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I. PREEMPTION

Third Circuit Finds Clean Air Act Does Not Preempt State Tort Claims

In a decision that may make it easier for plaintiffs to maintain tort claims against certain facilities permitted under the federal Clean Air Act, the U.S. Court of Appeals for the Third Circuit held that property owners could bring nuisance, negligence, and trespass claims against a power plant allegedly releasing particulates onto their properties. *See Bell v. Cheswick Generating Station*, No. 12-4216 (3d Cir. Aug. 20, 2013), *available at* www.bdlaw.com/assets/attachments/BellvCheswick.pdf.

Plaintiffs, a putative class made up of at least 1,500 individuals who own or inhabit residential property within one mile of GenOn's Cheswick Generating Station, brought this action alleging that the odors and particulates released by the plant have caused substantial damage to, and loss of enjoyment of, their property. *Bell*, slip op. at 3, 9-10. The trial court in the Western District of Pennsylvania found the Clean Air Act preempted Plaintiffs' state law claims. *Id.* at 11-12.

On appeal, Defendants argued that Pennsylvania tort law conflicted with the Clean Air Act and was preempted. *Id.* at 13. Defendants distinguished the Supreme Court's *Int'l Paper Co. v. Ouellette*, 479 U.S. 481 (1987), which allowed state tort claims under the Clean Water Act, on the grounds that the Clean Air Act states' rights savings clause was narrower than the Clean Water Act's analogous clause. *Id.* at 16.

The Third Circuit disagreed, holding that the Supreme Court's *Ouellette* decision controlled this case because "there is no meaningful difference" between the two savings clauses. *Id.* at 16, 20. The court also rejected Defendants' argument that state tort claims would create inconsistent standards, noting that the Supreme Court's *Ouellette* decision shows "states are free to impose higher standards on their own sources of pollution" using state tort law. *Id.* at 21-22. According to the court,"[i]f Congress intended to eliminate such private causes of action, 'its failure even to hint at' this result would be 'spectacularly odd.'" *Id.* at 23 (citations omitted).

II. TRESPASS

South Carolina High Court Finds Odors and Intangibles Do Not Constitute Trespass

Calling into question a jury's multi-million dollar award to the neighbors of a landfill, the South Carolina Supreme Court sided with the minority of states and determined that South Carolina law does not recognize a cause of action for trespass solely from odors. *Babb v. Lee Cnty. Landfill SC, LLC*, No. 2012-212741 (S.C. Aug. 14, 2013), at 17, *available at* www.bdlaw.com/assets/attachments/BabbvLeeCty.pdf.

Plaintiffs, six individuals residing near a landfill, asserted negligence, trespass, and nuisance claims based on landfill odors. *Babb*, slip op. at 2. Following a trial in which the jury awarded Plaintiffs more than $2 million, the United States District Court for the District of South Carolina determined that state precedent was unclear on several issues and certified five questions to the state Supreme Court, including whether a claim for trespass can be based on odors or other intangible invasions. *Id.* at 3.

The court acknowledged that some states have expanded the traditional trespass rule's requirement of a "physical" invasion given that modern science shows that intangible invasions such as odors can be caused by microscopic particulates landing on property. *Id.* at 12-14. Since not all microscopic invasions can amount to trespass, courts adopting this "modern rule" have also required plaintiffs to show that the intrusion is sufficiently substantial to interfere with exclusive possession. *Id.* at 13.

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The South Carolina Supreme Court declined to adopt this rule noting that it conflated trespass and nuisance, and that the traditional view was more clear, easier to administer, and provided better protections for exclusive possessory rights. *Id.* at 15-17. The court confirmed that plaintiffs may bring a negligence cause of action based on migration of offensive odors, but the plaintiff must still demonstrate the traditional elements of a negligence claim. *Id.* at 17-18.

Fourth Circuit Rejects Surface Owners' Trespass Claim Against Drilling Operator

In a victory for hydraulic fracturing interests, the Fourth Circuit held that Chesapeake Energy Corp. did not commit common law trespass upon surface owners' rights by developing natural gas wells below their farmland. *Whiteman v. Chesapeake Appalachia LLC*, No. 12-1790 (4th Cir. Sept. 4, 2013), *available at* www.bdlaw.com/assets/attachments/WhitemanvChesapeake.pdf.

Chesapeake owns the mineral rights below 101 acres in West Virginia, while Martin and Lisa Whiteman own the surface rights. *Whiteman*, slip op. at 2. Chesapeake operates three natural gas wells on 10 of the 101 acres, including a permanent drill waste disposal on the surface. *Id.* at 3. The Whitemans claimed that Chesapeake's drilling operations constituted common law trespass, arguing that those ten acres are unusable to them, and requested an injunction and damages. *Id.* at 8.

Examining the long history of mineral estate owners' rights in West Virginia law, the court found that Chesapeake's disposal of drill waste on the surface estate was "reasonably necessary" for enjoyment of the mineral estate. *Id.* at 10-24. The court emphasized that the drilling only impacted 10 acres, that the Whitemans admitted that their current monetary damages are "trivial," and that they did not rebut expert testimony that the drilling operations caused no diminution in the value of their property. *Id.* at 6, 10-24. The court also rejected the Whitemans' claim that Chesapeake should have implemented a closed-loop system instead, finding that those systems were not "reasonably necessary" because they are expensive and were not used in West Virginia at the time Chesapeake developed these wells. *Id.* at 25-26.

III. DAMAGES

Texas Jury Declines to Award Damages in $10B Toxic Flaring Case

In the first test case in a series of actions involving about 48,000 plaintiffs, a Texas jury declined to award damages in an action against Defendant BP Products North America's Texas City Refinery, despite finding that the refinery had negligently flared approximately 500,000 pounds of noxious chemicals. *See In re: MDL Litig. regarding Texas City Refinery Ultracracker Emission*, No. 10-UC-0001 (56th Jud. Dist. Tex. Oct. 10, 2013)

Plaintiffs brought property damage and personal injury claims, alleging that BP surreptitiously vented 19 different toxic chemicals during an extended emission period from April to May 2010. Although BP later disclosed to state and federal regulators that it flared the chemicals, Plaintiffs claimed that BP understated the significance of the event. Plaintiffs sought $200,000 each plus $10 billion in punitive damages to be donated to charity for property damage. The jury found that BP had flared chemicals, but declined to award damages.

The jury's verdict comes a little more than a week after BP defeated class certification in a federal lawsuit over air pollution related to the same refinery. *See Cannon v. BP Products N. Am. Inc.*, No. 10-00622 (S.D. Tex. Sept. 30, 2013), *available at* www.bdlaw.com/assets/attachments/CannonvBP.pdf. In that case, the U.S. District Court for the Southern District of Texas ruled that the damages model prepared by the plaintiffs' expert did not adequately tie air pollution from BP's refinery to alleged diminution to the plaintiffs' home values. *Id.* at 15-34. Since plaintiffs

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presented no alternative to prove causation or damages, the court could "not envision how a class action trial would operate." *Id.* at 37.

IV. MEDICAL MONITORING

Sixth Circuit Upholds Rule 11 Sanctions for "Meritless" Medical Monitoring Claims

In a decision that may discourage the assertion of certain medical monitoring claims, the U.S. Court of Appeals for the Sixth Circuit upheld $250,000 in sanctions on Plaintiffs' counsel for filing "meritless" medical monitoring claims against Chevron, USA, Inc. *See Baker v. Chevron, U.S.A. Inc.*, No. 11-4369 (6th Cir. Aug. 2, 2013), *available at* www.bdlaw.com/assets/attachments/BakervChevron.pdf. The court further found that Plaintiffs had offered insufficient proof for their personal injury and property damage claims. *Baker*, slip op. at 17-28.

Plaintiffs, approximately 200 former and current neighbors of a Chevron refinery, filed claims stemming from Chevron's activities at its crude oil refinery in Ohio. *Id.* at 1-2. Chevron acknowledged that the refinery was responsible for considerable environmental contamination, including hazardous air emissions and the cumulative release of approximately 8 million gallons of gasoline that had seeped into the soil and formed a groundwater plume in the vicinity of the refinery. *Id.* Plaintiffs fell into three categories: (1) individuals claiming personal injuries from air emissions from the refinery; (2) individuals seeking medical monitoring damages related to plume and soil vapor exposure and (3) individuals claiming property damage from the plume and soil vapors. *Id.* at 2.

In its review, the district court bifurcated the personal injury Plaintiffs from the property damage Plaintiffs and adopted a bellwether approach in analyzing each category of Plaintiffs' claims. *Id.* After excluding two of Plaintiffs' experts as unreliable, the court granted summary judgment to Chevron on all claims. *Id.* at 2, 14. The court also granted Chevron's motion for Rule 11 sanctions, finding that Plaintiffs' counsel unreasonably pursued the medical monitoring damages despite being aware that the Plaintiffs lacked the individualized exposure data necessary to substantiate their claims. *Id.* at 2, 15.

The Sixth Circuit affirmed the district court's decision to impose Rule 11 sanctions on Plaintiffs' counsel. *Id.* at 36. The court explained in establishing medical monitoring damages in Ohio, Plaintiffs' needed to establish present "increased risk" of contracting serious diseases. *Id.* at 33. By knowingly pursuing meritless medical monitoring claims, Plaintiffs' counsel acted unreasonably, therefore, Rule 11 sanctions were appropriate. *Id.* at 32-36. In addition, the Sixth Circuit upheld the District Court's dismissal of Plaintiffs' personal injury and property damage claims, agreeing that Plaintiffs had failed to offer sufficient proof that releases from the refinery caused their injuries. *Id.* at 21, 28

V. CAUSATION

Sixth Circuit Requires Expert Testimony to Prove Causation in Paper Mill Nuisance Case

Bolstering the defense view that competent expert testimony is typically required to prove causation in toxic tort actions, the U.S. Court of Appeals for the Sixth Circuit granted summary judgment dismissing property owners' claims that the Defendant paper mill's effluent interfered with their right to use and enjoy property. *See Freeman v. Blue Ridge Paper Prods.*, No. 12-6259 (6th Cir. July 9, 2013), *available at* www.bdlaw.com/assets/attachments/FreemanvBlueRidgePaper.pdf. The court affirmed a district court's ruling that lay testimony of causation was insufficient to survive summary judgment in this case. *Freeman*, slip op., at 9-11.

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Plaintiffs were a class of 300 real property owners whose property is located along a river approximately 26 miles downstream from Defendant's paper mill. *Id.* at 2. Plaintiffs brought a nuisance action, claiming that the Defendant's activities made the river discolored and caused a foul odor, which has caused them to experience fear, stress, annoyance and anxiety. *Id.* On appeal, Plaintiffs argued that expert testimony was not required because the river was only discolored and foul-smelling downstream of the Defendant's paper mill and longtime residents "insist the river never exhibited a foul color, odor or foam" previously. *Id.* at 9. The court rejected this argument, finding that lay testimony is insufficient based on the distance involved and because of the difficulties determining how the effluent interacted with the river. *Id.* at 9-11.

In the alternative, Plaintiffs argued expert testimony that their fears and anxieties about the river's water quality were sufficient to demonstrate a nuisance under the Restatement (Second) of Torts. *Id.* at 11-12. However, the court found persuasive that Plaintiffs presented no authority to suggest North Carolina would allow nuisance recovery based on fear or anxiety without any "scientifically verifiable evidence" of health risks. *Id.* at 11-15. Notably, the court did not go as far as to "declare that scientifically verifiable evidence is in fact required" to prove fear and anxiety based nuisance claims in every case. *Id.*

Maryland High Court Allows "Every Exposure" Testimony in Asbestos Case

Overturning what some commentators had considered a leading opinion rejecting the so-called "any exposure" theory, Maryland's highest court ruled that an expert may testify that "every exposure to asbestos is a substantial contributing cause" of mesothelioma. *Dixon v. Ford Motor Co.*, 433 Md. 137 (2013), www.bdlaw.com/assets/attachments/DixonvFord.pdf.

The husband and children of a woman who died of mesothelioma filed suit against Ford Motor Company for negligent failure to warn of the dangerous asbestos in their products. *Dixon*, slip op. at 1. Joan Dixon claimed she was exposed to asbestos from two sources: (1) her husband, a mechanic who worked almost exclusively on Ford brakes, brought asbestos-laden dust home with him on his clothes, which she laundered; and (2) a drywall joint compound allegedly manufactured by Georgia-Pacific that her husband used in a repair project at their home. *Id.* at 4-5. After a 12-day trial, the jury concluded that the only substantial contributing factor in causing Ms. Dixon's mesothelioma was the dust from the Ford brake products and returned sizeable verdicts in the Plaintiffs' favor. *Id.* at 2.

At trial, the jury heard Dr. Lauren Welch's expert testimony that even though Ms. Dixon may have been exposed to asbestos from a drywall joint compound during a home repair project, the Ford brake dust was still a cause of her disease because "every exposure to asbestos is a substantial contributing cause" of mesothelioma. *Id.* at 10. On appeal, the intermediate court threw out this "every exposure" opinion testimony, finding that Dr. Welch should have relied on a theory of "probabilistic causation" instead, and that the opinion was not helpful to the jury. *Id.* at 3. For more information on the intermediate court's decision, *see* http://www.environmentallawportal.com/Maryland-Court-Rejects-Any-Exposure-Theory.

The Maryland Court of Appeals reversed, finding that the intermediate court had improperly ignored the context within which Dr. Welch provided her testimony. *Id.* at 10. Dr. Welch provided her opinion based on the evidence that dust was brought into the Dixons' home twice a week for 13 years, and that the repeated exposure was high-intensity because asbestos fibers would remain in the home for an extended period. *Id.* at 13-16. With that background and context, the court was unwilling to conclude that Dr. Welch's opinion that each exposure increased the likelihood of contracting mesothelioma was a novel scientific theory. *Id.*

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Iowa Supreme Court Strikes "Exposure Estimate" Testimony in Pesticide Suit

Striking a blow to toxic tort plaintiffs who rely on estimates, as opposed to actual data, the Iowa Court of Appeals found that expert testimony relying on such "exposure estimates" was insufficient to prove causation of birth injuries associated with use of a pesticide. S*ee Junk v. Obrecht*, No. 3-454 (Iowa Ct. App. Sept. 5, 2013), *available at* www.bdlaw.com/assets/attachments/JunkvObrecht.pdf.

Plaintiffs, Rene Junk and her husband, hired Terminex International Company to treat their home for the presence of spiders while Ms. Junk was pregnant. *Junk*, slip op. at 2. Over a period of three years, Terminex employees sprayed the inside of Junk's home with the pesticide Dursban. *Id.* In 1992, the Junks' son, Tyler, was born with physical, neurological, and psychological impairments. *Id.* In 2005, Plaintiffs sued Terminex, two Terminex employees, Dow Chemical Company, and Dow AgroSciences alleging that exposure to chloropyrifos, a chemical in Dursban, caused their son's defects. *Id.*

Plaintiffs' key expert, Dr. Richard Fenske, used an "exposure estimates" methodology to substantiate his conclusion that while it was unknown how much chlorpyrifos the Junks' son had been exposed to, exposure levels likely exceeded recommended EPA levels. *Id.* The other experts had relied on Dr. Fenske's "exposure estimates" to form their own conclusions. *Id.*

Arguing that the "exposure estimates" were unreliable, Defendants moved to exclude the testimony in the federal court. *Id.* Using the analysis set out in *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 591-95 (1993) to determine whether scientific testimony is admissible, the court determined that Dr. Fenske had not applied a scientifically reliable methodology in estimating exposure levels and granted Defendants' subsequent motion for summary judgment. *Id.* at 3-4. The Eighth Circuit affirmed this ruling, finding that Dr. Fenske's conclusions were based on "unfounded assumptions." *Id.* However, the court remanded the action to state court for proceedings against the Terminex employees. *Id.* at 5.

Both Dr. Fenske and another expert filed new affidavits while the case was on remand, stating that they agreed with Fenske's first affidavit. *Id.* Defendants again moved for summary judgment on the basis that the expert testimony should be excluded, and the Iowa lower court granted the motion. *Id.* The Iowa Court of Appeals affirmed the court's decision, finding, like the Eighth Circuit, that Dr. Fenske's opinion failed to meet the scientific reliability standard set out in *Daubert* and that the opinions of the other experts, which relied on Dr. Fenske's report, were likewise unreliable. *Id.* at 6-12.

VI. CLASS ACTIONS

Georgia High Court Certifies Landowner Class in Noxious Fumes Suit

Although courts often decline to certify classes in environmental exposure or contamination cases due to differing circumstances among the plaintiffs, the Georgia Court of Appeals found that a group of property owners claiming hydrogen sulfide gas emissions from a paper mill had damaged their property had demonstrated sufficient commonality to warrant class certification. *See Georgia-Pacific Consumer Products, LP. v. Ratner*, No. A13A0455 (Ga. Ct. App. July 16, 2013), *available at* www.bdlaw.com/assets/attachments/GAPACvRatner.pdf. The certified class included the owners of 34 residential properties and 33 parcels zoned for industrial, agricultural and other uses in an area around the mill, who brought nuisance, negligence, and trespass claims alleging injuries from hydrogen sulfide fumes released by the mill. *Georgia-Pacific*, slip op. at 6.

Under Georgia certification rules, a class must meet numerosity, commonality, typicality, and adequacy requirements in order to receive class certification. *See* OCGA § 9-11-23(a). Like the federal requirements, Georgia rules provide that "questions of law or fact common to members

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of the class predominate over any questions affecting only individual members." *Id.* At the class certification hearing, Plaintiffs presented testimony from the mill's environmental manager that the noxious fumes could be detected within a four-mile radius of the mill. *Georgia-Pacific*, slip op. at 6. In addition, Plaintiffs also offered the affidavit of a real estate appraiser who testified that the fumes would decrease the market value of the residents' properties. *Id.* at 6-7. The trial court issued an order certifying the class, and the Defendants appealed. *Id.* at 7.

Among other arguments, Defendants claimed that Plaintiffs failed to establish the "commonality" element necessary for class certification because individual landowners were affected in different ways and sustained varying amounts of harm. *Id.* at 7. In affirming the lower court's decision, the Georgia high court ruled 4-3 that a number of issues were common to the class, including issues surrounding Defendant Georgia-Pacific's operation of the mill, its implementation of safety programs, as well as the overall effects of the noxious emissions on landowners. *Id.* at 10-11, 16-17.

Three dissenting judges raised common injury and damages concerns, noting that the Plaintiffs had alleged a variety of medical issues and property damages. *Id.* at 8-16 (Branch, J., dissenting). Also, the dissenters warned "significant trial time would be devoted to determining separate issues of liability," because the Plaintiffs had not presented sufficient evidence that the fumes actually affected a majority of the homes in the class area or adequate proof that the fumes were the proximate cause of the alleged property damage. *Id.* at 16.

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