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I. NUISANCE / CLIMATE CHANGE

Second Circuit Allows Climate Change Nuisance Action to Proceed

The Second Circuit in September issued a long-delayed and much-anticipated climate change decision, holding that states may bring public nuisance actions against privately owned electric utility defendants for greenhouse gas emissions. *See Connecticut v. Am. Elec. Power Co.*, No. 05-5105-cv, 05-5119-cv (Sep. 21, 2009), *available at* http://www.ca2.uscourts.gov/decisions/isysquery/caf8dad7-9c11-4aab-aab9-2997cb501981/2/doc/05-5104-cv_opn.pdf. The decision overturned a 2005 district court decision, *Connecticut v. Am. Elec. Power Co.*, 406 F. Supp. 2d 265 (S.D.N.Y. 2005), which had dismissed the claims on the ground that they presented a non-justiciable political question.

Relying heavily on the U.S. Supreme Court's decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007), the appellate panel rejected all of the arguments put forth by five power company defendants, holding that: the claims are not precluded by the political question doctrine; all of the plaintiffs have standing to bring their claims; current federal statutes do not "displace" the claims; and the claims were rightly brought under the common law doctrine of nuisance.

The Second Circuit expanded the definition of climate change standing articulated in *Massachusetts v. EPA*, which found state standing under the *parens patriae* doctrine, by also finding that states had standing under traditional standing principles in the context of environmental law, relying on *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), and its progeny. The case was decided by only two judges as then-Circuit Judge Sonya Sotomayor, who was part of the three-judge panel that presided over oral argument in the case, had been elevated to the Supreme Court by the time the panel issued its decision in the matter. For more information, see http://www.bdlaw.com/news-669.html.

II. PROPERTY DAMAGE

Federal Court Dismisses Suit for Damages From Noxious Odors at Chemical Plant

Due to a lack of evidence, a federal district court has dismissed a complaint alleging that noxious odors from a polyvinyl chloride ("PVC") manufacturing plant had adversely affected nearby property values. *See Dickens et al. v. Oxy Vinyls, LP*, No. 3:06CV-364-H (W.D. Ky. July 1, 2009). The plaintiffs, who lived near the facility, asserted claims for strict liability, trespass, negligence, and nuisance. *Dickens*, Slip. Op. at 2–3, 5–8. The court held that the plaintiffs could not sustain a nuisance claim because the plaintiffs' own experts opined that vinyl chloride, the only chemical tested for, was present at levels millions of times lower than the recognized threshold at which humans can detect its odor and because the plaintiffs had not attempted to link the odors directly to the defendant's facility. *Id.* at 9–11.

The court rejected the opinion of the plaintiffs' property value expert — a tax assessor rather than a property appraiser who opined, after a cursory tour of the plaintiffs' neighborhood, that the properties were "completely worthless" — as lacking any basis. *Id.* at 11–12. The court, basing its rulings on Kentucky law, also held that PVC manufacturing was not an ultra hazardous activity, as required for strict liability; that the plaintiffs had not presented any evidence of personal injury, as required for recovery in negligence; and that the plaintiffs had not presented any evidence of particulate matter from the defendant's facility entering their property, as required for recovery in trespass. *Id.* at 5–8.

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Federal Court Recognizes Inability to Develop Property as Compensable Injury

A federal district court in California has recognized the frustration of development plans due to contaminated groundwater as a sufficient injury to provide the basis for nuisance and trespass claims. *See West Coast Home Builders v. Aventis CropScience, USA*, No. C 04-2225 SI (N.D. Cal. Aug. 21, 2009). The plaintiff, a land developer, purchased property that hosted a crude oil tank farm for approximately 70 years and was generally contaminated with hydrocarbons. The defendants were the owner of an adjacent landfill and the alleged generators and transporters of the landfill's waste. *West Coast*, Slip Op. at 1–2.

At issue was one parcel of the property that could not be developed because additional contamination had migrated via groundwater from the landfill, which had been the subject of ongoing remediation since 1993. *Id*. The plaintiff asserted claims under RCRA and CERCLA, as well as nuisance and trespass, seeking $13 million in damages allegedly due to lost income. Both parties filed motions for summary judgment.

The defendants argued that the plaintiff's nuisance and trespass claims should be dismissed as uncertain and speculative. The court held that the inability to develop was a cognizable injury, and the amount of any damages could be determined at trial. *Id*. at 11–12. The court also held that the issue of whether the plaintiff's expenses qualified as response costs under CERCLA was best preserved for trial. *Id*. at 9–10. The court, however, dismissed the plaintiff's RCRA claim, holding that the frustration of development plans failed to meet RCRA's standard of "imminent and substantial endangerment." *Id.*

III. CLASS ACTIONS

Federal Court Rejects Majority of Contamination Claims, Moots Certification

A federal district court in West Virginia granted summary judgment for defendants on all but one of numerous tort claims based on alleged drinking water contamination and denied as moot the plaintiffs' motion for class certification. *See Rhodes v. E.I. Du Pont Nemours and Co.,* No. 6:06-cv-00530 (S.D.W. Va. Sep. 28, 2009), *available at* http://www.wvsd.uscourts.gov/district/opinions/pdf/606cv00530ORDsummj.pdf. The plaintiffs, asserting claims for negligence, gross negligence, private nuisance, trespass, battery, and medical monitoring, alleged that perfluoroctanoic acid ("PFOA") from a plant had reached the drinking water supply in Parkersburg, West Virginia. *Rhodes,* Slip Op. at 2. Specifically, the plaintiffs alleged that they faced a heightened risk of disease from PFOA without alleging that they had suffered any present physical injury. The court rejected the plaintiffs' initial attempt to certify a class in 2008, but granted the plaintiffs leave to amend their complaint and add a public nuisance claim, and the plaintiffs again sought class certification. *Id.*

With regard to negligence and gross negligence, the court found that the plaintiffs failed to demonstrate either a manifest physical injury or "reasonably certain" future injuries sufficient to sustain the claims. *Id.* at 20–21. The court dispensed with the battery and trespass claims based on the lack of invasion or contact with the plaintiffs' property or persons. *Id.* at 29–33.

With respect to the nuisance claims, the court held that the plaintiffs failed to demonstrate a claim for private nuisance because the injury alleged was interference with a purely public right. *Id.* at 21–24. The court similarly held that the plaintiffs failed to demonstrate the requisite injury for the public nuisance claim because "the class is the same set of people as the comparative population in the special injury analysis: the set of people exercising the public right to consume

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clean, safe water from the public water supply." *Id.* at 27. Having granted summary judgment for the defendants on the public nuisance claim, the court deemed the plaintiffs' motion for class certification on that claim to be moot. *Id.* at 2–13.

Finally, despite the lack of a present physical injury, the court held that a previous decision by the West Virginia Supreme Court of Appeals "must have meant that all elements of an existing theory of tort liability, *except for* the injury requirement, must be met for medical monitoring liability to arise" and denied the defendants' motion for summary judgment on that claim. *Id.* at 39 (emphasis in original) (discussing *Bower v. Westinghouse Electric Corp.*, 522 S.E.2d 424 (W. Va. 1999)).

Federal Court Refuses to Certify Medical Monitoring Class

A federal district court has denied certification of medical monitoring classes for a second time in the same toxic tort cases. *See Rowe et al. v. E.I. du Pont de Nemours and Co.*, Nos. 06-1810, 06-3080 (D.N.J. July 29, 2009). The plaintiffs in two consolidated cases sought injunctive relief and medical monitoring damages for alleged contamination of water by perfluorooctanoic acid ("PFOA"). The court previously denied class certification on the medical monitoring claims generally, but the plaintiffs then sought certification on a more narrow basis under Fed. R. Civ. P. 23(c)(4), including whether class members were exposed to PFOA, whether PFOA is toxic, the seriousness of human diseases caused by PFOA, the value of early diagnosis of PFOA exposure, and the availability of medical monitoring for PFOA exposure. *Rowe*, Slip Op. at 3–4 n.1.

In rejecting the plaintiffs' narrowed motion for certification, the court noted that certification of particular issues under Rule 23(c)(4) is only proper if the other requirements of Rule 23(a) and (b) are first met. *Id.* at 4. The court's earlier denial under Fed. R. Civ. P. 23(b)(2) included a finding that medical monitoring was not appropriate for the "class as a whole" because the proposed class definition encompassed all persons potentially — as well as actually — exposed to PFOA, and therefore the plaintiffs could not proceed under Rule 23(c)(4). *Id.* at 5–6.

The court admonished the plaintiffs' counsel for not undertaking an inquiry to determine which plaintiffs had been exposed to PFOA prior to seeking certification a second time. *Id.* The court further reasoned that even if the plaintiffs had determined individual exposure, "liability and damages in the context of medical monitoring cannot be separated from one another, and the issue of liability would require individualized inquiries into the elements of significant exposure, increased risk of disease and necessity of monitoring." *Id.* at 6–9. Accordingly, the court denied certification because it would not advance the litigation or result in a significant gain in efficiencies. *Id.* at 10–11.

IV. CAUSATION

Tenth Circuit Dismisses Radiation Claims Due to Insufficient Allegations, Evidence

The Tenth Circuit affirmed a district court's dismissal of claims for injuries and medical monitoring allegedly caused by radiation released during the mining and milling of uranium in Colorado. *See June v. Union Carbide Corp.*, No. 07-1532 (10th Cir. Aug. 21, 2009), *available at* http://www.ca10.uscourts.gov/opinions/07/07-1532.pdf. Twenty-seven plaintiffs alleged that they had suffered from actual diseases and sought compensatory damages, and 152 plaintiffs claimed an elevated risk of disease due to radiation exposure and sought medical monitoring damages. *June*, Sip Op. at 7–8. All plaintiffs sued under the Price-Anderson Act of 1957, which gives federal district courts jurisdiction over claims "resulting from a nuclear incident" and

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provides that courts apply state substantive law unless it conflicts with the statute. *Id.* at 6–7.

On a motion for summary judgment, the district court held that Colorado tort law required such claims to meet both the "but-for" and "substantial factor" causation tests and dismissed the claims of actual injury because the complaint did not address but-for causation. *Id.* at 8. The district court also dismissed the medical monitoring claims on the basis that plaintiffs had not alleged a "bodily injury" sufficient for federal court jurisdiction under the Price-Anderson Act. *Id.* at 9.

Although it affirmed the district court's result, the Tenth Circuit differed in its analysis of whether Colorado law required application of the substantial factor test in cases involving multiple potential causes. The Tenth Circuit found no definitive expression of Colorado law on point and noted that the Restatement (Third) of Torts had departed from the Restatement (Second)'s acceptance of the substantial factor test (in essence, because the test was easily misapplied). *Id.* at 24. The Tenth Circuit adopted the Restatement (Third)'s rejection of the substantial factor test and concluded that "it would be too adventurous . . . to assume that [the Supreme Court of] Colorado would depart from the Restatements." *Id.* at 24–25.

As to the medical monitoring claims, the Tenth Circuit agreed with the district court that "bodily injury" under the Price-Anderson Act must require something more than the exposure to radiation itself or the term would otherwise be rendered meaningless. *Id.* at 36–37, 42.

V. COMMON LAW

First Circuit Affirms Dismissal of Failure to Warn Claim Against Chemical Suppliers

The First Circuit has affirmed the dismissal of a case against polyvinyl chloride ("PVC") suppliers and a chemical industry trade association, holding that the defendants owed the decedent no duty to warn and that there was insufficient evidence to support the plaintiffs' fraud and conspiracy claims. *See Taylor et al. v. American Chemistry Council et al.*, 576 F.3d 16 (1st Cir. Aug. 3, 2009), *available at* http://www.ca1.uscourts.gov/pdf.opinions/07-2422P-01A.pdf. The plaintiffs brought wrongful death claims against the decedent's former employer (a PVC manufacturer), the former employer's backup PVC suppliers, and the trade association that published the material safety data sheets ("MSDS") at issue. The former employer was no longer a party to the action at the time of the grant of summary judgment by the district court. *See Taylor*, Slip Op. at 8–10.

Under Massachusetts law, a supplier of a product has a duty to warn foreseeable users of dangers about which the supplier knows or has reason to know *unless*, under the "sophisticated user" defense, the user appreciates the danger to the same extent as a warning would provide. *Id.* at 12–13. The First Circuit held that, under Massachusetts law, the sophisticated user defense does not require a defendant to demonstrate that it reasonably relied on an intermediate party to warn end users, *id.* at 14–18, and that the decedent's former employer qualified as a sophisticated user, *id.* at 19–27.

On the fraud claim, the First Circuit affirmed the district court's grant of summary judgment on the grounds that the plaintiffs had not adduced any evidence that the PVC supplier defendants, as opposed to the trade association, were responsible for the contents of the MSDS. *Id.* at 30–35. Likewise, on the civil conspiracy claim, the Circuit affirmed the district court's grant of summary judgment due to a lack of evidence that the suppliers had the requisite unlawful intent. *Id.* at 38–40.

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VI. JURY INSTRUCTIONS

Tennessee Court Vacates Jury Award for Improper Jury Instructions on Fear of Cancer

Following a *per curiam* remand by the United States Supreme Court, *CSX Transp. v. Hensley*, 129 S. Ct. 2139 (2009), the Tennessee Court of Appeals held that erroneous jury instructions on fear of cancer constituted harmful error and has ordered a new trial on damages. *See Hensley v. CSX Transp., Inc.*, No. E2007-00323-COA-RV-CV (Tenn. Ct. App. Aug. 26, 2009), *available at* http://www.tsc.state.tn.us/OPINIONS/TCA/PDF/093/Thurston%20Hensley%20v%20CSX%20Transportation%20OPN.pdf. At the trial level, a jury awarded $5 million to a 30-year railroad employee for injuries from exposure to asbestos and solvent chemicals, and the Tennessee Court of Appeals affirmed the verdict in 2008. *Hensley,* Slip Op. at 1.

The defendant appealed, and the Supreme Court of the United States held that the trial court erred by failing to instruct the jury that fear-of-cancer damages are only recoverable under the Federal Employees Liability Act if the fear is "genuine and serious." *Id*. The Tennessee Court of Appeals concluded that the Supreme Court did not decide whether the failure to give the instruction was harmless, which would require reversal and remand, and therefore analyzed that issue itself. *Id*. at 3–4.

In deciding whether the missing instruction constituted harmless error, the state court applied the federal harmless error rule as set forth in *United States v. Benitez*, 542 U.S. 74 (2004), which requires a probability of a different result "sufficient to undermine confidence in the outcome." *Hensley*, Slip Op. at 5–6. Under that standard, the court interpreted the amount of the damages award and the closeness of the evidence as indicative that the instructional error may have contributed to "some overcompensation." *Id*. at 6.

In addition, the court found little support in the trial court record for a "genuine and serious" fear of cancer and further noted that the Supreme Court's holding suggested that the missing instruction was not sufficiently covered in the trial court's other jury instructions. *Id*. at 7–8. Finally, the subject matter of the missing instruction, while not the "heart" of the case, was a "vital" matter upon which the jury probably based its award. *Id*. at 8–9.

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