

# TOXIC TORT & PRODUCT LIABILITY QUARTERLY



Vol. XVI  
January 19, 2012

**Editors:**

**Daniel M. Krainin**  
477 Madison Avenue  
15th Floor  
New York, NY 10022  
(212) 702-5417  
dkrainin@bdlaw.com

**Megan R. Brillault**  
477 Madison Avenue  
15th Floor  
New York, NY 10022  
(212) 702-5414  
mbrillault@bdlaw.com

**Contributors:**

Ryan J. Carra  
Toren M. Elsen

For more information about our  
firm, please visit  
[www.bdlaw.com](http://www.bdlaw.com)

If you do not wish to  
receive future issues of  
Toxic Tort & Product  
Liability Quarterly,  
please send an e-mail to:  
[jmilitano@bdlaw.com](mailto:jmilitano@bdlaw.com)

## TABLE OF CONTENTS

### I. PRODUCT LIABILITY

**Eleventh Circuit Dismisses Workplace Exposure Suit Under Learned Intermediary Doctrine** (*full article*)

### II. CITIZEN SUITS

**Federal Court Allows Citizen Suits to Proceed Based on State's Failure to "Diligently Prosecute" Enforcement Action** (*full article*)

### III. ECONOMIC LOSS DOCTRINE

**Fifth Circuit Finds Economic Loss Doctrine Not A Bar To Recovery for Negligence Claims in Texas** (*full article*)

### IV. CONTINUING TORTS

**District Court Finds No Continuing Tort Once Use of Unlined Pit Ceased** (*full article*)

### V. CERCLA

**Second Circuit Finds Declaratory Judgment for Future Costs Not Premature** (*full article*)

**Federal Court Rejects Claims Against Company Whose Employee Disposed of Hazardous Substances at Home** (*full article*)

**Federal Court Finds Virgin Islands Estopped from Bringing Natural Resources Claim Due to Prior Cost Recovery Claim** (*full article*)

### VI. CLIMATE CHANGE

**Virginia Supreme Court Holds Global Warming Not Covered Under Insurance Policy** (*full article*)

## I. PRODUCT LIABILITY

### Eleventh Circuit Dismisses Workplace Exposure Suit Under Learned Intermediary Doctrine

Emphasizing the importance of an intermediary's knowledge of the potential dangers of toxic chemicals in the workplace, the Eleventh Circuit Court of Appeals affirmed the dismissal of a claim by current and former employees of Lockheed Martin ("Lockheed") against manufacturers of beryllium parts. See *Parker v. Schmiede Machine & Tool Corp.*, No. 10-14741 (11th Cir. Oct. 21, 2011), available at [www.bdlaw.com/assets/attachments/Parker.pdf](http://www.bdlaw.com/assets/attachments/Parker.pdf). The court held that Lockheed was a "learned intermediary" because it had knowledge of the dangers of working with beryllium parts, and that knowledge relieved the manufacturers of any duty to warn Lockheed's employees of these dangers. *Parker*, slip op. at 8-9.

The plaintiffs, Lockheed employees, filed an action in Georgia state court claiming that working with beryllium parts manufactured by the defendants caused adverse health effects. *Id.* at 4. Three of the plaintiffs were alleged to have contracted chronic beryllium disease ("CBD") and nine others were alleged to have beryllium sensitization, a precursor to CBD. Defendants removed the action to the Northern District of Georgia. The District Court granted summary judgment to the defendants based on the learned intermediary doctrine. *Id.* at 5.

The Eleventh Circuit explained that Georgia's learned intermediary doctrine relieves product manufacturers of the duty to warn ultimate users of hazards associated with the product if an intermediary with knowledge of the hazards is in a position to warn the users. *Id.* at 7-8. The court found that Lockheed was a learned intermediary because: (1) Lockheed had worked with beryllium parts for almost 60 years at the facility in question; (2) Lockheed issued its own standards for engineering controls to prevent the inhalation of beryllium particles; (3) Lockheed had warned employees of the hazards of beryllium since the 1980s; and (4) in 1993, a Lockheed toxicologist spent hundreds of hours researching the health effects of beryllium. *Id.* at 8-9.

The plaintiffs argued that in spite of Lockheed's knowledge, the manufacturers possessed information about specific risks of beryllium handling that Lockheed did not. *Id.* at 10. The court responded that even if it accepted the legal framework espoused by plaintiffs, the evidence did not show that the manufacturers had knowledge about hazards that Lockheed lacked and, thus, the manufacturers were relieved of their duty to warn Lockheed's employees. *Id.* at 15-16.

## II. CITIZEN SUITS

### Federal Court Allows Citizen Suits to Proceed Based on State's Failure to "Diligently Prosecute" Enforcement Action

In a decision that looks beyond the mere existence of relevant enforcement actions and turns on the diligence with which they are being prosecuted, the U.S. District Court for the Southern District of West Virginia allowed a citizen suit to proceed despite pending enforcement actions against the defendant companies. See *Ohio Valley Env'tl Coal. v. Patriot Coal Co.*, No. 11-cv-00115 (S.D. W.Va. Dec. 7, 2011), available at [www.bdlaw.com/assets/attachments/OhioValley.pdf](http://www.bdlaw.com/assets/attachments/OhioValley.pdf). Plaintiffs brought the action alleging that defendants had improperly discharged selenium into waters near mining sites in West Virginia. *Ohio Valley*, slip op. at 2. The district judge denied defendants' motion to dismiss plaintiffs' complaint, finding that plaintiffs had standing and that the WVDEP failed to "diligently prosecute" enforcement actions against the defendants. *Id.* at 11-13.

Three environmental organizations filed the action against defendants Patriot Coal Corporation, Apogee Coal Company, LLC, Catenary Coal Company, LLC and Hobet Mining, LLC, under the citizen suit provisions of the Clean Water Act ("CWA") and the Surface Mine Coal

Reclamation Act (“SMCRA”). Plaintiffs alleged that the companies exceeded the selenium discharge limits in their permits issued by the West Virginia Department of Environmental Protection (“WVDEP”) and sought enforcement of the permits and their effluent limitations. *Id.* at 2. Defendants moved to dismiss the complaints because, among other things, the plaintiffs’ claims were subject of enforcement by the state and therefore barred.

The WVDEP had filed enforcement actions against Catenary and Apogee that were still ongoing when plaintiffs filed the current action. *Id.* at 3-5. Similarly, after receiving notices of intent to sue by Plaintiffs beginning in November 2006, the WVDEP filed an enforcement action against Hobet for permit violations. *Id.* at 5. Citizen suits under the CWA and the SMCRA are barred where a state or federal agency is diligently prosecuting an action based upon the same violations. *Id.* at 9.

The Court concluded that the enforcement actions with respect to Catenary and Apogee did not constitute “diligent prosecution” because the WVDEP did not seek to enforce the permit or the selenium limits, but rather sought vague relief from the state courts that specifically excluded selenium. *Id.* at 11-12. With respect to Hobet, the Court held that the action was not being diligently prosecuted and that the consent decree was not reasonably calculated to seek compliance with the permit limitations. *Id.* at 14-15. The Court further stated that “the regulatory climate for violations of selenium limitations is defined by continued extensions and enforcement actions that, rather than enforcing selenium limits, seek to accomplish in state courts the delays already rejected by the Environmental Protection Agency.” *Id.* at 13.

### III. ECONOMIC LOSS DOCTRINE

#### **Fifth Circuit Finds Economic Loss Doctrine Not A Bar To Recovery for Negligence Claims in Texas**

In a decision that endorses a limited reach for the “economic loss” doctrine in negligence-based claims under Texas law, the Fifth Circuit vacated a district court’s dismissal of a class action after the Texas Supreme Court reached a similar conclusion. *Hall v. El Dorado Chem. Co.*, No. 10-20871 (5th Cir. Nov. 22, 2011), available at [www.bdlaw.com/assets/attachments/Hall.pdf](http://www.bdlaw.com/assets/attachments/Hall.pdf).

In 2009, a fire at Defendant El Dorado Chemical Company’s fertilizer factory in Brazos County, Texas, destroyed its chemical warehouse. The resulting smoke plume, which contained toxic and hazardous materials, caused the evacuation of more than 20,000 residents and the closure of the surrounding businesses. *Hall*, slip op. at 1-2. Plaintiff filed a putative class action based on theories of negligence, *res ipsa loquitur*, and nuisance, seeking compensatory and exemplary damages as a result of the plume and evacuation. *Id.*

Defendant moved to dismiss the complaint under the economic loss doctrine, which provides that monetary losses alone – without accompanying physical or property damage – are not sufficient to state a claim. Relying on *City of Alton v. Sharyland Water Supply Corp.*, 277 S.W.3d 132 (Tex. App. 2009), the magistrate judge recommended dismissal of the complaint because, among other reasons, the negligence and nuisance claims failed since there was no claim of physical or property harm and exemplary damages were not recoverable without an underlying tort. *Id.* at 2-3. The magistrate judge relied on the *City of Alton’s* interpretation of the economic loss doctrine as barring recovery in tort when only economic loss is alleged. The district court adopted the magistrate judge’s recommendation.

Thereafter, the Texas Supreme Court heard *City of Alton* and reversed the intermediate court’s holding on the economic loss doctrine. The Texas Supreme Court held that the doctrine did not bar recovery on a negligence theory and that the doctrine was most often used to bar recovery in tort when recovery was more appropriate under contract law. Thus, in certain cases, plaintiffs suffering only economic loss may still pursue a negligence claim. See *City of Alton v. Sharyland*

*Water Supply Co.*, No. 09-0223, 2011 Tex. LEXIS 805 (Tex. Oct. 21, 2011). As a result of this decision, the Fifth Circuit vacated the decision and remanded the case to the district court. *Hall*, slip op. at 3.

## IV. CONTINUING TORTS

### District Court Finds No Continuing Tort Once Use of Unlined Pit Ceased

Focusing on the defendant's conduct as opposed to allegedly ongoing contamination, the U.S. District Court for the Western District of Louisiana rejected a punitive damages claim against Exxon Mobil Corporation ("ExxonMobil") for its alleged use of an unlined pit adjacent to an oil and gas exploration site. See *Sweet Lake Land & Oil Co. v. Exxon Mobil Corp.*, No. 2:09 CV1100 (W.D. La. Sep. 29, 2011), available at [www.bdlaw.com/assets/attachments/SweetLake.pdf](http://www.bdlaw.com/assets/attachments/SweetLake.pdf). The court held that the alleged continuing tort ceased when ExxonMobil stopped using the pit for waste disposal and not, as the plaintiff argued, years later when the pit was closed. *Sweet Lake*, slip op. at 5. The court further awarded partial summary judgment to ExxonMobil on plaintiff's punitive damages claim because the allegedly tortious conduct fell outside the relevant statutory period. *Id.*

Plaintiff Sweet Lake Land & Oil Company ("Sweet Lake") owns land near former ExxonMobil oil and gas exploration wells. *Id.* at 1. Sweet Lake claimed that hazardous materials migrated from an unlined "Big Pit" on ExxonMobil's property into its soil and groundwater and sued for damages, including punitive damages. Sweet Lake claimed that ExxonMobil used the Big Pit from 1952-1977, but that its tortious activity continued until the pit was sealed in 1989. *Id.* at 3. Plaintiff sought remediation of its property, damages, including punitive damages. ExxonMobil moved for partial summary judgment on the punitive damages claim, arguing that the tort could not have been continuing after it had ceased using the pit in 1977.

The District Court explained that Louisiana's continuing tort doctrine applies "when an injury is caused by continuing unlawful acts...[until] the damage-causing conduct terminates." *Id.* at 4. The court emphasized that the doctrine does not apply simply because damage continues to worsen, but requires "overt, persistent, and ongoing acts." *Id.* at 4 (quoting *Hogg v. Chevron USA, Inc.*, 45 So. 3d 991 (La. 2010)). Because ExxonMobil's conduct did not "continue" to occur during the time period the punitive damages statute was in effect (1984-1993), the plaintiff was not entitled to punitive damages. *Id.* at 4-5.

## V. CERCLA

### Second Circuit Finds Declaratory Judgment for Future Costs Not Premature

In a ruling that clarifies the availability of a declaratory judgment in certain Superfund cases, the Second Circuit reversed the decision of the U.S. District Court for the Western District of New York, which had denied a request for declaratory relief for future cleanup costs under the Comprehensive Environmental Response and Compensation Act ("CERCLA") and the Declaratory Judgment Act. See *State of New York v. Solvent Chem. Co.*, No. 10-2026-cv (2d Cir. Dec. 19, 2011), available at [www.bdlaw.com/assets/attachments/Solvent.pdf](http://www.bdlaw.com/assets/attachments/Solvent.pdf). The district court had awarded past costs to defendant/third-party plaintiff Solvent Chemical Company, Inc. ("Solvent"), but declined to declare liability for future costs because the allocation of those costs would be premature. *State of New York*, slip op. at 3. The Second Circuit disagreed with the district court's reasoning and concluded that a declaratory judgment as to liability (but not allocation) should be issued in favor of Solvent. *Id.* at 13-14.

Solvent and third-party defendants Olin Corporation ("Olin") and E.I. Du Pont de Nemours & Company ("DuPont") owned adjoining industrial facilities in Niagara Falls, New York, at various

times over the past century. Solvent manufactured chlorinated benzenes and other chemicals at its site, Olin manufactured the pesticide benzene hexachloride (“BHC”) and produced chlorinated benzene as a byproduct at its site, and DuPont manufactured various chlorinated aliphatic compounds at its facility. *Id.* at 4

In 1983, the New York State Department of Environmental Conservation (“NYSDEC”) sued Solvent for the chlorinated benzene contamination and Solvent entered into a consent decree with NYSDEC to perform the cleanup at both the Solvent site and part of Olin’s property. *Id.* at 4-5. Solvent thereafter filed third-party complaints against Olin and DuPont seeking contribution for response costs it had incurred as well as those costs yet to be incurred. *Id.* at 5. Following a bench trial, the district court found in favor of Solvent on its CERCLA contribution claim, awarding Solvent contribution from Olin and DuPont with respect to a portion of its past response costs. The district court denied Solvent’s declaratory claim that Olin and DuPont be held liable for future cleanup costs, ruling that such a judgment would be premature. *Id.* at 5-6.

The Second Circuit reversed. Turning to whether Solvent was entitled to a declaratory judgment pursuant to CERCLA § 113(g)(2), the court declined to decide this question. That provision, on its face, is limited to cost recovery claims under § 107, as opposed to contribution claims pursuant to § 113(f). Nevertheless, the First and Fifth Circuits have held that CERCLA §113(g)(2) applies to contribution actions. *Id.* at 7-9.

The Second Circuit determined, however, that the factors under the Declaratory Judgment Act were sufficient to issue a declaratory judgment. *Id.* at 11-13. The Court stated that the district court’s reasons for its refusal to issue a judgment on future costs may justify a “refusal to *allocate* cleanup responsibility” but that they did not support a refusal “to grant a declaratory judgment as to liability itself.” *Id.* at 10. The Court noted that a declaratory judgment would promote judicial economy by avoiding relitigation of many of the same issues presented in this action. *Id.* at 12-13.

## **Federal Court Rejects Claims Against Company Whose Employee Disposed of Hazardous Substances at Home**

Rejecting an expansive view of “covered persons” under the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”) and its Minnesota counterpart, a federal District Court dismissed a suit against a power company whose employee disposed of PCB-containing transformers at his home. See *Lancaster v. N. States Power Co.*, No. 11-619 (D. Minn. Nov. 9, 2011), available at [www.bdlaw.com/assets/attachments/Lancaster.pdf](http://www.bdlaw.com/assets/attachments/Lancaster.pdf). The court held that the plaintiffs failed to allege facts indicating that the power company was aware that the employee was removing the transformers from the workplace. *Lancaster*, slip op. at 7.

Axicator Trihus was employed for many years as an electrical engineer by defendant Northern States Power Company (“NSP”). *Id.* at 2. At an unknown time, Trihus disposed of six PCB-containing capacitors on real property he and his wife owned. After Trihus’s death, Mrs. Trihus contracted to sell the property to the plaintiffs. After the sale was closed and the plaintiffs took possession, they discovered PCB contamination on the property and brought suit against the defendants. *Id.* at 4.

The suit alleged violations of CERCLA and its Minnesota counterpart, the Minnesota Environmental Response and Liability Act (“MERLA”). *Id.* NSP argued that plaintiffs failed to sufficiently allege that NSP was a “covered person” under either act. To be a “covered person” under CERCLA, one must: 1) be the owner or operator of the facility at which the substance at issue was disposed; 2) arrange for the disposal of the substance; or 3) accept the substance for transport to a treatment or disposal facility. *Id.* at 8-9. The requirements to be a “covered person” under MERLA are similar. *Id.* at 9-10.

The court noted that the complaint only contained “bare assertions” that NSP had knowledge

of or involvement with the disposal of the capacitors. *Id.* at 7. Such “naked assertions devoid of further factual enhancement,” failed to meet the pleading requirements of the Federal Rules of Civil Procedure. *Id.* (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007)). Because the plaintiff did not properly allege that NSP owned or operated the disposal “facility” (the Trihus property), arranged for the disposal at the facility, or accepted the substances for disposal, the court dismissed the suit. *Id.* at 9.

## **Federal Court Finds Virgin Islands Estopped from Bringing Natural Resources Claim Due to Prior Cost Recovery Claim**

Finding that a second suit was precluded because it raised issues decided in a previous suit, the federal district court for the Virgin Islands dismissed an action seeking recovery of natural resource damages from the Century Alumina Company (“Century”). *Comm’r of the Dep’t of Planning and Natural Res. v. Century Alumina Co.*, No. 05-00062 (D. V.I. November 30, 2011), available at [www.bdlaw.com/assets/attachments/Alumina.pdf](http://www.bdlaw.com/assets/attachments/Alumina.pdf).

In January 2010, the Virgin Islands Department of Planning and Natural Resources (“DPNR”) joined Century in a Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”) cost recovery action (“Cost Recovery Action”), seeking response costs it had incurred to clean up hazardous substances emitted by an alumina refinery owned by the Virgin Islands Alumina Company (“Vialco”). *Comm’r*, slip op. at 4. Century’s sole link to the refinery was that it had owned the stock of Vialco for a single day in 1995. *Id.* at 5. DPNR’s claim against Century was contingent on the court piercing the corporate veil to hold Century liable for the actions of its subsidiary, Vialco. The court held that it would be legally improper to do so, and thus granted Century’s request for summary judgment in its favor. *Id.* at 6.

In a different action, the DPNR and the government of the Virgin Islands (“the government”) jointly sued Century for violations of 1) CERCLA; 2) the Virgin Islands Oil Spill Prevention and Pollution Control Act; and 3) Virgin Islands common law. *Id.* at 3. These claims were all connected to activities at the Vialco alumina refinery and, like the Cost Recovery Action, were all dependent on the court piercing Century’s corporate veil. Century argued that the collateral estoppel doctrine precluded the relitigation of this issue. *Id.* at 2.

The collateral estoppel doctrine applies when: 1) the identical issue was previously adjudicated; 2) the issue was actually litigated; 3) the previous determination was necessary to the decision; and 4) the party being precluded from relitigating the issue was fully represented in the prior action. *Id.* at 6-7. The government argued that it had not been fully represented in the Cost Recovery Action, which had been brought solely by DPNR. *Id.* at 9. The court explained that, generally, litigants are not bound by previous litigation to which they were not a party, but there is an exception if “the nonparty was adequately represented by someone with the same interests who was a party.” *Id.* (quoting *Taylor v. Sturgell*, 553 U.S. 880, 894 (2008)). The court held that the DPNR, which “is an Executive Department of the Government of the United States Virgin Islands” with the duty and power to enforce all environmental laws, fully represented the government’s interests in the Cost Recovery Action. *Id.* at 10. The court, finding that the other requirements of the collateral estoppel doctrine were also satisfied, dismissed the suit. *Id.* at 11.

## **VI. CLIMATE CHANGE**

### **Virginia Supreme Court Holds Global Warming Not Covered Under Insurance Policy**

In a decision that could give insurers greater leeway to deny coverage for certain environmental claims, Virginia’s highest court upheld a lower court’s grant of summary judgment in favor of an insurance company in a climate change case. See *AES Corp. v. Steadfast Insurance Co.*, No. 100764 (Va. Sept. 16, 2011), available at [www.bdlaw.com/assets/attachments/AES.pdf](http://www.bdlaw.com/assets/attachments/AES.pdf). The

Supreme Court agreed that the emission of carbon dioxide is not an “occurrence” within the meaning of a general liability policy, and therefore the insurer, Steadfast Insurance Company (“Steadfast”), did not owe the insured, AES, a defense or insurance coverage.

AES sought coverage under its policy with Steadfast for potential liability stemming from a complaint filed by the Native Village of Kivalina and City of Kivalina (“Kivalina”). In February 2008, Kivalina, a community located on an Alaskan barrier island, filed a lawsuit against AES and others alleging that emissions of greenhouse gases from AES’s power plants contributed to global warming and damaged Kivalina’s land. *AES*, slip op. at 1-2. Steadfast provided AES a defense under a reservation of rights and filed a declaratory judgment action seeking relief from coverage. Among other things, Steadfast claimed that the underlying complaint did not allege “property damage” caused by an “occurrence,” which was necessary for coverage under the policies at issue. *Id.* at 2.

The court held that an “occurrence,” as defined under the policies, was “an accident”, which means “an incident that was unexpected from the viewpoint of the insured.” *Id.* at 9. The underlying complaint alleged both intentional and negligent actions by AES, and therefore, AES argued that it was entitled to a defense where negligence was alleged. The court disagreed, holding that the property damage was not alleged to be the result of a fortuitous event or accident and thus was not covered under the relevant insurance policies. *Id.* at 13-14.

First, the court focused on the allegations that AES *intentionally* released tons of carbon dioxide and greenhouse gases into the atmosphere as part of its electricity-generating operations, and that there is “clear scientific consensus that the natural and probable consequence of such emissions is global warming and damages[.]” *Id.* at 12. The court concluded that “whether or not AES’s intentional act constitutes negligence, the natural and probable consequence of that intentional act is not an accident under Virginia law.” *Id.*

In addition, although the court could still have found an occurrence if the alleged injury resulted from an unforeseen cause beyond the ordinary experience of a reasonable person, the underlying complaint included allegations that AES knew or should have anticipated the damages resulting from its emitting carbon dioxide and greenhouse gases. *Id.* at 10. The court held that “inherent in such an allegation is the assertion that the results were a consequence of AES’s intentional actions that a reasonable person would anticipate,” and therefore, there was no occurrence and no coverage under the policy. *Id.* at 13. The decision allows insurers to argue that pollution-related claims, under some policies, are not covered because the insured should have known the environmental damage would result.

**Office Locations:**

Washington, DC

Maryland

New York

Massachusetts

New Jersey

Texas

California