spill,'' Knauf said. Although the language of the superfund law ''may not always be the clearest,'' he said, ''in this case the defendant was trying to twist the words of the statute to defeat its purpose. You are only liable if you buy the source of spill, not if you buy a downgradient property that is impacted by a plume.''

Counsel for the church did not respond to a request for comment.

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Contamination From Church Property. Alprof Realty LLC owns property adjacent to the west side of a parcel owned by the Mormon Church. VFP Realty LLC owns property to the west of the Alprof property. The ground water in the area flows to the west, from the church property to the Alprof and VFP properties.

Before the parties owned the parcels, contaminants were spilled or discharged on the church property. The contaminants include trichloroethylene (TCE), petroleum, vinyl chloride, and other hazardous substances. None of the parties was responsible for the contamination, but the church was aware that the soil was contaminated when it purchased the property.

Environmental testing revealed extensive ground water contamination on the Alprof property. Alprof and VFP sued the Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints under the Comprehensive Environmental Response, Compensation, and Liability Act for investigation, cleanup, remediation, removal, and response costs; New York's Oil Spill Law; and common law theories of negligence, nuisance, and restitution. The church moved to dismiss only the restitution claim.

The church counterclaimed to recover partial response costs from the plaintiffs, claiming that the plaintiffs are strictly and jointly liable under CERCLA § 107 for the costs of responding to the contamination, that it is entitled to contribution from the plaintiffs under CERCLA § 113 for past and future response costs, and asserting state law claims for contribution and unjust enrichment. The plaintiffs moved to dismiss all of the church's counterclaims.

Church's Counterclaims Dismissed. The theory underlying the church's counterclaims is that the spread of contamination from the church property to the Alprof property makes the Alprof property part of the single CERCLA ''facility'' at issue, making Alprof responsible for cleanup costs as a current owner of the facility.

The church also alleged that there were sources of contamination on the Alprof property unrelated to the contamination that migrated from the church property, and these independent sources provide another basis for holding the plaintiffs responsible for CERCLA cleanup costs.

The parties do not disagree that the church property is a facility at which there has been a release of hazardous substances. They disagree on how the boundaries of the facility should be defined, the court said.

The church cited caselaw to support their theory that a contiguous geographical area of contamination always constitutes a single facility under CERCLA, regardless of whether it crosses property lines or where the contamination originated.

The court rejected this argument, finding that the ''cases cited by the parties establish that a contaminated site that is or was managed as a whole constitutes a single facility for CERCLA purposes—regardless of whether the area crosses property lines—and that a widely contaminated area should not unnaturally be divided into multiple facilities in order to limit a party's liability.''

Here, the properties were never owned and operated together as a single waste disposal facility that released contaminants onto all three properties. Accordingly, the court found that the Alprof property is not a part of the same facility as the church property, and dismissed the church's counterclaims under CERCLA § § 107 and 113.

Once it determined that the properties were not part of the same facility, the court also concluded that the plaintiffs had no legal duty to clean up the contamination on the church's property, and dismissed the church's state law contribution and unjust enrichment claims.

Plaintiffs' Restitution Claim Dismissed. The church argued that the plaintiffs' claim for restitution failed because they did not perform any cleanup that was the church's duty to perform or take any action that was ''immediately necessary to satisfy the requirements of public decency, health, or safety,'' as required under New York law.

The court found that the plaintiffs' complaint lacked any factual allegations that they undertook efforts to cleanup the contamination. Further, the plaintiffs failed to cite any authority to support the argument that a restitution claim is viable where the plaintiff did not undertake any effort to clean up the contamination.

Finding it implausible that any money the plaintiffs spent on environmental consultants and attorneys was necessary to satisfy the requirements of the law, the court granted the church's motion to dismiss the restitution claim.

Judge Carol Bagley Amon wrote the opinion.

Alan Knauf and Amy K. Kendall, of Knauf Shaw LLP in Rochester, N.Y., and James P. Rigano and Kevin P. Walsh, of Rigano LLC in Melville, N.Y., represented Alprof Realty LLC and VFP Realty LLC.

Alan E. Kraus, Gerhard P. Gengel, and Kegan Andrew Brown, of Latham & Watkins LLP in Newark, N.J., represented the church.

BY PERRY COOPER

The opinion is at http://op.bna.com/txlr.nsf/r?Open=pcor-8yaq82.

Citizen Suits

CERCLA's 'Timing of Review' Provision Bars RCRA Citizen Suit to Clean Up Anacostia

The ''timing of review'' provision of the federal superfund law bars a citizen suit to compel a gas company to eliminate hazardous waste allegedly endangering human health and the Anacostia River, a federal trial court in the District of Columbia held Sept. 24 (*Anacostia Riverkeeper v. Washington Gas Light Co.*, D.D.C., No. 11-1453, 9/24/12).

The government has already selected a cleanup plan and is implementing removal and remedial actions at the site, making the citizen suit untimely, the U.S. District Court for the District of Columbia said, dismissing the complaint.

The court's ruling falls in line with a number of circuit courts that have held that the superfund timing of review provision bars enforcement actions brought under the Resource Conservation and Recovery Act.

Gas Plant Operations Contaminated Site, River. Washington Gas Light Co. manufactured gas for nearly a century at a plant on the Anacostia River in Washington, D.C. As a result of Washington Gas's manufacturing

and disposal practices, the site's surface soil, subsurface soil, ground water, and the water and sediment in the Anacostia are contaminated.

In 2006, the National Park Service—which managed the site at the time—issued a record of decision for the site under the Comprehensive Environmental Response, Compensation, and Liability Act. The ROD selected a response plan for the property, but according to the plaintiffs, deferred identifying any response action for the contaminated sediment in the river.

Because of the delay in actual implementation of response actions at the site, the Anacostia Riverkeeper and the Anacostia Watershed Society asked the court to enter judgment declaring that Washington Gas ''has contributed and/or is contributing to the past and/or present handling, storage, treatment, transportation, and/or disposal of solid or hazardous waste containing coal tar and other contaminants that presents or may present an imminent and substantial endangerment to human health or the environment'' under RCRA.

Washington Gas moved to dismiss, arguing that the court lacks subject matter jurisdiction over the claims because the federal government is already engaged in a CERCLA cleanup at the site and the statute's ''timing of review'' provision therefore bars the complaint.

CERCLA's 'Timing of Review' Bars RCRA Claim. CERCLA's timing of judicial review provision shields pending CERCLA response actions from lawsuits that might otherwise interfere with an ''expeditious cleanup effort.'' CERCLA § 113(h) states: ''No Federal court shall have jurisdiction under Federal law . . . to review any challenges to removal or remedial action selected under section [104 of CERCLA], in any action except one of the following [exceptions].''

The plaintiffs argued that § 113(h) applies only to additional CERCLA enforcement actions, not to RCRA endangerment actions.

The court found the plaintiffs' argument ''logically strained,'' saying ''exceptions to the jurisdictional bar that *advance* CERCLA enforcement can hardly be said to authorize lawsuits under other statutes.''

The court cited a D.C. Circuit case that held that § 113(h) barred a National Environmental Policy Act suit, as well as cases from other circuits that have found that the provision barred RCRA enforcement actions specifically.

'Constructive Completion' Theory Rejected. The plaintiffs sought to avoid the § 113(h) bar by arguing that there is no ongoing CERCLA response action at the site. They said that because certain remedies will be left in place indefinitely, they should be treated as complete because they do not have a discernible termination date, after which their RCRA suit would be allowed.

''In essence, Plaintiffs argue that § 113(h)'s withdrawal of federal court jurisdiction may not indefinitely bar judicial review. Faced with a remedy of lengthy but uncertain duration . . . Plaintiffs advance a theory of 'constructive completion' to void CERCLA's litigation bar,'' the court said.

Based on the record in this case, the court rejected the plaintiffs' ''constructive completion'' theory. The court said, regardless of a slow start, the United States is ''moving ahead diligently now'' with remediation of the site.

Judge Rosemary M. Collyer wrote the opinion.

Hope Madeline Babcock and Margot Julia Pollans, of the Institute of Public Representation at Georgetown University Law Center in Washington, D.C., represented the Anacostia Riverkeeper and the Anacostia Watershed Society.

Harold L. Segall, of Beveridge & Diamond P.C. in Washington, D.C., represented Washington Gas Light Co.

BY PERRY COOPER

The opinion is at http://op.bna.com/txlr.nsf/r?Open=pcor-8ygpmb.

Clean Air Act

Enforcement

Court Says Power Plant Modifications Not 'Routine' Maintenance Under Air Act

RALEIGH, N.C.—Reheater replacements at a Louisiana power plant do not qualify for a ''routine'' maintenance exception under the Clean Air Act, a federal trial court ruled Sept. 19 (*U.S. v. Louisiana Generating LLC,* M.D. La., No. 3:09-cv-100, 9/19/12).

In granting a partial motion for summary judgment filed by prosecutors, the U.S. District Court for the Middle District of Louisiana said ''no reasonable jury'' could find the activities at issue to be routine if it considered the multifactor test laid out in a 1990 federal appeals court decision (*Wisconsin Elec. Power Co. v. Reilly*, 893 F2d 901, 30 ERC 1889 (CA 7 1990)).

The district court's ruling allows the Environmental Protection Agency and the Louisiana Department of Environmental Quality to pursue a lawsuit alleging that Louisiana Generating LLC failed to install and run modern pollution control equipment after modifications to its Big Cajun 2 power plant, in violation of the Clean Air Act and state law.

A spokesman for the utility said the company disagrees with the court and plans to challenge the ruling and continue to defend itself in court.

Agencies Claim Controls Required. Federal prosecutors filed the lawsuit against Louisiana Generating in February 2009, claiming the Big Cajun 2 power plant had been illegally operating for decades without installing best available control technology, as required under the Clean Air Act's Prevention of Significant Deterioration provisions (42 U.S.C. Section 7470, et seq.). The lawsuit seeks to force installation of new air pollution control technologies as well as the imposition of civil penalties.

About a year after the lawsuit was filed on behalf of EPA, the Louisiana Department of Environmental Quality joined in, alleging violations of state air pollution law as well.

Louisiana Generating bought Big Cajun 2 in March 2000 out of bankruptcy from Cajun Electric. Prior to the sale, Cajun Electric had replaced the primary reheaters in two generating units at the power plant because they had been causing costly shutdowns.

Federal and state regulators claim the modifications were major, while Louisiana Generating asserts they

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constituted routine maintenance, repair, or replacement, which are exempt from the PSD requirements at issue.

Work Not Considered 'Routine.' In making its ruling, the court said ''common sense dictates that when a generating facility takes 25 days and spends $4.5 million—the largest amount ever spent on the unit—with the intent to decrease forced outages and therefore increase future generation, this work cannot in any way be considered routine.''

To find otherwise, ''would essentially allow what was intended to be a narrow exception to swallow the entire PSD program,'' the court said.

According to David Knox, a spokesman for Louisiana Generating, the court's ruling is not final and ''just one element of a case.''

''We disagree with the court's ruling and intend to challenge it,'' Knox told BNA Sept. 20. The company continues to believe the activities at issue qualify for the routine exemption, he said.

''We still have a very strong case,'' with many other factors that still need to be considered, Knox said.

BY ANDREW M. BALLARD

The decision of the U.S. District Court for the Middle District of Louisiana in United States v. Louisiana Generating LLC is available at http://op.bna.com/env.nsf/r?Open=maln-8ybrtg.

Enforcement

Court-Ordered Charitable Contribution Can't Exceed Statutory Fine in Air Act Case

AUSTIN, Texas—Community service requirements for a convicted defendant cannot include monetary contributions to charity if the amount of those contributions exceeds the maximum fine for the offenses, a federal district court in Texas ruled Sept. 18 in an air pollution case (*U.S. v. CITGO Petroleum Corp.,* S.D. Tex., No. C-06-00563, 9/18/12).

A proposed $44 million contribution to seven community service projects set as a condition of probation for CITGO Petroleum Corp. and CITGO Refining and Chemicals Co. LP is impermissible because it exceeds the statutory maximum fine of $2.09 million, the U.S. District Court for the Southern District of Texas held.

The court granted a motion by CITGO to block the government from seeking a penalty in excess of the statutory maximum.

The CITGO companies were convicted of two felony counts each for operating an oil-water separator without proper emission control devices in violation of the Clean Air Act at their East Plant Refinery in Corpus Christi. They also were convicted on three misdemeanor counts each under the Migratory Bird Treaty Act.

The total fine that can be imposed for the Clean Air Act violations is $2 million, and the total for the Migratory Bird Treaty Act violations is $90,000. The government had recommended the maximum penalty.

In addition, the government requested a maximum probation term of five years, including a condition that the companies contribute $44 million to the community service projects.

Payment to Charitable Organizations. While the court has the authority to require defendants to work in community service, the government is seeking payment of money, the court said.

Quoting from a 1984 decision by the U.S. Court of Appeals for the Third Circuit (*U.S. v. John Scher Presents Inc.*, 746 F2d 959 (3d Cir. 1984)), the court said, '' 'The only difference between this condition and a fine is that here the payee on the corporate checks would be a charitable organization rather than the United States Treasury.' ''

The court rejected an argument that the adoption of the Sentencing Reform Act of 1984 invalidated the earlier rulings, finding that ''no authority holding that these 'indirect monetary sanctions'—when coupled with any other fine imposed by the court—can exceed the maximum statutory fine.''

A requirement to pay a penalty in excess of the maximum fine is illegal, the court concluded.

Senior Judge John D. Rainey wrote the opinion.

CITGO's attorneys included Dick DeGuerin and Catherine Baen of DeGuerin and Dickson in Houston.

Attorneys for the government included Howard P. Stewart of the Department of Justice in Washington, D.C., and James L. Turner of the Office of the U.S. Attorney for the Southern District of Texas in Houston.

BY NANCY J. MOORE

The opinion of the U.S. District Court for the Southern District of Texas in U.S. v. CITGO Petroleum Corp. is available at http://op.bna.com/env.nsf/r?Open=jsun-8yatv2.

Permitting

Judges Say Congress Was Clear in Requiring Permit Applicants to Monitor Air Quality

Judges on a federal appeals court Sept. 24 said Congress was clear when it decided that sources must monitor air quality before applying for a prevention of significant deterioration permit, questioning the Environmental Protection Agency's decision to create an exemption to the requirement (*Sierra Club v. EPA,* D.C. Cir., No. 10-1413, *oral arguments* 9/24/12).

In a 2010 final rule, EPA created the exemption to allow new or modified facilities that are expected to emit small amounts of fine particle pollution to avoid conducting monitoring. The Sierra Club challenged the regulation.

Judge Harry Edwards said during oral arguments in the U.S. Court of Appeals for the District of Columbia Circuit that the monitoring requirement was ''a legislative call,'' and EPA made a decision contrary to Congress's direction.

A separate issue in the case, which centers on EPA's decision to create another exemption based on a source's significant impact level, likely will be remanded to the agency.

The prevention of significant deterioration program requires new or modified sources in areas in attainment of national air quality standards to obtain a permit that demonstrates they will not cause or contribute to a violation of the standards or of a specified pollution increment.

EPA Sets Exemptions. The increments are designed to limit pollution increases, and EPA in 2010 issued a rule setting the increments for fine particulate matter. The Sierra Club is not challenging the specific increments (75 Fed. Reg. 64,864).

However, the 2010 rule at 40 C.F.R. Parts 51 and 52 contained two other provisions that the environmental group is challenging.

First, the rule set significant impact levels. If a source's projected emissions are below the significant impact level, it is exempt from conducting a cumulative source impact analysis to demonstrate it would not cause or contribute to a violation of the air quality standards or increments.

Second, the EPA rule set significant monitoring concentrations. The provision provides an exemption to the requirement that sources submit a year's worth of monitoring data when a source's emissions are not expected to have a significant impact.

EPA set the significant monitoring concentration at double the minimum level of fine particles that monitors can detect. The minimum level was doubled to account for measurement uncertainties.

Jessica O'Donnell, a Justice Department attorney representing EPA, told the D.C. Circuit that requiring monitoring for sources with low levels of emissions would be fruitless.

Sierra Club's Challenge. The Sierra Club cited 42 U.S.C. 7475(e)(2), which says prevention of significant deterioration permit applicants must submit an analysis that includes ''continuous air quality monitoring data gathered for purposes of determining whether emissions from such facility will exceed the maximum allowable increases or the maximum allowable concentration permitted under this part. Such data shall be gathered over a period of one calendar year preceding the date of application for a permit.''

Edwards said Congress was clear in wanting sources to be monitored, and Judge David Sentelle said Congress did not specify that a source's obligation could be met through substitutes, such as modeling.

O'Donnell also argued that the Sierra Club's argument is not timely because the agency first issued a rule setting its methodology for significant monitoring concentrations in 1980, and the challenge should have been brought then.

However, Edwards said the Sierra Club's case is a new issue, which would make it timely.

Remand Expected. EPA has agreed to the vacatur and remand of the significant impact levels issues, and Sentelle indicated the court would order the remand.

In its June 26 final brief, EPA said vacatur and remand are appropriate because the rule, as promulgated, does not give permitting authorities discretion to deny the use of significant impact levels if they would violate the air quality standards or increments.

However, Andrea Bear Field, an attorney with Hunton & Williams LLP representing intervenor Utility Air Regulatory Group, asked the court not to vacate the significant impact level provisions if they are remanded. She said doing so would make it difficult for applicants to receive prevention of significant deterioration permits. The Utility Air Regulatory Group intervened on behalf of EPA in the case.

Earthjustice attorney David Baron, representing the Sierra Club, asked the court to decide the question of whether EPA has the authority to create such an exemption. If the court does not do so, it is likely the Sierra Club will litigate the issue after the agency issues a replacement rule.

BY JESSICA COOMES

Clean Water Act

Enforcement

New Cingular Wireless to Pay $1.37 Million To Resolve Air, Water, Reporting Case

New Cingular Wireless PCS has agreed to pay $1.37 million in fines and supplemental environmental projects under a proposed administrative settlement to resolve alleged Clean Water Act, Clean Air Act, and Emergency Planning and Community Right-to-Know Act violations at facilities spanning the nation, according to a Sept. 19 Environmental Protection Agency notice.

EPA said that New Cingular, which inherited the facilities from AT&T Wireless, will pay $750,000 in fines and be required to spend $625,000 on environmental projects. In addition, the wireless company will be required to conduct Clean Air Act and Clean Water Act compliance audits at the facilities that were in violation. (77 Fed. Reg. 58,129).

At issue were alleged violations discovered during investigations that EPA's Special Litigation and Projects Division carried out between 2001 and 2003 at numerous facilities that formerly belonged to AT&T Wireless, also known as legacy facilities. New Cingular Wireless bought the facilities from AT&T Wireless in 2004.

Although the EPCRA violations at issue occurred between 2001 and 2003, EPA told BNA Sept. 25 that ''some of the legacy AWS-owned sites had Clean Water Act and Clean Air Act violations that continued beyond 2003, extending, in a few instances, into 2007 and 2008.''

EPA said New Cingular disclosed the air and water violations during settlement negotiations. These violations also are being resolved as part of the proposed settlement.

The agency will take comments until Oct. 19 on the draft agreement. The Environmental Appeals Board has to approve the settlement to make it final.

Water Violations Seen in 12 States. According to the notice, EPA found Clean Water Act violations between 2001 and 2008 at 14 facilities in 12 states arising from a failure to develop and implement spill management plans, as required under the spill prevention, control, and countermeasure (SPCC) rules. The agency found Clean Air Act violations because New Cingular operated diesel-powered backup electricity generators without obtaining permits from the local air pollution districts in California.

EPA said the company violated EPCRA Section 311 reporting requirements by not submitting a material safety data sheet for hazardous chemicals at 51 facilities between 2001 and 2003. New Cingular also violated Section 312 by not submitting chemical and emergency

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inventory forms for 314 facilities to the local fire districts, the notice said.

Federal SPCC rules at 40 C.F.R. Part 112 require owners and operators of facilities that use, store, transfer, or consume oil or oil-based products to develop and implement professionally certified spill-prevention plans to avoid discharges of oil to the waters of the United States. PA said 14 facilities at New Cingular violated this rule and incurred penalties because Section 311 of the Clean Water Act allows EPA to assess penalties for violating the act's rules.

Regarding Clean Air Act violations, EPA said New Cingular did not get operating permits for diesel backup generators in the Bay Area Air Quality Management District and in the San Joaquin Valley Unified Air Pollution Control District, thereby violating the California state implementation plan.

EPA said it will accept comments identified by Docket ID No. EPA-HQ-OECA-2009-0562 on the proposed settlement at http://www.regulations.gov.

BY AMENA H. SAIYID

The Sept. 19 notice about the settlement with New Cingular is available at http://www.gpo.gov/fdsys/pkg/FR-2012-09-19/pdf/2012-23090.pdf,

More information about the proposed agreement is available from Michael Calhoun in EPA's Special Litigation and Projects Division at (202) 564-6031 or calhoun.michael@epa.gov.

Outside the Courtroom

Agency Action

Clean Water Act Jurisdiction Draft Guidance Viewed as Either Promising or Troublesome

The latest effort by federal agencies to define Clean Water Act jurisdiction contains distinct improvements or pitfalls, depending on perspective, according to attorneys at a Sept. 20 briefing.

Regardless of perspective, the new definition of jurisdictional waters follows much litigation and likely will be followed in turn by more, partly because of the pitfalls, the attorneys said at a session held by the American Law Institute and the American Bar Association.

The draft final Clean Water Act guidance by the Environmental Protection Agency and the U.S. Army Corps of Engineers is now under review at the White House Office of Management and Budget. It would replace a 2008 guidance with a more expansive definition of jurisdiction, notably a case-by-case approach to geographically isolated waters rather than the presumption in the earlier guidance that those waters are beyond jurisdiction.

The approach to isolated waters is one of the many unclear areas in the draft guidance, along with problems like determining the significance of connections between various waters whether they are isolated or not, according to the attorneys.

Many Rulings. The guidance is being issued to interpret two U.S. Supreme Court decisions on jurisdiction (*Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001); *Rapanos v. U.S.*, 547 U.S. 715 (2006)).

SWANCC established that agencies could not use the presence of migratory birds as a basis for Clean Water Act jurisdiction, while *Rapanos* produced a split decision on how to assess whether wetlands and water bodies are under federal jurisdiction—the ''significant nexus'' test or the determination that they are adjacent to navigable waters and relatively permanent.

Since the 2001 *SWANCC* decision, there have been 19 appellate court decisions and about 40 lower court decisions on jurisdiction, EPA attorney Donna M. Downing said at the session. Of the 19 appellate court decisions, 17 agreed that *SWANCC* focused on isolated waters, Downing said.

In the wake of *Rapanos*, the appeals courts for the First, Third, and Eighth Circuits have ruled that jurisdiction can be determined by either the criteria of adjacency and relative permanence, which was favored by the plurality of justices in the case, or the significant nexus test espoused by Justice Anthony Kennedy.

Split Interpretations. The U.S. Court of Appeals for the Eleventh Circuit has ruled that only the Kennedy significant nexus test should be used, while the appeals courts for the Seventh and Ninth Circuits have accepted the Kennedy test without foreclosing the possibility of using the plurality's standard in a different case.

The Obama administration, like the First, Third, and Eighth Circuits, says either the plurality's test or Kennedy's determination can be used, Downing said. She added that EPA and Corps of Engineers regulations over the years have generally defined jurisdictional waters as broadly as the U.S. Constitution's commerce clause allows, because of references to commerce in the legislative history of the Clean Water Act.

Downing said the Supreme Court likely will revisit the subject, although she noted that the court has so far rejected eight petitions for writs of certiorari on Clean Water Act jurisdiction since *Rapanos* was decided.

Attorney Jan Goldman-Carter of the National Wildlife Federation said she believes the case-by-case approach in the draft guidance is in keeping with Kennedy's significant nexus test. Kennedy said such a nexus must be based on the effect that a water body or wetland has on the physical, chemical, or biological integrity of navigable waters.

Isolated Waters Can Have Significance. Goldman-Carter said she believes that a large percentage of isolated waters, such as the lakes and ponds called prairie potholes, can be shown to have significance for navigable waters in their cumulative if not their individual effects. The same can also be shown for intermittent and ephemeral streams, she argued.

An important part of the draft guidance, in her view, is the provision for measuring cumulative effects, which can aggregate water bodies and wetlands in a watershed.

The lack of a provision for examining cumulative impacts ''might be the most important flaw in the existing 2008 guidance,'' she said, calling the inclusion of cumulative impact the most important improvement in the draft guidance now pending at the White House.

Attorney Margaret N. Strand of the law firm Venable LLP said the draft guidance contains the potential for more litigation in its unclear uses of words such as ''proximity.''

''I have a little trouble figuring out what proximity means,'' she said, explaining that the guidance is unclear on whether the term is to be used to determine adjacency or to determine a significant nexus.

Questions Raised About 'Significant.' Strand said she would have liked to see the draft guidance devote more effort to explaining how to determine what is significant. ''Significant nexus? What is significant?'' she asked rhetorically.

''You can't advise clients to stay on this side of the line or that side, where they want to stay, when the line is that fuzzy,'' she said.

Strand said the pending guidance as drafted would not be helpful. She agreed with Goldman-Carter that what is needed is a formal rulemaking, not just a guidance. The issue probably needs to be addressed by Congress but probably will not be, Strand added.

BY ALAN KOVSKI

Climate Change

U.S. Insurers Face Increasing Risks From Global Warming, Ceres Report Says

U.S. insurers are facing increased risks from climate change impacts and extreme weather losses, according to a Sept. 20 Ceres report.

Floods, heat waves, hailstorms, tornadoes, and other extreme weather events in 2011 cost U.S. property and casualty insurers $34 billion, according to *Stormy Futures for U.S. Property and Casualty Insurers: The Growing Costs and Risks of Extreme Weather Events*.

Private insured losses for 2012 are lower than 2011 so far, but the U.S. drought is expected to cost insurers about $20 billion. While the federal crop insurance program is expected to cover the majority of this amount, private insurers will pay more than $5 billion of the total cost. Losses from drought in 2012 are expected to be the highest since 1988.

Ceres is group of investors, companies, and public interest groups that promote sustainable business practices.

Climate change is contributing to stronger, more frequent heat waves, drought, and extreme precipitation events, the report said. More than 25,000 new high temperature records have been set in the United States so far in 2012, according to the National Oceanic and Atmospheric Administration.

Insurers need to better understand and anticipate changes in climate and weather extremes so they can adapt their pricing and promote effective risk management strategies to customers, the report said.

Insurers Need to Adapt Models. A small number of insurers are planning a response to extreme weather losses posed by climate change, but far more action from the industry is needed, Mindy Lubber, president of Ceres, said in a statement.

Some insurers are promoting new products and policies to reduce the carbon pollution that is driving climate change, the report said. And some are focused on increasing resiliency to climate change impacts, such as sea level rise, stronger storms, and extreme precipitation events. But more of the industry needs to take action, the report said.

Insurers also need to adapt the models that they rely on to project extreme weather losses in order for insurance to remain ''available and affordable,'' Mike Kreidler, Washington state insurance commissioner, said in the Ceres statement. Such models need to be adjusted to reflect the latest science, the report said.

Insurance companies also should get more involved in where and how buildings and infrastructure are built to reduce vulnerability to weather extremes, according to the report.

Push for Mandatory Climate Risk Disclosure. State insurance regulators also should strengthen and expand mandatory climate risk disclosure, the report said. Insurance commissioners in the states of Washington, California, and New York already require major insurers to disclose their potential exposure to climate change and strategies for dealing with its risks.

The report said investors and rating agencies should encourage insurers to improve disclosure of climate change risks, and regulators also should include the risks in the financial oversight process.

The report is based on a review of U.S. property and casualty insurance industry financial results as reported by A.M. Best Co. in early 2012. The company provides news, credit ratings, and financial data products and services for the insurance industry.

BY AVERY FELLOW

The report, Stormy Futures for U.S. Property and Casualty Insurers: The Growing Costs and Risks of Extreme Weather Events, is available at http://op.bna.com/env.nsf/r?Open=phey-8ycr7q.

International Environment

Groups Call for Criminal Investigation Into Toxic Waste Dumping in Ivory Coast

Amnesty International and Greenpeace called on the United Kingdom Sept. 25 to launch a criminal investigation of multinational commodity trading company Trafigura Beheer BV for the 2006 dumping of hazardous waste in Ivory Coast's commercial capital of Abidjan.

In a report, *The Toxic Truth*, the groups further urged Ivory Coast to reassess the legality of a $198 million settlement with the company in 2007 and claimed local laws were flouted in reaching the agreement.

In 2006, Trafigura took 528 tons of a chemical mixture used to remove sulfur from an unrefined gasoline called coker naphtha, as well as other residues, to Ivory Coast for treatment and disposal because it was cheaper to do so than in the Netherlands as originally intended.

According to Trafigura, the waste was transferred to a locally licensed contractor, Compagnie Tommy, which then illegally dumped the waste at sites across Abidjan. The report said the waste killed 15 to 17 people across the city and sickened up to 100,000.

Greenpeace and Amnesty International said the waste was defined as hazardous under the Basel Convention, making its export without consent illegal.

''It's time that Trafigura was made to face full legal accountability for what happened,'' Salil Shetty, Amnesty International's secretary general, said in a state-

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ment. ''People in Abidjan were failed, not just by their own government but by governments in Europe who did not enforce their own laws. Victims are still waiting for justice, and there are no guarantees that this kind of corporate crime will not happen again.''

Trafigura is involved in the trading of crude oil, petroleum products, renewable energies, metals, coal, and concentrates for industrial consumers, according to its website.

Complex Legal History. Legal challenges in the case have occurred in both Europe and Africa. A Dutch court fined Trafigura a total of €1 million ($1.3 million) in July 2010 for illegally dumping the waste and for concealing the dangerous nature of the waste (Case No. 13/846003-06).

In September 2009, Trafigura settled a civil claim in the United Kingdom with 30,000 victims for £30 million ($45 million) but did not admit wrongdoing.

In a 2007 settlement, the company agreed to pay $198 million to the Ivory Coast government to help clean up the waste.

Specific Recommendations. The Amnesty International/Greenpeace report urged Ivory Coast to publicly disclose how the settlement funds have been allocated, conduct a human health study on the long-term impacts of the waste, and alter its criminal code on the importation of hazardous waste and criminal prosecution of companies.

The report recommended the United Kingdom pursue options for initiating a criminal investigation into the company, called on Norway to release a report detailing why it elected not to file criminal charges against Trafigura in the case, and urged the Netherlands to strengthen its criminal code for prosecution of companies.

Trafigura said courts in five legal jurisdictions had examined the case, so it was improper to suggest adequate legal scrutiny had not been applied in the case.

'The report oversimplifies difficult legal issues, analyses them based on ill-founded assumptions and draws selective conclusions which do not adequately reflect the complexity of the situation or the legal processes,'' the company wrote in a letter to Greenpeace and Amnesty International.

'Regrettable' Funds Did Not Reach Targets. The company said it had sought to assist the people affected by the incident through legal settlements and said it was ''regrettable'' some of the funds had not reached their intended targets.

''Trafigura deeply regrets the impact the Probo Koala incident had,'' the company wrote in the letter. ''We have sought to learn from our experiences and have maintained our commitment to the countries in which we operate.''

BY ANTHONY ADRAGNA

The report, The Toxic Truth, is available at http://op.bna.com/txlr.nsf/r?Open=phas-8yhquu.

Trafigura's response to the report is available at http://www.trafigura.com/our_news/probo_koala_updates/amnesty_international__greenp.aspx.

Risk Assessment

Panel Backs EPA Finding on Health Effects From Amphibole Asbestos at Superfund Site

An Environmental Protection Agency advisory panel said Sept. 25 it supports the agency's draft conclusions that amphibole asbestos from the superfund site in Libby, Mont., impairs lung function in addition to causing cancer.

EPA should complete its analysis of the health problems the amphibole asbestos causes and the doses at which those problems can occur so that the agency can continue its clean up of the Libby Asbestos Superfund Site, members of the Science Advisory Board's (SAB) Libby Amphibole Asbestos Review Panel said during a teleconference.

''We strongly supported EPA's analysis,'' said panel member Elizabeth Sheppard, an environmental and occupational health professor at the University of Washington.

''We don't want EPA to sit back another five or 10 years,'' said Agnes Kane, the review panel's chairwoman and a fiber toxicologist teaching at Brown University. ''It is necessary to proceed with remediation of the superfund site,'' she said.

EPA began cleanup activities at the former W.R. Grace mining site in Libby in 2000, and in 2002 the site was added to the superfund National Priorities List of most seriously contaminated sites.

Members of SAB's Libby Amphibole Asbestos Review Panel clarified their support of EPA's draft conclusions during a teleconference in which a separate committee, the Chartered SAB, evaluated the panel's draft critique of EPA's draft *Toxicological Review of Libby Amphibole Asbestos*.

Released in August 2011, the draft toxicological review was conducted as part of EPA's Integrated Risk Information System (IRIS) program.

First-Ever Reference Concentration. In addition to concluding that the particular type of amphibole asbestos found in Libby and Troy, Mont., causes cancer, EPA's draft toxicological review proposed the first-ever reference concentration (RfC) for any type of asbestos.

RfCs are the agency's estimate of the amount of a substance—in this case Libby amphibole asbestos fibers—that could be inhaled over a lifetime without expectation of harm from a disease other than cancer.

EPA proposed an RfC of 0.00002 fibers per cubic centimeter of air (fibers/cc). Inhaling that concentration of Libby amphibole asbestos fibers or less should not cause ''localized pleural thickening'' or thickening of the chest wall, it said. If that problem were prevented, other noncancerous problems such as asbestosis and impaired lung function should be prevented, according to EPA's draft toxicological review.

The panel's draft critique did not endorse or object to the specific reference concentration EPA proposed. Rather the panel urged the agency to conduct additional analyses and better justify its final RfC.

The panel also recommended EPA conduct additional analyses of the exposure that would be necessary to cause the respiratory problems.

More Analysis Need to Carcinogenic Potency. The agency should also conduct more analyses of the carcinogenic potency of Libby amphibole asbestos, the SAB review panel said in its draft report, which included many other recommendations for analyses and research that the panel said would improve the draft toxicological review and scientific knowledge about Libby amphibole asbestos.

SAB members urged the review panel to revise its draft critique to make clear which recommendations were essential to improving the IRIS assessment and which were long-term, academic research recommendations that would address limitations of scientific knowledge about this specific type of asbestos.

SAB reports receive a final review before they can be issued as documents offering advice to the agency.

SAB member Gina Solomon said, ''I am worried the committee lost the big picture of what it was doing.''

EPA's Region 8 asked the agency to conduct an IRIS assessment of the form of asbestos in Libby five years ago so that the region could generate needed information to calculate cleanup levels, she said.

Major Versus Minor Suggestions. ''Major recommendations are not separated from more minor suggestions,'' Solomon said in preliminary comments distributed prior to the Sept. 25 teleconference.

Kane agreed to work with members of the review panel to clarify that distinction.

During the public comment period, Nancy Beck, a toxicologist with the American Chemistry Council, urged the SAB to call on EPA to revise its draft toxicological review and reissue it for public comment and peer review.

''It's hard to know the impact'' of the reanalyses recommended by the SAB review panel, which could alter the agency's assessment of Libby amphibole asbestos, Beck said.

Toxicologists, risk assessors, consultants working for the W.R. Grace Co., as well as Karen Ethier, a company vice president, challenged the scientific credibility of EPA's conclusions. From 1963 to 1990, W.R. Grace operated a vermiculite mine and processing mill in Libby that lead to worker and public exposures to asbestos.

The public should have the opportunity to more fully review newly obtained data that EPA relied on for its assessment but which was not available to the public previously, Ethier said.

The statistical analyses EPA made are weak, the agency used unrealistic models to reach its proposed conclusions about the cancer and noncancer health problems it associated with this form of asbestos, and the agency failed to support its proposed RfC, Ethier said.

BY PAT RIZZUTO

EPA's draft Toxicological Review of Libby Amphibole Asbestos is available athttp://tinyurl.com/95fcg57.

The Libby Amphibole Asbestos Review Panel's draft critique of EPA's draft toxicological review is available at http://tinyurl.com/9bj94nq.

Comments about the Libby Amphibole Asbestos Review Panel's report along with EPA's draft assessment that were submitted to the Chartered SAB prior to its teleconference are available at http://tinyurl.com/br36tz7.

Agency Action

EPA Denies Petition by Environmental Groups Seeking Objections to Kentucky Power Plant

The Environmental Protection Agency denied a petition from two environmental groups asking to it to raise objections to the Clean Air Act operating permit issued to a Kentucky plant, according to a notice published in the *Federal Register* Sept. 26.

The Environmental Integrity Project and Southern Alliance for Clean Energy said the permits issued to the Tennessee Valley Authority for its coal-fired Shawnee Fossil Plant in West Paducah, Ky., do not include prevention of significant deterioration pollution controls after the facility was allegedly modified in the 1980s and 1990s. The environmental groups also argued that particulate matter monitoring requirements for the plant were insufficient.

The groups petitioned EPA in February 2011 to raise objections to the permit issued by the Kentucky Division for Air Quality.

EPA denied the petition because it said those issues were not addressed when Kentucky reissued the plant's Title V operating permit in 2009. Kentucky had reopened the permit, originally issued in 2004, to correct an error in the emissions monitoring and recordkeeping provisions. EPA said the environmental groups' concerns ''do not derive from the monitoring changes made in the reopening for cause'' and therefore cannot be addressed at this time.

EPA Administrator Lisa Jackson signed the order denying the request Aug. 31.

Eric Schaeffer, executive director of the Environmental Integrity Project, told BNA Sept. 25 the petition was denied because of ''a technicality there that we ran into.'' The group has filed several requests with EPA to review Clean Air Act permits issued to industry facilities.

''We've done pretty well,'' Schaeffer said. ''We generally only pick them when we think there's only one answer to the question we're asking.''

EPA denied a similar request from WildEarth Guardians to raise objections to a permit issued to Cheyenne Light, Fuel & Power for its Wygen II power plant in Campbell County, Wyo. In a notice published Sept. 25, EPA said the group had filed its comments on the proposed permit after the comment period had closed (77 Fed. Reg. 58,988).

BY ANDREW CHILDERS

The Feb. 26 notice on denial of the petition on the TVA power plant is available at https://s3.amazonaws.com/public-inspection.federalregister.gov/2012-23690.pdf

The petition to EPA on the TVA permit is available at http://www.epa.gov/region07/air/title5/petitiondb/petitions/shawnee_response2011.pdf.

The Feb. 25 notice on denial of the petition to object to the Wygen II power plant in Wyoming is available at http://www.gpo.gov/fdsys/pkg/FR-2012-09-25/pdf/2012-23590.pdf

For more information, contact James Purvis in EPA's Region 4 Air Permits Section at (404) 562-9139 or purvis.james@epa.gov.

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Pesticides

Clean Water Groups Call for Analysis Of Nanosilver's Environmental Impacts

An association of publicly owned waste water treatment plants and clean water agencies Sept. 7 urged the Environmental Protection Agency to fully evaluate the environmental impacts of pesticide products containing nanosilver and take steps to restrict uses to prevent any adverse effects.

James Kelly, executive director of the Bay Area Clean Water Agencies (BACWA), filed a comment letter requesting the agency to resolve ''numerous outstanding scientific questions'' on the environmental impact and toxicity of nanosilver before allowing any products containing nanosilver to be used. BACWA represents 55 publicly owned waste water treatment facilities and collection system agencies in the San Francisco Bay Area.

Kelly wrote the waste water sector is concerned that the use of nanosilver products may result in discharges to waste water treatment plants. Existing research demonstrates that silver is ''highly toxic'' to aquatic life at low concentrations and can bioaccumulate in certain aquatic organisms, according to Kelly.

BACWA was one of several groups that submitted comments in response to a July notice announcing that EPA will conduct a registration review of 23 registered pesticides, including nanosilver, to ensure the products continue to meet safety standards.

The Natural Resources Defense Council filed a lawsuit in January challenging EPA's conditional registration of two nanosilver products used as an antimicrobial on textiles (*NRDC v. EPA*, 9th Cir., No. 12-70268, 1/26/12).

Concerns Over Nanosilver Runoff. BACWA requested EPA address several concerns during the registration review of nanosilver, including the quantity of nanomaterials and metallic ions being used as an antimicrobial in commercial products, the amount of nanosilver that will end up in treated waste water, and the concentration of nanosilver that will be released to waste water treatment plants and the environment as a result of the registration of nanosilver products.

The organization also asked EPA to address the potential for nanosilver to accumulate in aquatic and terrestrial food chains.

The National Association of Clean Water Agencies filed comments in support of BACWA's, urging EPA to ''use its full authority'' to obtain the data needed to fully evaluate the environmental and treatment plant impacts of nanosilver.

Richard Boon, chair of the California Stormwater Quality Association, also filed comments echoing BACWA's concerns.

Boon wrote storm water quality management organizations are concerned about the registration status of nanosilver products because uses of registered pesticides have resulted in ''adverse impacts to water quality and aquatic life in urban runoff and receiving waters'' on a recurring basis.

'Multi-Million-Dollar Regulatory Burden' Created. The presence of pesticides in surface waters receiving urban runoff have created what Boon classified as a ''multi-million-dollar regulatory burden'' for municipalities.

''When this water pollution occurs, municipalities may be subject to enforcement under National Pollutant Discharge Elimination System permits,'' he wrote. ''Municipalities also face negative publicity and the increasing threat of litigation under the citizen suit provisions of the Clean Water Act.''

Boon urged EPA to use its regulatory authority to prevent pesticide pollution in surface waters.

The Silver Nanotechnology Working Group, in comments filed by the law firm Bergeson & Campbell, PC on behalf of the industry group, requested that EPA defer the start of the registration review on nanosilver until the Office of Pesticide Programs completes an evaluation of new scientific data.

SNWG wrote the agency ''does not appear to recognize that considerable new scientific information has accumulated'' since the Federal Insecticide, Fungicide, and Rodenticide Act Science Advisory Panel reviewed existing nanosilver data in 2009. The new studies demonstrate that the toxicity of nanosilver is no greater than other forms of silver, according to SNWG.

EPA Can Conduct Valid Risk Assessment. The group said new data demonstrate that EPA can conduct a ''scientifically valid unified risk assessment'' for all pesticides containing silver or silver compounds, including nanosilver.

SNWG also wrote the agency needs to take additional time to resolve ''severe discrepancies'' in product classification. EPA has based many of its current conclusions on the toxicity of registered silver products on data developed using nanosilver, according to SNWG.

The group estimated that ''more than half'' of the registered pesticides containing silver or silver compounds include some nanoscale silver that is similar in size to compounds found in products that the agency plans on assigning to the nanosilver category.

The Silver Task Force North America, an association formed in response to EPA's registration review of nanosilver antimicrobial products, also filed comments questioning the agency's method for classifying nanosilver products. The task force suggested that EPA complete the collection and review of relevant data to identify a clear definition of nanosilver before moving ahead with the registration review process.

The agency should collect comments from interested parties after a definition of nanosilver has been identified and the agency has notified registrants that their products will be subject to registration review requirements, according to the task force.

Registrant Disagrees With Product Reclassification. The Clariant Corp. filed a comment letter urging EPA to withdraw its proposal to reclassify three pesticide products registered by Clariant as containing nanosilver, which the company argues is ''not scientifically justified.''

EPA proposed to reclassify the products JMAC Composite PG, JMAC LP10A, and Nipacide JLP10 as containing nanosilver and include them in the registration review of nanosilver.

Larry Kesler, senior product safety chemist at Clariant, wrote the company ''strongly disagrees'' with the reclassification because the products do not contain nanoscale particles.

''The active chemical entity of Clariant's products is the silver ion released from the silver chloride in aqueous media,'' Kesler wrote. ''A metal ion in aqueous so-

lution is a cation and not to be classified as a nanoscaled particle.''

Clariant is working with an outside lab to develop data that the company is confident will confirm that the material in those registered products do not fall into the range of nanoscale particles. That data will not be available until late 2012, according to Kesler.

Technology Group Seeks Petition Response. The International Center for Technology Assessment, a research organization that advocates for better oversight of technology, urged EPA to respond to a 2008 petition requesting the agency Stop Sale, Use or Removal Orders or take other steps to ensure unregistered nanosilver pesticide products are not sold.

The petition, also supported by Greenpeace, the Center for Food Safety, Friends of the Earth, and Beyond Pesticides, said nanosilver consumer products are being sold on the market in violation of FIFRA.

Jaydee Hanson, policy director for ICTA, wrote in a Sept. 10 comment letter that there are over 600 consumer products on the market that contain nanosilver. Over the past four years, EPA has only taken action to remove two unregistered nanosilver products from the market, according to Hanson.

Hanson also commended EPA for ''finally reviewing the registration'' of some commercial nanosilver products. He offered support for EPA efforts to collect more data on the possible human health effects related to nanosilver exposure, including occupational exposures faced by workers who handle various forms of nanosilver.

More Research Needed. ''A review of the literature related to nanosilver and its possible effects on human and environmental health suggests to us that there is not adequate research to make definitive judgments in many areas,'' Hanson wrote.

Hanson also wrote nanosilver registrants should not be allowed to shield health and safety data, including descriptions of the product and formulation processes, by claiming that data are confidential business information.

BY PATRICK AMBROSIO

All comments submitted on the registration review of nanosilver are available at http://www.regulations.gov under Docket ID No. EPA-HQ-OPP-2011-0370.

Agency Action

EPA Grants Hazardous Waste Exclusion For Underflow Water at ExxonMobil Refinery

The Environmental Protection Agency will exclude from hazardous waste regulation up to 7,427 cubic yards per year of underflow water from an ExxonMobil refinery in Texas, according to a final rule published Sept. 20.

ExxonMobil can either accumulate the underflow water, an aqueous solution that seeps through soil where other wastes have been disposed of in an area of the refinery site, in a holding tank or route the waste water to a collection system that leads to the company's sewer system under the rule, which takes effect immediately. The company must continue to sample the underflow annually and submit the results to EPA for review.

EPA proposed the exclusion under the Resource Conservation and Recovery Act for ExxonMobil's Baytown Refinery in June (77 Fed. Reg. 54,760; 27 TXLR 710, 6/21/12).

''EPA agrees with the petitioner that the waste is nonhazardous with respect to the original listing criteria,'' the agency said. ''EPA considered whether the waste is acutely toxic, the concentration of the constituents in the waste, their tendency to migrate and to bioaccumulate, their persistence in the environment once released from the waste, plausible and specific types of management of the petitioned waste, the quantities of waste generated, and waste variability.''

The Baytown refinery, the largest in the United States according to the company's website, processes crude oil to make fuels, solvents, and chemical feedstocks.

EPA proposed to exclude the 7,427 cubic yards per year (1.5 million gallons) of underflow water under 40 C.F.R. 261.31 and 261.32, according to the notice.

EPA received two comments on the proposed rule from citizens, but said neither affected the decision to grant the petition.

ExxonMobil would have to petition the agency for an additional exclusion if it produces more waste than the petition states. As part of the review process, the company submitted historical information on waste generation and management practices and analytical results from five samples for concentrations of concern.

BY ANTHONY ADRAGNA

The final rule is available at https://s3.amazonaws.com/public-inspection.federalregister.gov/2012-23091.pdf.

In Brief . . .

Water Suit Filed Too Soon After Discharger Notified

Individuals and organizations seeking to protect the Black Warrior River in Alabama filed a Clean Water Act suit against a coal mine owner too soon after giving the mine notice of their intent to sue, a federal district court in Alabama held Sept. 17.

The plaintiffs served Black Warrior Minerals Inc. with notice of the mine's CWA violations and the plaintiffs' intent to sue on Sept. 2, 2011. Less than two weeks later, on Sept. 13, the plaintiffs sued the mine.

Under 33 U.S.C. § 1365(a), a plaintiff bringing a citizen suit under the Clean Water Act may not commence the action ''prior to sixty days after the plaintiff has given notice of the alleged violation . . . to any alleged violator of the [Act].'' The statute provides an exception to the 60-day rule for suits against owners of ''new sources''; such suits may be brought immediately after notification.

The U.S. District Court for the Northern District of Alabama held that the plaintiffs' suit did not fall under the exception to the waiting period. The mine—classified as a new source because the mine was built after the publication of proposed regulations governing mining—had a National Pollutant Discharge Elimination System permit issued by the Alabama Department

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of Environmental Management to discharge into the river. Therefore, the notice and delay provisions of § 1365 apply, the court said.

The court dismissed the plaintiffs' CWA claims with prejudice, but left the door open for the plaintiffs to bring claims under the federal and state surface mining control acts (*Black Warrior Riverkeeper Inc. v. Black Warrior Minerals Inc.*, N.D. Ala., No. 7:11-CV-3307, 9/17/12). The opinion is at http://op.bna.com/txlr.nsf/r?Open=pcor-8ygjrr.

BNA Insights

CLASS ACTIONS

ENVIRONMENTAL LAW

The U.S. Supreme Court in *Wal-Mart Stores v. Dukes* announced a more stringent test for evaluating commonality in all putative class actions, no matter the subject area. In the context of environmental class actions, the increased focus on commonality, along with the need to establish commonality using reliable expert evidence, has led to fewer environmental class actions being certified, say attorneys Douglas A. Henderson, William M. Droze, and Steven J. Hewitson in this BNA Insight. But not all courts follow *Dukes*, the authors note, and *Dukes* does not prohibit certification of all environmental class actions.

Environmental Class Actions After *Dukes*: Is 'Rigorous' Analysis the New Rule of Law?

BY DOUGLAS A. HENDERSON, WILLIAM M. DROZE, AND STEVEN J. HEWITSON

Although the Supreme Court's recent health care and immigration cases dominated the news this year, few recent cases cast as long a legal shadow as the Court's decision last year in *Wal-Mart Stores v. Dukes*.[1] A major employment case in its own right, *Dukes* doubles as a landmark civil procedure case with relevance for class actions in every area of the law. In *Dukes*, the Court held that ''commonality,'' one of the key elements of class certification, was not just a perfunctory legal box to check with a statement that ''common issues exist.'' Rather, according to *Dukes*, the fundamental elements of commonality and predominance must be established with ''significant'' evidence—both expert and factual—for a class to be certified.

But just how has *Dukes* affected environmental cases specifically? Has *Dukes* really rewritten how courts must enforce the commonality and closely related predominance requirements, two key considerations in environmental contamination class actions? Notably, of the 10 environmental class action decisions released since *Dukes*, all but three cite *Dukes*. Using this measure, the bench plainly views *Dukes* as a bellwether decision in the environmental arena. But even after *Dukes* however, the majority rule remains that environmental disputes are not typically appropriate for class certification given the unique characteristics usually present in those cases. This article analyzes environmental class action decisions decided since *Dukes* and summarizes the state of environmental class actions law today.

Wal-Mart v. Dukes

In *Dukes*, the Supreme Court reversed the Ninth Circuit, which had upheld certification of the largest employment class action ever filed. As class representatives for more than 1.5 million past and present female employees, Plaintiffs claimed Wal-Mart discriminated against them when it allowed local managers to exercise discretion in employment cases, and denied employees equal pay and promotions in violation of Title VII.

Justice Scalia, writing for the majority, determined the *Dukes* plaintiffs offered no convincing evidence of

[1] *Wal-Mart Stores, Inc.* v. Dukes, ___ U.S. ___, 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011).

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disparate impact because of a discrete corporate policy. The Court ruled unanimously that because of varying plaintiffs' individual circumstances, the class could not proceed as comprised, and ruled 5-4 that it could not proceed as any kind of class action suit. Procedurally, the Court held that the plaintiffs failed to prove commonality under Rule 23(a)(2). The Court announced a new rule: ''[c]ommonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury.' This does not mean merely that they have all suffered a violation of the same provision of law .... Their claims must depend upon a common contention.. . . That common contention, moreover, must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.''[2]

In reaching its decision, the *Dukes* Court engaged in an extensive weighing of the merits of the claims in the class certification analysis. Specifically, the Court held, the social science, statistical, and anecdotal evidence presented by the plaintiffs was insufficient to establish commonality. The plaintiffs' evidence, a broad-based statistical analysis, drew the criticism that ''[e]ven if they are taken at face value, these studies are insufficient to establish that respondents' theory can be proved on a class-wide basis.''[3]

Environmental Contamination Cases Rejecting Class Certification After *Dukes*

Like *Dukes* itself, subsequent cases broadly address the requirements for class certification, not just in environmental and toxic tort cases.

Price v. Martin

In *Price v. Martin*, the Louisiana Supreme Court closely followed the teaching of *Dukes* in an environmental context.[4] In *Price*, a group of property owners near a wood treating facility sought to certify a class for property damage. Plaintiffs defined the putative class as ''all persons and entities, at any time since 1940 until the present time located or residing in . . . or who were or are physically present within the geographic area. . . .''

Citing *Dukes* repeatedly, the court noted that ''[c]lass action rules do not set forth a mere pleading standard; rather 'a party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of fact or law, etc.' ''[5] In reversing the trial court, which had certified the class, and the court of appeals, which had affirmed, the court found no questions of law or fact common to the class. But before taking up the commonality question, the court in *Price* reiterated the finding in *Dukes* that the ''commonality'' requirement is ''easy to misread, since any competently crafted class complaint literally raises common questions.''[6] Citing entire sections of *Dukes*, the court concluded the mere existence of common questions would not satisfy the commonality requirement. Commonality requires a party seeking certification to demonstrate the class members' claims depend on a common contention, and that common contention must be one capable of classwide resolution—one where the ''determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.''[7]

In *Price*, as in *Dukes*, the linchpin was the commonality requirement. At the certification hearing, plaintiffs alleged the commonality requirement was satisfied by the existence of one common issue—whether defendants' off-site emissions caused property damage to the residents in the area surrounding the plant.[8] In reversing, the Louisiana Supreme Court found ''this conclusion reflects a misinterpretation of the law and of plaintiffs' burden of proof.''[9]

Rather, according to the court, to establish the ''common issue,'' plaintiffs were required to present evidence not simply that emissions occurred, but that the emissions resulted in the deposit of unreasonably elevated levels of toxic chemicals on plaintiffs' properties—that defendants had a duty to avoid the release of unreasonable levels of contaminants from their operations, that this duty was breached, and that the breach caused plaintiffs to sustain property damage.[10] Further, this common issue must be capable of resolution for all class members based on common evidence.[11] Again citing *Dukes*, the court in *Price* held proof of commonality must be ''significant.''[12] And, after reviewing the evidence, the court held that neither the issue of breach nor that of causation was capable of resolution on a classwide basis on common evidence in the case.

With respect to the breach question, the court found that, while the facility had three successive owners during the relevant time period (1944 to present), only two of the owners had been sued, but all three engaged in independent and varying operations. The specific operations that plaintiffs allege resulted in off-site emissions—such as overflow, runoff, and the burning of wood by residents—occurred at varied and specific times. And it was undisputed the operations had changed over time, with the use of pentachlorophenol not beginning until 1964, a key point for the court.[13]

The court deemed similarly important the legal standards applicable to the wood treating operations that changed over time. The plaintiffs' own consultant testified that regulatory agencies allowed the release of certain levels of substances and that it would be ''absurd'' to hold a business to a zero emission standard. For the Louisiana Supreme Court, it was clear that a single legal standard could not be applied to a single course of conduct. For instance, class members who owned property affected by emissions in the 1950s would not be able to rely on the same environmental standards invoked by those who owned property affected by emissions in the 1980s.

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[2] *Id*. at 2551, 180 L. Ed. 2d at 389-90 (citations omitted).
[3] *Id.* at 2555, 180 L. Ed. 2d at 393.
[4] *Price v. Martin*, 79 So. 3d 960 (La. 2011).
[5] *Id*. at 967 (quoting *Dukes*) (emphasis in original).
[6] *Id*. at 969.
[7] *Id*. at 969 (citing *Dukes*, 131 S. Ct. at 2551, 180 L. Ed. 2d at 389-90).
[8] *Id*. at 969.
[9] *Id*. at 969.
[10] *Id*. at 969-970.
[11] *Id*. at 969-970.
[12] *Id*. at 970 (citing *Dukes*, 131 S. Ct. at 2553, 180 L. Ed. 2d at 392).
[13] *Id*. at 970.

As for the allegations of industrial releases, the court found the ''issue of breach will thus turn on different conduct, by different defendants, at different times, under different legal standards.''[14] Addressing the testimony, the court noted plaintiffs' expert only estimated the amount of air emissions generated by facility operations for a single year, and conceded the calculations would not be valid for other years. And even while certain samples were taken at residences, not one of the named plaintiffs was shown to have contamination at his or her property. In short, plaintiffs offered no evidence to demonstrate that the issue of breach can be resolved from a common nucleus of operative facts—*i.e*., the same emissions or conduct by defendants were not shown to touch and concern all members of the class.[15]

Also weighing against certification of the class was the ubiquitous nature of the substances associated with the industrial facilities. Based on the evidence in the record, the court noted, the alleged substances causing the harm could have come from facilities other than those of the defendants: ''[e]vidence that a claim can exist is not evidence that it does exist or that all class members have that claim in common.'' Because plaintiffs were required to tie the alleged contamination to the defendants, and it was impossible on the record to connect the contamination to the specific defendants, it was improper to certify a class because the claims would differ based on which facility emitted the substances.[16]

Again citing *Dukes* extensively, the court held that, to prove commonality, plaintiffs must demonstrate that there is, in fact, a common question, one whose ''truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.''[17] On this point, the court noted that given the multitude of sources of PAHs and dioxins, the substances in question, it was clear that plaintiffs would not be able to offer any significant proof that causation for each class member would be determined by a common nucleus of operative facts.[18]

Surveying the landscape of environmental cases, the Louisiana Supreme Court observed that only mass torts arising from a common cause or disaster are appropriate for class certification and, citing *Dukes*, there must be ''significant'' proof, subject to ''rigorous analysis,'' of a common question—one where the ''determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.''[19] Before concluding, the court wrote that because the commonality requirement had not been met, it was impossible for the predominance requirements of Rule 23(b)(3) to be met. And as for the superiority requirement, because of the highly individualized issues involved, certification would be unfair to members of the class who have claims stronger than those of the named plaintiffs. The court also found the plaintiffs failed to prove that litigation could not proceed efficiently under traditional rules of joinder.[20] In short, the Louisiana Supreme Court soundly rejected class certification for these generalized industrial emissions.

Gates v. Rohm and Haas

In *Gates v. Rohm and Haas Co*., a case involving allegations of property damage caused by emissions of vinylidene chloride in Lake Village, Illinois, the Third Circuit addressed the requirements and considerations for certifying an environmental class action.[21] Although plaintiffs alleged multiple pathways of contamination from numerous chemicals, the putative class included only those with economic injury or exposure—and class certification was limited to a single chemical, vinyl chloride, and a single pathway, via a shallow aquifer into the air, for two separate putative classes: a medical monitoring class and a property damage class.[22]

Before addressing the class certification requirements, the court focused on the evidence presented in support of class certification by an air dispersion expert and by a toxicologist. According to the court, the air dispersion expert developed isopleths lines showing the isopleths concentrations of vinyl chloride for four time periods. The toxicologist estimated the ''average'' amount of exposure for residents over a 25-year period, derived by averaging the concentrations in the isopleths of air impacts. At the class certification hearing, the Third Circuit noted, the toxicologist testified that the hypothetical risk calculations are ''not meant to predict risk for a single individual under any specific scenario'' because of ''individual or personal-variability susceptibility.''[23]

In affirming the district court, which had rejected the medical monitoring class, the Third Circuit noted the plaintiffs failed to present proof they suffered from exposure ''greater than normal background levels.'' The court declined to accept average exposure, as opposed to the exposure of any actual class member, and held it was inappropriate to use isopleths with a constant value across different times. Stated differently, the court found no common proof of minimum exposure level above which class members were at an increased risk of serious disease.

Without addressing each element of Rule 23(a), the Third Circuit focused on the nature of the common proof of exposure. The trial court held the isopleths could not constitute proof of common exposure above background level. On appeal, the court explained several problems with plaintiffs' approach: the isopleths only showed average daily exposure, not minimum exposure; the analysis used average exposure over very

[14] *Id*. at 971.
[15] *Id*. at 971.
[16] *Id*. at 972.
[17] *Id.* at 972 (citing *Dukes*, 131 S. Ct. at 2551, 180 L. Ed. 2d at 389-90).
[18] *Id*. at 973.
[19] *Id*. at 975.

[20] After deciding *Price*, the Louisiana Supreme Court reversed a trial court's judgment certifying a class related to a chemical spill from a railroad tank car in the City of New Orleans. Citing both *Price* and *Dukes*, especially the commonality provisions of both, the court noted that the trial court ''failed to take into account undisputed evidence in the record demonstrating that any determination of damages will be dependent upon proof of facts individual to each putative class member.'' *Alexander v. Norfolk So. Corp.*, 82 So. 3d 1235, 1236 (La. 2012). The court noted that, according to the evidence, only individuals with a unique susceptibility to ethyl acrylate would exhibit physical symptoms at the extremely low concentrations involved in the release. *Id*.
[21] *Gates v. Rohm & Haas Co.*, 655 F.3d 255 (3d Cir. 2001).
[22] *Id*. at 259.
[23] *Id*. at 261.

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long periods of time when exposure likely varied; and plaintiffs could not show that every class member was exposed above background levels.[24]

For the Third Circuit, in class certification cases, evidence of exposure of actual class members is not a substitute for estimated evidence of hypothetical, composite persons. In other words, the evidence was not ''common'' because it was not shared by all (possibly not even most) individuals in the class. Averages or communitywide estimations would not be probative of any individual's claim because any one class member may have an exposure level well above or below the average.[25] For the Third Circuit, the use of averages was improper given the wide variability of factors: levels of vinyl chloride varied within the times in the isopleths; releases ended in certain years; and different persons had different levels of exposures based on biological factors or individual activities over the class period, or their work habit. As a matter of evidence, plaintiffs' experts failed to provide individual average exposures of actual class members. Plaintiffs failed to use a method of proving the proper point where exposure to vinyl chloride presented a significant risk of developing a serious latent disease for *each* class member. Rather, plaintiffs provided a single concentration without accounting for the age of the class members being exposed, the length of exposure, other individualized factors such as medical history, or showing the exposure was so toxic that such individualized factors are irrelevant.[26]

Turning to predominance and superiority under Rule 23(b)(3) for the medical monitoring class claims, the court observed that, even assuming the elements of Rule 23(a) could be met, ''[c]ourts have generally denied certification of medical monitoring classes when individual questions involving causation and damages predominate over (and are more complex than) common issues such as whether defendants released the offending chemical into the environment.''[27]

Finally, in rejecting the Rule 23(b)(3) class for property damage, the Third Circuit affirmed the trial court, which found plaintiffs' evidence left unanswered key questions such as causation of contamination, extent of contamination, fact of damages, and amount of damages. Here the plaintiffs contended varied levels of vinylidene chloride at various times seeped into a shallow aquifer, degraded into vinyl chloride, diffused from the aquifer to the ground above, and evaporated into the air to be carried over the village. Given the potential difference in contamination on the properties, common issues did not predominate. And rejecting a plea for an ''issue only'' certification, the court noted that ''[a] trial on whether the defendants discharged vinlydine chloride into the lagoon that seeped in the shallow aquifer and whether the vinyl chloride evaporated [into] the air from the shallow aquifer is unlikely to substantially aid resolution of the substantial issues on liability and causation.''[28] Accordingly, class certification was denied.

Ginardi v. Frontier Gas Services

In *Ginardi v. Frontier Gas Services*, Judge Wilson of the Eastern District of Arkansas considered certification of a property damage class within a one-mile radius of natural gas compressors, from which defendants allegedly emitted ''toxic pollutants'' and loud noises.[29] Citing *Dukes*, the court held that ''Rule 23 does not set forth a mere pleading standard, but the parties seeking class certification 'must affirmatively demonstrate [their] compliance with the Rule—that is, [they] must be prepared to prove' all the requirements of Rule 23.''[30]

As for numerosity, the court noted there would be more than 1,000 putative plaintiffs who lived around the compressor stations. Without analyzing the issues in detail, and because the defendants ''failed to make a hard run at denying numerosity,'' the court held numerosity was satisfied. Turning to commonality, the court summarized the *Dukes* Court's detailed focus on commonality, relying upon the *Dukes* quote that ''[w]hat is important to class certification 'is not the raising of common 'questions'—even in droves—but, rather the capacity of a class-wide proceeding to generate common answers apt to drive the resolution of the litigation.' ''[31] Dissimilarities within the proposed class are what have the potential to impede the generation of common answers, the court held.[32]

In trying to establish the commonality requirement, the plaintiffs proposed that at least nine questions were common to the proposed class:

> (1) the amount of emissions from the compressor stations; (2) the level of noise caused by compressor stations; (3) the dispersal and effect of the emissions within a one-mile radius of the compressor stations; (4) the effect of noise caused by the compressor stations within a one-mile radius of the compressor stations; (5) whether Defendants have engaged in activity that is ultra-hazardous and not a common usage; (6) whether Defendants have breached the duty of care to persons and property within a one-mile radius of the compressor stations; (7) whether Defendants have committed a trespass on property within a one-mile radius of the compressor stations; (8) whether the compressor stations constitute a nuisance to person and property within a one-mile radius of the compressor stations; and (9) whether defendants have engaged in willful and wanton conduct.[33]

Citing these questions, but not addressing the rationale behind the questions, the court found the plaintiffs ''have chinned the bar in proving commonality and typicality.''[34] In reaching this holding however, the court agreed with the defendants that individualized issues and proof were presented.[35]

Finding commonality, the court turned to predominance and superiority under Rule 23(b). It was because of predominance, according to the court, not commonality, that the class claims failed. Noting that predominance requires a determination of whether the nature of evidence varies from member to member, the court looked to individual questions. The court noted that while mass tort cases are not categorically excluded from being certified as a class action, the ''individualized issues can become overwhelming in actions involving long-term mass torts (i.e., those which do not arise

[24] *Id*. at 265.
[25] *Id*. at 266.
[26] *Id*. at 268.
[27] *Id*. at 270.
[28] *Id*. at 274.

[29] No. 4:11-CV-00420, 2012 BL 98229 (E.D. Ark. Apr. 19, 2012).
[30] *Id*. at *5.
[31] *Id*. at *7.
[32] *Id*.
[33] *Id*. at *8-9.
[34] *Id*. at 9.
[35] *Id*.

out of a single incident).''[36] Summarizing toxic tort cases, the court stated that where there is not ''one set of operative facts [that] establishes liability, no single proximate cause equally applies to each potential class member and each defendant, and individual issues outnumber common issues. [Thus], the district court should properly question the appropriateness of a class action for resolving the controversy.''[37]

After reviewing the arguments of the parties, the court found that ''[p]laintiffs' causes of action would require a detailed look at each plaintiff's individual damages—including the amount of noise heard, the amount of gases present, and any level of contamination in the air, groundwater or soil.''[38] With an abbreviated analysis, the court then found against plaintiffs as to the superiority prong, holding that, because of the individualized issues in the case, a class action was not the most efficient way of settling the controversy. The court concluded, ''[e]ach plaintiff would have to present individual proof of their damages, which essentially defeats any of the efficiency of trying this as a class action.''[39] No certification was warranted for these reasons, the court held.

Henry v. Dow Chemical Co.

Shortly after *Dukes* was issued by the Supreme Court, a Michigan state court addressed the clarified commonality requirement in *Henry v. Dow Chemical Company*, which involved alleged dioxin releases in Midland, Michigan.[40] There the putative class alleged Dow negligently released dioxin, a synthetic chemical potentially hazardous to human health, from its plant in Midland into the Tittabawassee River, which they used. Plaintiffs sought class certification under the Michigan class action statute, which is similar to Rule 23.

The trial court granted class certification and Dow appealed. Prior to the *Dukes* decision however, the Michigan Supreme Court found the circuit court potentially used an evaluative framework that was inconsistent with the court's interpretation of the rule and articulation of the proper analysis for class certification, and remanded to ''clarify its reasoning'' on the other elements and ''reanalyze'' the numerosity, commonality, and superiority prerequisites, if it determined that it had not used the proper standards.[41] Two years after the Michigan Supreme Court's remand in *Henry*, the U.S. Supreme Court released its decision in *Dukes*.

On remand, the trial court in *Henry* noted that, despite the focus in *Dukes* on Rule 23 of the Federal Rules of Civil Procedure, it nonetheless ''has far-reaching implications for certification of class action lawsuits, including the present case.''[42] Indeed, based on the Supreme Court's new framework in *Dukes*, the trial court reversed its earlier decision and determined plaintiffs had failed to provide sufficient information to establish the commonality prerequisite to class certification. The court reasoned that, like the plaintiffs in *Dukes*, plaintiffs in the case failed to establish any ''glue'' to hold their claims together.

For the Saginaw Circuit Court, the only common question was whether Dow released dioxin into the Tittabawassee River floodplain; but, even assuming that Dow negligently did so and that it contaminated the soil on plaintiffs' properties, ''whether and how the individual plaintiffs were injured involves highly individualized factual inquiries regarding issues such as, the level and type of dioxin contamination in the specific properties, the different remediation needs and different states of remediation for different properties, and the fact that some of the properties have been sold.''[43]

Applying *Dukes* to the facts at hand, the *Henry* court found plaintiffs' nuisance claims required similar individualized factual inquiries—''whether plaintiffs have suffered an interference with or loss of use and enjoyment of their property requires an individualized factual inquiry into each plaintiff's use and enjoyment of [his or her] property.''[44] Accordingly, because a common contention capable of classwide resolution was not established, the court held that it was unnecessary to consider the typicality and adequacy requirements and denied plaintiffs' motion for class certification.

Earley v. Village of Crestwood

Earley v. Village of Crestwood addressed class certification in the context of allegedly contaminated groundwater supplied by a muncipality.[45] In a three-page opinion, which did not cite *Dukes*, the court denied a motion for partial class certification, finding that, under Illinois law, the predominance element was not met.[46] Finding prior Illinois precedent directly on point, *Smith v. Illinois*, in which the Illinois Supreme Court denied class certification for a chemical spill from a freight train derailment, the court found this case would degenerate into multiple lawsuits tried on the issues of liability and damages.[47] Just as in *Smith*, the court held, and as the plaintiffs' own experts in the case noted, the issue of proximate causation, and Defendants' ultimate liability, will involve ''highly individual determinations,'' and ''each individual plaintiff will need to establish the amount and type of their damages proximately caused by Defendants.''[48] For the court, damages could ''not be calculated by formula,'' and trials would be ''necessary for each member of the class on the issue of proximate causation and damages.''[49] For this reason, certification was denied.

Cases Granting Certification in Environmental Contamination Cases Since *Dukes*

Environmental contamination cases decided since *Dukes* have granted class certification. But in the main,

[36] *Id.* at *13 (citing *Georgine v. Amchem Product*, 83 F.3d 610, 628 (3d Cir 1996)).
[37] *Id.* at *13-*14 (citing *Sterling v. Velsicol Chemical Corp.*, 855 F.2d 1188 (6th Cir. 1988)).
[38] *Id.* at *16.
[39] *Id.* at *17.
[40] No. 03-47775 (Saginaw Cnty. Cir. Ct. July 18, 2011).
[41] *Henry v. Dow Chemical Co.*, 484 Mich. 483 (2009).
[42] *Henry v. Dow Chem. Co.*, No. 03-47775, slip op. at 3 (Saginaw Cnty. Cir. Ct. July 18, 2011)
[43] *Id.* at 6.
[44] *Id.*
[45] *Earley v. Village of Crestwood*, No. 09CH32969 (Cook Cnty. Cir. Ct. May 14, 2012).
[46] Slip op. at 2.
[47] Slip op. at 3 (*citing Smith v. Illinois*, 233 Ill. 2d. 441, 443 (2006).
[48] *Id.*
[49] *Id.*

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their analysis is not as detailed as that of the courts denying class certification.[50]

Powell v. Tosh

In *Powell v. Tosh*, the issue was whether the trial court properly certified a class of property owners claiming devaluation from a nearby hog farm.[51] In claiming they suffered from ''recurring intolerable noxious odors,'' plaintiffs sought to certify a class ''within 1.25 mile radius'' of certain separate swine farms.[52]

In considering the class requirements, Judge Russell of the U.S. District Court for the Western District of Kentucky dispensed with numerosity quickly, finding that more than 450 persons would be affected. Judge Russell found that ''a geographical dispersion among the putative class members will usually support a finding of numerosity because such a finding supports the proposition that joinder is impracticable,'' and it was unlikely the plaintiffs, alone, would have filed the lawsuit.[53]

After finding numerosity, the court turned to commonality, focusing on *Dukes* explicitly. Citing *Dukes* that ''[c]ommonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury,' '' the court held the claims of the plaintiffs must depend on a common contention—that is ''of such a nature that it is capable of class-wide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.''[54]

In finding commonality, the court noted plaintiffs asserted common issues of fact including: ''Do the actions of the Defendants (1) create a temporary nuisance; (2) create a permanent nuisance; (3) constitute a trespass on another's property; (4) constitute a negligent breach of duty owed another, to the injury of the other; (5) constitute negligence per se; (6) constitute a civil conspiracy; (7) done in a manner than constitutes wanton, intentional or grossly negligent behavior, and (8) warrant injunctive relief.''[55]

Critical to the district court was an expert report submitted on behalf of the plaintiffs that used meteorological data, chemical data related to particular chemicals associated with hog farm emissions, and sensory data gathered by independent observers, which concluded the alleged effects from the farm extended the class boundary to 1.25 miles. Distinguishing *Dukes*, in which there was ''no glue holding the reasons for those employment decisions together,'' the court found the plaintiffs' complaint was aimed at a ''single hog barn'' causing the same injury.[56] In addition, in *Dukes*, the plaintiffs only engaged in a ''social framework'' analysis to support their claims, but in *Powell* the plaintiffs relied on expert testimony using data on wind speed and wind direction to confirm odor plumes. As for the defendant's claims that the impacts differed by individual property owner, the court held that ''while the frequency and intensity of the effects suffered by those within the proposed class may differ, there are common questions of law and fact capable of class-wide resolution in regards to liability.''[57]

Interestingly, the court rejected one of the proposed classes around another hog firm, finding that while the expert presented general evidence, the evidence was insufficient, because extrapolating the odor plumes from one specific farm could not be generalized to other farms. In addressing commonality, one must grapple with the commonality conclusion in *Powell,* where a single odor emanating from a single hog farm was at issue, which differs from cases such as *Price* or *Gates* where multiple constituents of concern and variable exposures were presented.

After the district court found typicality and adequacy of representation, the court turned to the elements of Rule 23(b). As for plaintiffs' Rule 23(b)(2) class, the court found, citing *Dukes*, that because their claims sought both compensatory and punitive damages, there could be no class under Rule 23(b)(2). The court then tackled whether the class met the requirements of Rule 23(b)(3), predominance and superiority. Disagreeing with defendant's view that causation could not be determined on a classwide basis, the district court found that expert testimony established that one hog farm was the source of the alleged ''recurring intolerable noxious odor'' and it is ''present throughout the entire class area.''[58] With this finding as to unity of source, the court certified the class.[59]

Jackson v. Unocal

Four months after *Dukes* was issued, the Colorado Supreme Court took up an asbestos contamination case, *Jackson v. Unocal Corp*.[60] At issue in Unocal was whether two classes should be certified relating to the migration to residential properties of asbestos used in a wrap being removed from an underground pipeline: (1) an Easement Property Class that included the owners of the pipeline easement; and (2) a Contiguous Property Class that included owners of properties adjacent to the easement.

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[50] Without citing *Dukes*, in an unpublished opinion by a Kentucky state court, the Kentucky Court of Appeals concluded that it was unable to determine if class certification was proper in a case involving drinking water contamination resulting from fuel spills along the Kentucky River. *Childers Oil Co. v. Reynolds*, No. 2011-CA-001352 (Ky. Ct. App. May 25, 2012). While finding the trial court did not abuse its discretion in finding commonality and the other fundamental elements of class certification were met, the court of appeals held that it was unable to determine whether predominance was met and remanded for additional facts. *Id*. at *28.

[51] 280 F.R.D. 296 (W.D. Ky. 2012).

[52] *Id*. at *3.

[53] *Id*. at *17-*18.

[54] *Id.* at *22-*23.

[55] *Id.* at *23.

[56] *Id*. at *24.

[57] *Id.* at *27.

[58] *Id*. at *39.

[59] In *Dickens v. Zeon G.P. LLC*, No. 3:06-CV-363, 2011 BL 232408 (W.D. Ky. Sept. 12, 2011), the court certified a settlement class involving allegations from chemical and utility plants near the ''Rubbertown'' area of Louisville. To be sure, certification of a settlement class where all parties are in agreement may not be the surest precedent for a contested class decision. Notably, while concluding ''environmental impact from the odors, particulate and air contamination has affected Plaintiffs' properties in similar ways under the law,'' the court expressed skepticism over the merits of the case, although it ultimately concluded the court was ''satisfied'' the settlement class met the requirements of Rule 23(b)(3). Because it was a negotiated settlement, the court found that it had a ''much easier time finding commonality for purposes of the settlement.'' *Id.* at *9.

[60] 262 P.3d 874 (Colo. 2011).

The trial court did not resolve the expert dispute over air dispersion of asbestos fibers from the easement, which may conflict with a certifying court's obligations, but then concluded that common issues predominated. In reversing the trial court, the Colorado Court of Appeals held it was essential to resolve the expert disputes as part of the class certification decision, regardless of any overlap with the merits of the class claims.

In reviewing the court of appeals' decision, the Colorado Supreme Court considered whether the class proponent was required to establish the requirements by a ''preponderance of the evidence.''[61] In addressing this issue, the *Unocal* court noted that the lower court considered 146 pages of briefs with 54 exhibits, affidavits from seven experts, portions of deposition transcripts from 12 witnesses, wind and sampling data, and numerous other documents. Unocal argued that any lesser standard would leave trial courts with virtually unfettered discretion, in essence precluding appellate review of the trial court's decision to certify a class. In rejecting this rule, which the court admitted was the recent trend among the federal courts, the Colorado Supreme Court held that class certification decisions were at the ''significant discretion'' of the trial court. For the court, ''[l]eaving class certification to the discretion of the trial court without requiring a specific burden of proof squares with the pragmatic and flexible nature of the class certification decision, recognizes the trial court's ongoing obligation to assess the certification decision in light of new evidence, and preserves the trial court's case management discretion.''[62]

That said, and citing *Dukes*, the court moved to the second issue, whether a court can consider the merits in considering the class certification requirements. Noting the Supreme Court found this ''cannot be helped,'' the Colorado Supreme Court narrowed the holding in *Dukes* so that in considering a class certification decision, a trial court may consider factual and legal issues that overlap with the merits, but only to the extent necessary to satisfy itself that the class certification requirements have been met.[63]

Working from this framework, the *Unocal* court turned to the key issue—whether a trial court is required to resolve expert disputes as part of the class certification decision. Finding that while a trial court may not uncritically accept contested expert testimony offered in support of class certification, the court held that at the class certification stage a trial court ''need not'' determine which expert will prevail for that is ''simply a merits decision best left for the jury.''[64] It is unnecessary, the court noted, for the trial court to declare a ''proverbial winner of battling experts'' at the class certification stage.[65] Nor, according to the *Unocal* court, does a trial court have to determine whether the expert testimony will be admissible at trial. While acknowledging its holding was contrary to most federal law, the *Unocal* court held that, when analyzing expert testimony for class certification, the issue for a trial court is whether the expert testimony establishes class certification ''to its satisfaction.''[66] In light of this departure from the federal standard, the value of this precedent is questionable outside of Colorado.

Framing the proof and evidentiary requirements for class certification, the court considered whether the predominance requirement had been met.[67] It first questioned whether the class had been defined sufficiently. For the court, when a plaintiff defines a class in geographic terms, one key question is whether there is a ''logical reason'' or ''evidentiary basis'' for drawing class boundaries at a particular location. Without weighing the evidence, the court noted that plaintiffs provided testimony from an air quality scientist, but Unocal also presented testimony that the asbestos was not friable and could not be transported by air. In reversing the court of appeals, the Colorado Supreme Court held there was no need for the trial court to resolve the expert dispute by preponderance of the evidence. The court noted that the admissibility of the air emissions data could be addressed in a pre-trial hearing.

Justice Eid, joined by Justice Rice, issued a blunt dissent, finding the rule put forth by the majority to be unworkable. The problem, they wrote, was the majority's confusion of the trial court's discretion with the plaintiffs' burden of proof. As the dissent noted, ''[d]iscretion is what a trial court exercises in choosing from available options; it is, by definition, a dynamic concept. A burden of proof, by contrast, is a static, legal concept that is applicable to all cases in a particular category.''[68] Under the rule put forth by the majority, the dissent maintained, class certification decisions would essentially be unreviewable in Colorado—the only person who needs to be ''satisfied'' is the trial judge. Put simply, there was no objective standard of proof that a class proponent must produce. As such, there is nothing for an appellate court to review—''if the trial court is 'satisfied' when it enters an order certifying the class, the amount of proof produced to meet the trial court's discretion is, by definition, sufficient.''[69] Citing *Dukes*, the dissent noted that it was imperative for a trial court to resolve the evidentiary issues—without those being resolved, there could be no meaningful analysis of class certification.

Johnson v. Walsh

In *Johnson v. Walsh*, the Common Pleas Court of Philadelphia County addressed whether class certification should be granted in the context of property owners claiming their developers and broker failed to disclose elevated levels of lead and arsenic in soils at the property.[70] In considering the elements of Pennsylvania's class action statute, which differed from Rule 23, the court noted that it ''must refrain from ruling on plaintiff's ultimate right to achieve any recovery, the credibility of witnesses, and the substantive merits of defenses raised.''[71] Speaking of the burden of proof for the plaintiff, the court held that ''since the hearing on class certification is akin to a preliminary hearing, it is not a heavy burden.''[72]

[61] *Id*. at 881.
[62] *Id*. at 882.
[63] *Id*. at 885.
[64] *Id*. at 885-886.
[65] *Id*. at 886.
[66] *Id*. at 886.
[67] *Id*. at 878.
[68] *Id*. at 891.
[69] *Id*. at 891.
[70] *Johnson v. Walsh*, No. 2012 (C.P. of Phila. Cnty. Dec. 2, 2011).
[71] *Id*. at *9-10.
[72] *Id*. at *10.

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After simply identifying the plaintiffs' evidence—a geologist's opinion that all the properties were ''similarly contaminated with arsenic and lead at levels above'' the regulatory guidelines, an economist's testimony the homes will suffer a ''loss of value,'' and the need to disclose the contamination to potential buyers when they sell the property—the court skipped through the class certification requirements. In a very thinly analyzed decision, the court observed that ''[p]laintiffs seek to redress a common legal grievance on behalf of the similarly situated property owners.''[73] With that finding, the class was certified. In its decision, the court did not mention *Dukes*, nor does this decision appear to comport with the rigorous analysis required to certify a class.

Take-Aways

While bright-line rules for class certification remain elusive, the following conclusions seem clear from the environmental class action cases decided since *Dukes*:

1. Environmental Contamination Cases Generally Not Amenable to Certification

As recognized by the United States District Court for the Southern District of New York, ''the overwhelming majority of state and federal courts have denied certification of environmental mass tort classes, even in single source cases,'' and even where only property damage claims and no personal injury claims were present.[74] The cases decided since *Dukes* further this trend.[75]

Doubtless a factual record might be developed in an environmental case that warrants class certification. However, class certification in the environmental context remains the exception not the rule, *e.g.*, a discrete mass disaster, leading to a one-time release of a regulated substance, at concentrations presenting established harm, for a defined spatial area, and a discrete period of time—all supported by *Daubert*-compliant evidence. By comparison, a record replete with facts such as decades of general emissions, perhaps legally permitted, or from numerous sources, or over a number of years during which regulatory and equipment changes occur, or over a diffuse area—and without evidence that any release or exposure affects the entire class—is unlikely to warrant class certification.

The environmental cases issued since *Dukes* fall well within this general pattern. As in *Price*, purported class actions that rely on allegations of emissions from industrial facilities, which have operated for years, with numerous changes in operation and varying regulatory requirements, are unlikely to be certified as a class.

*2. Post-*Dukes*, Commonality and Predominance Are Key Considerations*

The commonality requirement in class actions remains a significant hurdle in environmental cases, no doubt heightened as a result of *Dukes*. Some courts, like the Louisiana Supreme Court in *Price* or the Third Circuit in *Rohm and Haas* faithfully followed the *Dukes* rule on commonality. The point in *Dukes* was that commonality cannot be met just because a plaintiff says that a potential group has issues in common. Rather, as made clear by the environmental cases, courts are not focusing intensely on the mere existence of common proof, but rather the quality and specificity of factual and expert evidence geared towards a determination that will resolve an issue that is central to the validity of each one of the plaintiffs' claims in one stroke.

While some courts fail to appreciate the importance of the *Dukes* commonality rule, they still can reach a legally ''correct'' result. For example, *Frontier Gas* fails to give voice to the Supreme Court's analysis of commonality in *Dukes*, but the court nevertheless reached a correct decision and rejected class certification. *Frontier Gas* never explained why the one-mile radius made any sense as a matter of commonality—there was no discussion of the distance, and why one-mile was a better distance than 5 miles. Unlike what appears to be the leading doctrinal approach, the *Frontier Gas* court rejected class certification under a predominance prong when it should have denied class certification as a commonality failure. The decision does reflect however that predominance, like commonality, should not be given short shrift by any court addressing class certification after *Dukes*.

As might be expected, some courts just skim over commonality and its legal cousin, predominance. No better example of this is the *Walsh* decision, in which the court certified the class for no other reason than an allegation that ''common issues'' existed. The lack of detailed consideration reflects an era of legal analysis of class certification now not considered the standard and lacking in rigorous analysis.

3. In Pondering Certification, Courts Engage in Fact-by-Fact Consideration of Merits

Disavowing an allegedly contrary suggestion in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1975), the case which suggests that the merits cannot be considered in evaluating class certification, *Dukes* emphasized that district courts are required to resolve any ''merits question(s)'' bearing on class certification, even if the plaintiffs ''will surely have to prove [those issues] again at trial in order to make out their case on the merits.''[76]

While the rule is still evolving, the days of keeping the elements of class certification separate from an analysis of the merits largely appears to be an outdated concept. For virtually every court considering class actions today, the idea that any aspect of the merits cannot be considered is now history.[77] No better example

[73] *Id*. at *14.

[74] *In re MTBE Prods. Liab. Litig*., 209 F.R.D. 323, 347-48 (S.D.N.Y. 2002).

[75] Charles W. Schwartz & Lewis C. Sutherland, *Class Certification for Environmental and Toxic Tort Claims*, 10 TUL. ENVTL. L. J. 187 (1997). *See, e.g., LaBauve v. Olin Corp*., 231 F.R.D. 632 (S.D. Ala. 2005) (class certification denied for property devaluation resulting from mercury exposure); *Church v. Gen. Elec. Co*., 138 F. Supp. 2d 169 (D. Mass. 2001) (declining to certify class of landowners alleging nuisance and trespass as a result of PCB contamination); *Thomas v. FAG Bearings Corp*., 846 F. Supp. 1400, 1404 (W.D. Mo. 1994) (''[w]hile there are undoubtedly common issues of law and fact, such as whether [defendant] released TCE into the groundwater, the individual issues of causation and damage so overshadow those in numerosity and complexity to render a class action unhelpful.'').

[76] 131 S. Ct. at 2552 n.6, 180 L. Ed. 2d at 391 n.6.

[77] Although the merits may be considered in the class certification process, this practice should not be read to postpone

of this concept is the Third Circuit's decision in *Rohm and Haas*. There the court engaged in a detailed, thoughtful analysis of the proof establishing commonality—or rather, the improper proof of commonality. For the Louisiana Supreme Court in *Price*, it was the evidence on the varying factual issues, combined with the increased rigor mandated by *Dukes*, which dictated a denial of class certification. For the Western District of Kentucky in *Tosh*, the evidence tying the hog odors to a single defendant was critical in certifying the class, even with the increased focus on commonality mandated by *Dukes*. In other words, considering the merits is now part of the class action calculus.

Two of the environmental class action cases issued since *Dukes* take a more traditional path in certifying the class. Both *Unocal* and *Walsh* represent a minority view of class certification involving environmental contamination. Their refusal to consider the merits in certifying an environmental class action represents what appears to be an outdated legal view of class certification, clearly contrary to the holding in *Dukes*.

The error evident in *Unocal* and *Walsh* may soon be rectified. On June 25, 2012, the Supreme Court granted certiorari in *Comcast v. Behrend* to specifically address whether a trial court is required to resolve expert disputes as part of the class certification process.[78] Ultimately, if the court decides that a *Daubert*-type analysis is required to evaluate expert testimony establishing the commonality or predominance requirements, courts considering environmental disputes may find even fewer putative classes being certified.

consideration of class issues until the merits are fully developed in the record, nor to subvert the fairly common practice of utilizing distinct procedures for class and merits discovery.

Conclusion

The legacy of *Dukes* may go well beyond its increased focus on commonality and its unstated requirement to resolve fundamental evidentiary issues at the certification stage.

The true bottom line in *Dukes* is the required *rigorous analysis* for each element of class certification. In environmental cases, the rule appears to be the more rigorous the analysis of the class certification requirements, the fewer environmental class actions which ultimately are certified.

And given the gatekeeper role that a trial court must play after both *Daubert* and *Dukes*, rigorous analysis is a good thing for the legal system.

[78] *Comcast Corp. v. Behrend*, No. 11-864, 2012 BL 157527 (U.S. June 25, 2012).

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Journal

MEETINGS

October 3-7, 2012—''Society of Environmental Journalists Conference,'' Texas Tech & The Institute of Environmental & Human Health, Lubbock, Texas (Texas Tech, President Guy Bailey, Director Ron Kendall, IEHH, environmental writer Randy Lee Loftis, 'Dallas Morning News,' conference chair; http://today.ttu.edu/2010/09/texas-tech-to-host-society-of-environmental-journalists-in-2012/).

October 6, 2012—''Healthy Harvest: NCAP's Annual Event 2012,'' Vets' Club Ballroom, Eugene, Oregon (Northwest Center for Alternatives to Pesticides, http://www.pesticide.org/the-buzz/healthy-harvest-ncaps-annual-event-2012).

October 9-10, 2012—''9th Annual NAEE Research Symposium,'' Oakland, Calif. (North American Association for Environmental Education, (202) 419-0412, http://www.naaee.net/conference).

October 10-13, 2012—''NAAEE 41st Annual Conference, 'Gaining Perspective: Seeing Environmental Education Through Different Lenses,' '' Oakland, Calif. (North American Association for Environmental Education, (202) 419-0412, http://www.naaee.net/conference).

October 18-19, 2012—''15th Annual National Asbestos Litigation Conference, Emerging Issues for the Most Active Jurisdictions in 2012,'' Hotel 71, Chicago, Ill. (HB Litigation Conferences, (484) 324-2755, http://litigationconferences.com).

October 18-19, 2012—''Lead Litigation Conference,'' Sheraton New Orleans Hotel, New Orleans, La. (HB Litigation Conferences, brownie.bokelman@litigationconferences.com, http://litigationconferences.com).

November TBA, 2012—''3rd Annual Health Effects of Shale Gas Extraction Conference,'' Pittsburgh, Pa. (University of Pittsburgh Graduate School of Public Health, http://shalegas.pitt.edu/index.php?q=node/12).

November 4-8, 2012—''2012 Water Quality Technology Conference & Exposition,'' Toronto, Ontario, Canada (American Water Works Association, 800-926-7337, awwamktg@awwa.org, http://www.awwa.org/Conferences).

November 11, 2012—''Protecting Our Atmosphere for Generations to Come, '25th Anniversary of the Montreal Protocol on Substances that Deplete the Ozone Layer,' Seminar,'' Geneva, Switzerland (United Nations Environment Programme (UNEP), Ozone Secretariat, + 254-20-762-3851, ozoneinfo@unep.org, http://www.ozone.unep.org/).

November 14-16, 2012—''21st Annual ELI Eastern Boot Camp on Environmental Law,'' Arnold & Porter LLP Offices, Wash., D.C. (Environmental Law Institute, http://www.eli.org/).

Nov. 29-Dec. 2, 2012—''NGW Association Ground Water Expo & Annual Meeting,'' Las Vegas, Nev. (National Ground Water Association, 800-551-7379; ngwa@ngwa.org, http://www.ngwa.org/Pages/default.aspx; www.groundwaterexpo.com).

December 9-12, 2012—''Society for Risk Analysis 2012 Annual Meeting,'' Hyatt Regency, San Francisco, Calif. (SRA, (703) 790-1745, sra@burkinc.com, http://www.sra.org/).

January 31-February 1, 2013—''Asbestos Claims & Litigation, ACI 13th Annual Advanced Forum,'' Union League, Philadelphia, Pa. (American Conference Institute, http://www.americanconference.com/asbestos).

February 6-8, 2013—''Environmental Law,'' Washington, D.C., and Live Video Webcast (ALI-ABA, now known as ALI CLE, www.ali-aba.org/CU026, www.ali-aba.org/lp/ali-cle/).

February 15, 2013—''Making the Connection 2013: Emerging Clinical Issues in Environmental Health,'' Madison, Wis. (Wisconsin Environmental Health Network, info@psrwisconsin.org, wehnmail@gmail.com, http://www.psr.org/chapters/wisconsin/environment-and-health/).

March 3-6, 2013—''Environmental Health 2013, Science & Policy to Protect Future Generations,'' Boston, Mass. (www.environmentalhealthconference.com).

March 5-6, 2013—''Advanced Multi-Party Negotiation of Environmental Disputes,'' BLM National Training Center, Phoenix, Ariz. (U.S. Institute for Environmental Conflict Resolution, Udall Foundation, Diane Wilkinson, (520) 901-8578, wilkinson@ecr.gov, http://www.ecr.gov/).

March 10-14, 2013—''Society of Toxicology 52nd Annual Meeting 2013 & ToxExpo,'' San Antonio, Texas (SOT, http://www.toxicology.org/).

April 4-6, 2013—''22nd Annual Toxic Torts Spring CLE Meeting,'' Arizona Biltmore, Phoenix, Ariz. (American Bar Association Toxic Torts & Environmental Law Committee, http://apps.americanbar.org/, http://www.americanbar.org/).

May 15-17, 2013—''Brownfields 2013 Conference, 'Sustainable Communities Start Here,' '' Atlanta, Ga. (U.S. EPA, ICMA, Grant Sparks, (202) 962-3657, gsparks@icma.org). http://www.brownfieldsconference.org).

July 28-August 2, 2013—''International Conference on Mercury as a Global Pollutant: Science Informing Global Policy,'' Edinburgh, Scotland (ICMGP, in recognition of ''2013 launch of the United Nation's Environment Program's Global Legally Binding Treaty on Mercury,'' http://www.mercury2013.com/).

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http://www.uscourts.gov/

Federal Judicial Center
http://www.fjc.gov

Federal Register Table of Contents
http://www.access.gpo.gov/su_docs/aces/fr-cont.html

Environmental Protection Agency
http://www.epa.gov

Environmental Appeals Board
http://www.epa.gov/boarddec/

Department of the Interior
http://www.doi.gov/index.cfm

Code of Federal Regulations
http://www.access.gpo.gov/nara/cfr/index.html

White House
http://www.whitehouse.gov

Thomas
http://thomas.loc.gov

U.S. House of Representatives
http://www.house.gov

U.S. Senate
http://www.senate.gov

U.S. Code
http://uscode.house.gov/usc.htm

American Bar Association, Section of Litigation
http://www.abanet.org/litigation/home.html

American Bar Association, Tort and Insurance Practice Section
http://www.abanet.org/tips/committee.html

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