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I. CLIMATE CHANGE

Federal Court Holds State Tort Claims Preempted By Clean Air Act

Answering a key question left open by the U.S. Supreme Court in *American Electric Power Co. v. Connecticut*, 131 S. Ct. 2527 (2011) (*see Supreme Court Rules in Favor of Utilities in Climate-Nuisance Case*, Toxic Tort and Product Liability Quarterly, July 20, 2011, *available at* http://www.bdlaw.com/assets/attachments/Toxic_Tort_Product_Liability_Quarterly_July_2011.pdf), a Western District of Pennsylvania judge held that state law tort claims based on carbon dioxide emissions are preempted by the federal Clean Air Act. *Bell v. Cheswick Generating Station*, No. 2:12-cv-929 (W.D. Pa. Oct. 12, 2012), *available at* www.bdlaw.com/assets/attachments/Bell.pdf.

Plaintiffs, a putative class, alleged that emissions from defendant's 570-megawatt coal-fired electrical generating facility caused damage to their property. Bell, slip op. at 2. The complaint asserted that defendant continued "to operate the power plant without proper or best available technology or any proper air pollution control equipment." *Id.* at 3. Plaintiffs asserted nuisance, negligence and recklessness, trespass, and strict liability claims. *Id.*

In dismissing the action, the court found "[a] review of the Complaint reveals that the allegations of Plaintiffs, as pleaded, assert various permit violations and seek a judicial examination of matters governed by the regulating administrative bodies. . . . Thus, the Court reads the Plaintiffs' Complaint, including its common law claims, as necessarily speaking to and attacking emission standards." *Id.* at 10, 12. Relying on analogous decisions in other districts, the court held that the Clean Air Act preempted plaintiffs' claims because they would "necessarily require" the court "to engraft or alter" Clean Air Act standards enforced by the U.S. Environmental Protection Agency. *Id.* at 14. Plaintiffs have appealed the decision.

II. CLASS ACTIONS

Court Approves Deepwater Horizon Medical Benefits Settlement

In a landmark settlement that may set a benchmark for the resolution of personal injury claims in future mass toxic tort cases, the U.S. District Court for the Eastern District of Louisiana approved the medical benefits portion of a class action settlement in the Deepwater Horizon oil spill case (the "Medical Benefits Settlement"). *In Re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico on, April 20, 2010*, No. 2:10-md-2179 (E.D. La. Jan. 11, 2013), *available at* www.bdlaw.com/assets/attachments/BP%20Medical.pdf. The Medical Benefits Settlement resolves the class action claims of remediation workers and certain area residents who allege they sustained personal injuries as a result of their exposure to oil spilled or to chemical dispersants used during the cleanup efforts. *Deepwater Horizon*, slip op. at 6-7.

The Medical Benefits Settlement includes four major components. *Id.* at 8. The first allows class members to receive compensation for certain physical conditions, even without offering medical records as evidence. *Id.* By providing medical records, however, class members are able to qualify for a larger compensation payment. This part of the settlement is an uncapped benefit, meaning that all qualifying claims will be paid. *Id.* at 11. The Medical Benefits Settlement also provides for a "Periodic Medical Consultation Program," which entitles class members to an initial medical consultation followed by additional visits every three years over the 21-year life of the program. *Id.* at 12. The Periodic Medical Consultation Program is not medical monitoring but instead provides access to general medical services free of charge. *Id.*

The third component of the Medical Benefits Settlement is the Gulf Region Health Outreach Program, under which BP will provide $105 million over five years to a set of integrated projects

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designed to improve capacity for and access to community-based healthcare services in the Gulf Coast region. *Id.* at 13. Finally, the Medical Benefits Settlement provides a mediation/litigation process for members who seek compensation in the future for a physical condition that allegedly resulted from exposure to oil or chemical dispersants but is claimed to have manifested after the class action complaint was filed (i.e., after April 16, 2012). *Id.* at 16.

The district court approved the terms on January 11, 2013, determining that the class action settlement between the Medical Benefits Settlement Class and BP was "fair, reasonable and adequate" to class members. *Deepwater Horizon*, slip op. at 59. The court also concluded that class treatment was superior to litigation via multiple trials, with the Medical Benefits Settlement containing several benefits that could only be obtained through a comprehensive class settlement. *Id.* at 58.

Previously, on December 21, 2012, the court approved a separate settlement that resolved economic and property claims resulting from the Deepwater Horizon spill. That settlement includes monies for economic loss, including approximately $2.3 billion to the Gulf seafood industry, and medical injuries, including $105 million for a Gulf Health program. BP has estimated it will pay $7.8 billion to resolve economic, property loss, and medical claims, but the final amount is uncapped.

Environmental Tort Suit Arising from "Local Event" Not Mass Action

Striking a blow to class action defendants seeking to litigate class action claims in federal court, the U.S. District Court for the Virgin Islands remanded an environmental tort action brought by more than 400 plaintiffs back to state court. *Abraham v. St. Croix Renaissance Group, L.L.L.P.*, Civil Action No. 12-11 (D.V.I. Dec. 7, 2012), *available* at www.bdlaw.com/assets/attachments/Abraham.pdf. The court held that the case belongs in state court rather than federal court because it does not meet the definition of "mass action" under the Class Action Fairness Act ("CAFA") given that the action was based on a "local event or occurrence" that took place in the state in which the action was filed. *Abraham*, slip op. at 8.

Plaintiffs filed suit in the Superior Court of the Virgin Islands claiming personal injury and property damage arising out of the alleged emission of hazardous materials including bauxite residue (red mud and red dust), coal dust, and friable asbestos from defendant's property in St. Croix over a period of years. *Id.* at 1. The defendant's property, which was once occupied by an alumina refinery, contained large piles of these materials, which plaintiffs alleged had blown over residential dwellings continuously since a hurricane in 1995. *Id.* at 4. Defendant timely removed the case to federal district court on the grounds that it was a mass action for which subject matter jurisdiction exists under CAFA based on diversity of citizenship. *Id.*

The court agreed with defendant that the diversity requirement was met, but remanded the case based on a provision in CAFA that excludes tort claims arising "from an event or occurrence" in the state in which the action is filed. *Id.* at 2-4, 8. The court held that the word "event" could encompass a continuing tort that "results in a regular or continuous release of toxic or hazardous chemicals" where there is "no superseding occurrence or significant interruption that breaks the chain of causation." *Id.* at 8. Here, the court found plaintiffs' complaint arose from such an event – defendant's alleged continual release of toxic substances from a single facility in the Virgin Islands – and the resulting injuries were confined to the Virgin Islands, thereby precluding federal jurisdiction under CAFA. *Id.*

Federal Court Finds Pollution Claims against Paper Facility Too Vague

Underscoring the importance of detailed factual allegations to support a well-pleaded complaint, a federal judge in South Carolina dismissed environmental tort claims against International Paper, finding that the allegations were too vague to support personal injury and property damage

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claims. *Winley et al. v. Int'l Paper Co.*, No. 2:09-cv-02030 (D.S.C. Oct. 23, 2012); *Anderson et al. v. Int'l Paper Co.*, No. 2:09-cv-02031 (D.S.C. Oct. 23, 2012), combined decision *available at* www.bdlaw.com/assets/attachments/Abraham.pdf.

In partially granting International Paper's motion to dismiss in both actions, the court found that in both the *Anderson* case, consisting of 135 plaintiffs, and the *Winley* case, consisting of four named plaintiffs claiming to represent three proposed classes, the plaintiffs failed to state facts sufficient to support their claims regarding the pollution allegedly occurring at the Georgetown, South Carolina paper facility. *Winley/Anderson*, slip op. at 3, 6. Although plaintiffs' theory of each case was based on their claim that the paper manufacturing mill released hazardous pollutants into the environment, the court found neither complaint stated specific facts, such as when the releases occurred, how they occurred, which chemicals were released, the quantities of the releases, or the harm suffered by each person. *Id.* at 6, 14.

The court also found several claims were insufficiently pled because plaintiffs failed to state details regarding their alleged physical ailments or property damage, instead only broadly asserting that they have suffered "cancer," "birth defects" and "other serious, disabling, and life-threatening diseases and health conditions." *Id.* at 6, 14, 20-21. Moreover, the court found that even though plaintiffs each alleged that at some point they lived near the "Georgetown community," they provided no information as to where or when they lived there. *Id.* at 6.

The court dismissed with prejudice plaintiffs' claims for public nuisance, wantonness, negligence per se, ultra-hazardous activity, fraudulent nondisclosure, fraudulent suppression, unjust enrichment, and abnormally dangerous activity. *Id.* at 28-29. The court also granted plaintiffs leave to file an amended complaint to reassert claims for trespass, private nuisance and negligence. *Id.*

III. CAUSATION

Nevada High Court Adopts Substantial Continuing Factor Test for Asbestos Exposure

Announcing a new causation standard for Nevada asbestos suits, the Nevada Supreme Court adopted the Fourth Circuit's substantial contributing factor causation test, under which a plaintiff's burden of proof on liability is to establish sufficient "frequency, regularity, [and] proximity" of exposure to a defendant's asbestos-containing products. *Holcomb v. Georgia Pacific LLC*, No. 56510, (Nev. Dec. 6, 2012), *available at* www.bdlaw.com/assets/attachments/Holcomb.pdf. On appeal from summary judgment, the court held that a plaintiff alleging mesothelioma resulting from asbestos-containing products must prove exposure to (1) a particular defendant's product (2) "on a regular basis" (3) "in proximity to where the plaintiff actually worked" (4) sufficient to establish that the alleged exposure is the "probable" cause of mesothelioma. *Holcomb*, slip op. at 1.

Plaintiff Holcomb worked for several years as a construction laborer and automotive mechanic. *Id.* at 3. After contracting mesothelioma, plaintiff filed negligence and strict products liability claims against various joint-compound manufacturers, asbestos suppliers and automotive brake product manufacturers, distributors and sellers alleging that his exposure to asbestos in defendants' products caused his cancer. *Id.* Although plaintiff testified that he recalled using certain brands of asbestos-containing products during certain periods, he could not connect a particular brand to a particular job or time. *Id.* at 4. Plaintiffs' expert testified that "all significant exposures contribute to the causation of a subsequent mesothelioma." *Id.* at 6.

The district court granted summary judgment in favor of the joint-compound defendants based on plaintiffs' inability to identify the products used and their frequency, but denied summary

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judgment with respect to the automotive-brake defendants. *Id.* at 6. Plaintiffs appealed, arguing that in light of the expert testimony that "low exposures are sufficient to cause mesothelioma," plaintiffs had raised triable issues of fact. *Id.* at 8.

Seeking to strike a balance between the difficulties faced by "deserving plaintiffs" and the "interests of nonresponsible defendants," the Nevada Supreme Court considered three different causation tests, ultimately adopting the substantial contributing factor test used by the Fourth Circuit. *Id.* at 10-11. The test requires evidence of "more than a casual or minimum contact with the product," but is a less rigid standard and can be "tailored to the facts." *Id.* at 16-17. The same test was adopted in the First and Second (but not the Third) Restatements of Torts. Applying this standard, the court held that although plaintiff Holcomb was unable to link a particular product to a particular job site, the testimony that he used a manufacturer's asbestos-containing products numerous times over a certain period established sufficient evidence to defeat summary judgment. *Id.* at 23-24. As noted below, the Virginia Supreme Court this month rejected the same standard in a similar asbestos-exposure case.

Virginia High Court Adopts "Multiple Sufficient Causes" Test for Asbestos Exposure

In a decision issued approximately one month after the Nevada Supreme Court adopted the Fourth Circuit's substantial contributing factor causation test, the Virginia Supreme Court instead adopted the Restatement (Third) of Torts' "multiple sufficient causes" standard for multiple-exposure mesothelioma cases. *Ford Motor Co. v. Boomer*, No. 120283, (Va. Jan. 10, 2013), *available at* www.bdlaw.com/assets/attachments/Ford.pdf. Specifically, the state's highest court held that the plaintiff's burden was to establish that exposure to asbestos from the product at issue "more likely than not that" was "sufficient" to cause plaintiff's mesothelioma. *Boomer*, slip op. at 20-21.

Plaintiff encountered potential exposure to asbestos during two parts of his career: first as a pipefitter in a naval shipyard for approximately one year, and later as a Virginia State Trooper, where he was exposed to brake dust during vehicle inspections over a seven-to-eight-year period. *Id.* at 2-4. Plaintiff's experts testified that the asbestos found in the brakes at issue was a "substantial contributing factor" to plaintiff's mesothelioma, while the brake defendants' experts testified that the type of asbestos fibers in the lung tissue were more consistent with shipyard work, and that people who work around brakes are at "no higher risk" of mesothelioma than people who do not. *Id.* at 4-5.

Although recognizing the difficulties posed by mesothelioma cases, the court rejected the "substantial contributing factor" causation test, concluding that it is riddled with ambiguities and that the phrase could be interpreted either as increasing or decreasing plaintiff's burden of proof. *Id.* at 8-9, 12-13. Adopting the Third Restatement test, the court held that where a plaintiff has been exposed to multiple sources of asbestos, the plaintiff must establish that each defendant's product alone was "sufficient" to have caused plaintiff's mesothelioma. *Id.* at 16-17. The court remanded the case for a determination consistent with the new standard. *Id.* at 20.

IV. EXPERTS

Ninth Circuit Vacates $9M Jury Award For Lack of Daubert Hearing

Finding that the trial court failed to exercise its gatekeeping responsibility to determine whether expert testimony is relevant and reliable, the U.S. Court of Appeals for the Ninth Circuit vacated a $9.4 million mesothelioma award. *Barabin v. AstenJohnson, Inc.*, No. 10-36142 (9th Cir. Nov. 16, 2012), *available at* www.bdlaw.com/assets/attachments/Barabin.pdf. The Ninth Circuit held that the district court abused its discretion when it failed to conduct a *Daubert* hearing

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or otherwise make relevance and reliability determinations regarding the expert's testimony. *Barabin*, slip op. at 7.

Plaintiff, a retired paper mill employee, and his wife sued a paper mill and dryer felt manufacturers alleging that his mesothelioma was caused by over 20 years of occupational exposure to asbestos. *Id.* at 4-5. The defendants filed a motion *in limine* to exclude plaintiffs' expert. *Id.* at 5. The district court initially excluded plaintiffs' expert because of his "dubious credentials and his lack of expertise with regard to dryer felts and paper mills," but later reversed its decision allowing the expert to testify at trial. *Id.* at 5. The district court determined that plaintiffs, in a subsequent court submission, had "clarified [their expert's] credentials, including that he had testified in other cases". *Id.* The court, however, did not conduct a hearing pursuant to *Daubert v. Merrell Dow Pharmaceuticals, Inc.* *Id.* The case proceeded to trial, and the jury found in favor of plaintiffs, awarding $10.2 million in damages. *Id.* at 6. After settlement offsets, the plaintiffs were awarded approximately $9.4 million. *Id.*

On appeal, the Ninth Circuit vacated the jury's verdict. The Court of Appeals concluded that the lower court failed to assess the scientific methodologies, reasoning or principles plaintiffs' expert applied, and improperly left it to the jury to determine the relevance and reliability of the proferred expert testimony. *Id.* at 9. The Court of Appeals noted that the "decision to admit or exclude expert testimony is often the difference between winning and losing a case," and emphasized "the importance of assiduous 'gatekeeping' by trial judges." *Id.* at 9, 11.

V. TRESPASS

West Virginia Court Rejects Trespass Claim For Reasonable Disposal Of Mining Waste

In a decision that eliminates a potential impediment to oil and gas drilling in West Virginia, the Northern District of West Virginia held that surface disposal of drilling waste in on-site pits does not constitute common law trespass under state law. *Teel v. Chesapeake Appalachia LLC*, No. 5:11-cv-5 (N.D. W. Va., Oct. 25, 2012), *available at* www.bdlaw.com/assets/attachments/Teel.pdf. Granting summary judgment in favor of the defendant, the court concluded that because the placement was "fairly or reasonably necessary" to the mining operation and not a "substantial burden" on the surface owner, defendant had an implied right to construct and utilize disposal pits on the surficial property. *Teel*, slip op. at 10, 16.

Wetzel County, West Virginia land owners sought monetary and injunctive relief for alleged damage to their property against defendant Chesapeake Appalachia LLC, the owner of subsurface mining rights for the same land. *Id.* at 1, 6-7. In conjunction with its natural gas drilling operations, defendant constructed two pits for disposal of drill cuttings and other waste, which it ultimately covered with soil. *Id.* at 5-7. Plaintiffs asserted a variety of tort claims, seeking monetary damages in addition to injunctive relief for removal and remediation of the alleged contamination. *Id.* at 1. Defendant moved for summary judgment, arguing in part, that its actions did not constitute trespass. *Id.* at 4.

Under West Virginia law, a subsurface property owner has the right to use the surface land if it is fairly necessary for the enjoyment of the subsurface rights. *Id.* at 9. However, where those rights are implied rather than express, the subsurface owner's actions must also not substantially burden the surface owner. *Id.* at 12. In finding that defendant's actions were reasonable and fairly necessary, the court noted that the defendant's mining permit contemplated its disposal of waste in on-site pits and that such practice already had been determined to be suitable and reasonable to the natural gas operation in another case before the court, *Whiteman v. Chesapeake Appalachia, LLC*, No. 5:11-cv-31, 2012 U.S. Dist. LEXIS 78876 (N.D. W. Va. June 7, 2012). *Teel*, slip op. at 15-17. Although it expressed sympathy for the plaintiffs' concerns regarding their property,

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the Court dismissed plaintiffs' argument that the availability of alternative disposal methods made the defendant's choice to use on-site pits unreasonable and held that the disposal pits were not a trespass as a matter of law. *Id.* at 18.

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