ENVIRONMENTAL LITIGATION AND TOXIC TORTS
2008 Annual Report[1]

I. PUNITIVE DAMAGES

The United States Supreme Court issued a landmark ruling limiting punitive damages that may provide new tools for defendants facing punitive damages in all civil cases. In the latest chapter of the long-running *Exxon Valdez* saga, the Supreme Court overturned a $2.5 billion punitive damages award assessed against Exxon for the 1989 *Valdez* oil spill, holding that the award is excessive under maritime common law.[2] Justice Souter announced for the 5-3 majority that, under maritime law, the upper limit for punitive damages is a 1:1 ratio to compensatory damages. Based on this holding, Exxon's punitive damages for the *Valdez* oil spill, which were previously reduced from $5 billion to $2.5 billion by the United States Court of Appeals for the Ninth Circuit, will now be a maximum of $507.5 million, the amount of compensatory damages awarded by the jury.[3] Although the Court's ruling was limited to maritime cases, its reasoning was not. It is likely that defendants facing punitive damages in other contexts will rely on the High Court's general concern regarding excessive and unpredictable punitive damage awards, and courts handling non-maritime cases may also limit punitive damages to an amount equal to or less than compensatory damages.

Unlike previous decisions in which the Court examined punitive damage awards in light of constitutional due process standards, here the Court considered the issue under federal maritime jurisprudence.[4] Justice Souter, writing for the majority, defended the policy-making nature of the opinion by noting that the Court was "acting here in the position of a common law court of last review, faced with a perceived defect in a common law remedy."[5] According to Justice Souter, punitive damage awards created by judges, along with runaway juries and a lack of legislative standards, have led to unpredictable outcomes and outlier awards.[6] The Court found that the best way to cure that defect in this case was to impose a 1:1 ratio of compensatory-to-punitive damages as the upper limit for punitive damages.[7] Notably, the compensatory-to-punitive damages ratio adopted by the Court is based on a broad rationale derived from state common law and statutory precedents that aim to ensure fairness and consistency for such awards with respect to all types of legal disputes. Thus, although it was clothed as a narrow holding of maritime law, lower courts may find the underlying rationale—and the 1:1 ratio of compensatory to punitive damages—applicable in other common law cases involving punitive damages.

Addressing the certified questions of whether Ohio's statutory caps on non-economic and punitive damages facially violate various provisions of the Ohio State Constitution, the Ohio Supreme Court ruled in *Arbino v. Johnson & Johnson* that, in most

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[1]This report was edited by Daniel Krainin of Beveridge & Diamond, P.C., New York, New York and Patrick Jacobi of Beveridge & Diamond, P.C., Washington, D.C. Authors of this report included Mr. Krainin; Mr. Jacobi; and Graham St. Michel of Beveridge & Diamond, P.C., Washington, D.C. The authors also wish to thank the following for their assistance: Matthew Gerhart; Sean Roberts; Thomas Singer; Elena Kobrinski; Jacqueline Bennett-Vroman; and Toren Elsen of Beveridge & Diamond, P.C.; as well as Samantha Williams of Columbia Law School.

[2]Exxon Shipping Co. v. Baker, 128 S. Ct. 2605 (2008).

[3]*Id.* at 2634.

[4]*Id.* at 2626-27.

[5]*Id.* at 2629.

[6]*Id.*

[7]*Id.* at 2632-34.

tort suits, the caps should be upheld.[8] In 2005, Ohio enacted limits on both noneconomic damage awards and punitive damage awards in tort actions.[9] The plaintiff in *Arbino* argued that the limitations violated the provisions in the Ohio Constitution related to the right to trial by jury, a remedy, an open court, due process, equal protection, and the notion of separation of powers. Because the state-enacted damages caps only limit awards as a matter of law without altering a jury's findings of fact or eliminating a remedy altogether, the court concluded that the caps do not violate the right to due process, a remedy, or an open court.[10] The court also held that the caps do not violate due process or equal protection because they are rationally related to the legislature's findings that the costs and uncertainty of civil litigation were harming the state economy and the public welfare.[11] Although the tasks of finding facts and assessing damages in a case are primarily judicial functions, the court concluded that these are not exclusively judicial functions and recognized the legislature's ability to limit damages for certain types of cases.[12]

In *Santa Clara Valley Water District v. Olin Corp.*, the United States District Court for the Northern District of California ruled that a water management agency could pursue punitive damages in a negligence claim involving perchlorate contamination that required the agency to take remedial action.[13] The Santa Clara Valley Water District (SCVWD) claimed that, in response to perchlorate contamination, it had spent over $4 million to sample water production wells and supply alternative drinking water to customers.[14] Identifying the alleged source of the contamination as an industrial facility, the water district sued to recover not only the response costs but also punitive damages under theories of negligence and restitution, and the defendant countered that SCVWD was barred from seeking punitive damages because the agency did not suffer any direct injury from the contamination.[15] To be eligible for punitive damages in California, a claimant must demonstrate not only a direct injury but also clear and convincing evidence of malice, oppression, or fraud by the defendant. On the negligence claim, the court found that the water district suffered a direct injury, sufficient to support a finding of malice because of the 12-year period in which the defendant knew of the contamination but refused to act.[16]

II. CLASS ACTION

In *Rhodes v. E.I. Du Pont de Nemours & Co.* (*Rhodes I*),[17] the United States District Court for the Southern District of West Virginia followed the lead of a handful of other courts in establishing what now appears to be the trend of holding a *Daubert*[18] hearing prior to deciding whether to certify a class of plaintiffs. (In the ensuing opinion (*Rhodes II*),[19] which is discussed in the "Medical Monitoring" section of this chapter, the

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[8]880 N.E.2d 420 (Ohio 2007).
[9]OHIO REV. CODE § 2315.18 (2005) (non-economic); OHIO REV. CODE § 2315.21 (2005) (punitive).
[10]*Arbino*, 880 N.E.2d at 432-33, 441-42.
[11]*Id.* at 436-37, 442-43.
[12]*Id.* at 438, 441, 443.
[13]No. 07-CV-03756 (N.D. Cal. Aug. 18, 2008).
[14]*Id.* at 2.
[15]*Id*. at 2-4.
[16]*Id*. at 4.
[17]No. 6:06-cv-00530, 2008 U.S. Dist. LEXIS 46159, at *2 (S.D. W. Va. June 11, 2008).
[18]Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993).
[19]Rhodes v. E.I. Du Pont de Nemours & Co. (*Rhodes II*), 253 F.R.D. 365 (S.D. W. Va. 2008).

same court denied class certification, finding that the plaintiffs' fact and expert evidence failed to prove an exposure and injury distinct from that of the general population.)

The *Daubert* hearing in *Rhodes I* focused on whether a putative class of plaintiffs in a toxic tort action had satisfied its burden of meeting the class certification requirements set out in Federal Rule of Civil Procedure 23. The plaintiffs argued for class certification based, in part, on a common medical monitoring cause of action for those plaintiffs who received drinking water from the local utility board in Parkersburg, West Virginia, and who allegedly were exposed to a chemical known as C-8 in the water.[20] Because West Virginia recognizes a cause of action for medical monitoring only where claimants prove that the expenses are necessary and reasonably certain, the court concluded in *Rhodes I* that, as alleged, the individual issues related to each plaintiff's potential medical monitoring needs were inconsistent with the requirements of Rule 23—particularly the "cohesiveness" requirement that courts have interpreted to be a part of Rule 23(b)(2).[21] Accordingly, the court reasoned that a *Daubert* hearing was necessary because the validity of the plaintiffs' assertions of commonality and cohesiveness depended solely on the opinions of the plaintiffs' experts.[22]

In *Bullard v. Burlington Northern Santa Fe Railway Co.*, the United States Court of Appeals for the Seventh Circuit decided an issue of first impression at the federal appellate level and upheld a district court's decision to deny a motion to remand a suit brought by 144 individual plaintiffs from federal to state court, holding that federal jurisdiction for "mass actions" under the Class Action Fairness Act (CAFA)[23] can be determined any time after the filing of a complaint.[24] The defendants had previously removed the case to the United States District Court for the Northern District of Illinois pursuant to CAFA as a "mass action," which the court described as a suit involving the claims of 100 or more litigants where at least one plaintiff demands $75,000, the stakes of the entire action exceed $5 million, and minimal diversity of citizenship is present.[25] Despite conceding that the complaint met the substantive requirements of a "mass action," the plaintiffs nonetheless moved for remand back to state court, arguing that removal of a suit from state to federal court as a "mass action" under CAFA—as the defendants had previously succeeded in doing—was not proper absent a final pretrial order, typically issued on the eve of trial, that identifies the plaintiffs whose claims are, as described in CAFA, "proposed to be tried jointly."[26] Writing for the court, Chief Judge Easterbrook characterized the plaintiffs as seeking to maintain their "class action substitute" in state court through a "loophole" in CAFA, rejected the plaintiffs' arguments, and interpreted the definitions of "class action" and "mass action" in CAFA to be met if a complaint "is either filed as a representative suit or becomes a 'mass action' at any time."[27]

Focusing on the defendant's course of conduct, the United States District Court for the District of Connecticut granted a group of plaintiffs' motion for class certification in *Collins v. Olin Corp*.[28] The plaintiffs, neighboring property owners in Hamden, Connecticut, alleged claims under Superfund and state law against Olin Corp., which owned and operated a nearby facility from the 1930s to the 1950s. According to the plaintiffs' allegations, Olin disposed of waste from the facility in public landfills, despite

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[20] *Rhodes I*, 2008 U.S. Dist. LEXIS 46159, at *2, *16; *Rhodes II*, 253 F.R.D. at 373-74.
[21] *Rhodes I*, 2008 U.S. Dist. LEXIS 46159, at *5-*15; *Rhodes II*, 253 F.R.D. at 374.
[22] *Rhodes I*, 2008 U.S. Dist. LEXIS 46159, at*16-*18.
[23] 28 U.S.C. §§ 1332(d), 1453, 1711-15 (2006).
[24] 535 F.3d 759 (7th Cir. 2008).
[25] *Id.* at 761.
[26] *Id.* (quoting 28 U.S.C. § 1332(d)(11)(B)(i)).
[27] *Id*. at 762.
[28] 248 F.R.D. 95 (D. Conn. 2008).

knowing that the contents of the waste—arsenic, lead, and manufacturing waste—were hazardous and that the landfills would later be developed for residential purposes. Despite Olin's argument that classes should not be certified in mass tort actions and that establishing causation would require hundreds of individualized mini-trials, the court stressed, as the basis for granting certification, that the defendant's course of conduct was a predominant fact common to all plaintiffs.[29]

A number of courts denied class certification in major toxic tort or product liability actions in 2008. In the multi-district litigation of Teflon product liability claims, the United States District Court of Iowa denied a motion for class certification of twenty-three proposed classes of plaintiffs who had used DuPont cookware featuring non-stick cookware coatings (NSCC), which, plaintiffs alleged, can decompose and release harmful levels of perfluorooctanoic acid.[30] Instead of seeking damages for physical injuries, plaintiffs sought only economic damages and injunctive relief.[31] The district court ruled that the plaintiffs failed to satisfy the requirements of parts (a) and (b) of Federal Rule of Civil Procedure 23—typicality, cohesion, and the predominance of common issues and facts—as well as the implicit requirements of Rule 23, such as a clear definition of the class and that all representatives are members of the proposed class.[32] Among the court's many reasons for denial, the court noted that proposed class representatives could not document or remember whether they owned DuPont cookware with NSCC; did not allege physical injury as other class members did, potentially precluding the other class members' claims of physical injury under res judicata; and that the mere fact of ownership of DuPont non-stick cookware did not provide the cohesion necessary to satisfy Rule 23(b)(2).[33]

III. EXPERTS

A number of courts excluded expert testimony in 2008 because an expert failed to acknowledge the possibility that a disease had no known cause. For example, in *Perry v. Novartis Pharmaceutical Corp.*, the United States District Court for the Eastern District of Pennsylvania barred the testimony of two plaintiffs' experts due to the failure to account for such a possibility.[34] Without the experts' testimony, the plaintiffs could not prove that a prescription drug known as Elidel, manufactured by defendant Novartis, caused their child's non-Hodgkin lymphoma, and the court granted the defendants' motion for summary judgment.[35] With regard to specific causation, each expert surveyed the plaintiffs' exposure to certain risk factors; identified pimecrolimus, the active ingredient in Elidel, as the only risk factor present; and concluded that it caused lymphoma in the plaintiffs' child.[36] The court, however, rejected the experts' differential diagnosis (i.e., the determination of a diagnosis through medical analysis involving process of elimination) because it failed to consider the possibility that the cause of the lymphoma was unknown, or idiopathic.[37]

A number of courts also excluded testimony or granted summary judgment based on an expert's failure to deliver an opinion that would satisfy specific or even general causation in a manner that was scientifically reliable. In *Seaman v. Seacor Marine*

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[29] *Id*. at 104-06.
[30] *In re* Teflon Prod. Liab. Litig., 254 F.R.D. 354 (S.D. Iowa 2008).
[31] *Id.* at 357.
[32] *Id.* at 370.
[33] *Id.* at 361-62, 367-69.
[34] 564 F. Supp. 2d 452 (E.D. Pa. 2008).
[35] *Id.* at 473.
[36] *Id.* at 469.
[37] *Id.* at 469-71.

L.L.C., for example, the United States District Court for the Eastern District of Louisiana granted the defendant's motions to exclude the plaintiff's expert and for summary judgment on causation.[38] Plaintiff's suit alleged that occupational exposure to numerous toxic chemicals, including Ferox and diesel exhaust, caused his bladder cancer.[39] The court deemed the expert's testimony to be scientifically unreliable because the expert's "only knowledge about Ferox was gleaned from the MSDS [Material Safety Data Sheets]" and what the expert found when the expert "Googled [Ferox] on the internet," and because the expert possessed no knowledge on either the chemical composition of diesel exhaust or the plaintiff's exposure to diesel exhaust.[40] In terms of causation, the court rejected the expert's opinions because the expert did not offer a definitive link between the plaintiffs and the chemicals, admitted that the assessed link to cancer was based solely on two journal articles that were neither discussed nor cited in the expert's report or deposition, and admitted that he lacked knowledge about the amount of actual exposure involved.[41]

Departing from most federal and state court precedents, the Oregon Court of Appeals held in *Kennedy v. Eden Advanced Pest Technologies* that a medical diagnosis of "multiple chemical sensitivity" (MCS) has sufficient support in the scientific community to allow a jury to consider it.[42] To support the theory that pesticide exposure caused the alleged symptoms, the plaintiff submitted the testimony of a physician who had diagnosed the plaintiff with MCS and had determined that pesticide exposure exacerbated an alleged preexisting chemical sensitivity. The defendant countered with an expert who testified that MCS is not generally accepted by the medical community.[43] In ruling that the trial court should have allowed the MCS testimony, the appellate court noted the existence of "a controversy in the medical community about whether . . . MCS is a valid diagnosis,"[44] and stated that when qualified experts disagree about the validity of medical diagnoses or other scientific evidence, "judges are in no better position to resolve that dispute than are juries."[45] That the defendant offered expert testimony attacking the credibility of scientific conclusions regarding MCS did not justify exclusion where the plaintiff offered evidence that "many legitimate entities view MCS as a legitimate diagnosis."[46]

With respect to expert discovery issues, the United States Judicial Conference's Advisory Committee on Civil Rules proposed two amendments to Rule 26 of the Federal Rules of Civil Procedure in mid-2008.[47] One amendment would limit discovery of draft expert disclosure statements or reports as well as many communications between expert witnesses and counsel. The Committee has found fault with the current rule, which allows discovery of such drafts and communications, because it has led to protracted discovery disputes over drafts or communications that might undermine an expert's testimony. These disputes have driven the cost of litigation higher in numerous ways, from time-consuming depositions to counsel retaining both a testifying and consulting

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[38]564 F. Supp. 2d 598 (E.D. La. 2008).
[39]*Id.* at 599.
[40]*Id.* at 601.
[41]*Id.* at 604.
[42]193 P.3d 1030 (Or. App. 2008).
[43]*Id.* at 1035-38.
[44]*Id.* at 1039.
[45]*Id.* at 1042.
[46]*Id.* at 1040.
[47]HONORABLE LEE H. ROSENTHAL, CHAIR, STANDING COMM. ON RULES OF PRACTICE & PROCEDURE, REPORT OF THE CIVIL RULES ADVISORY COMM. (June 30, 2008), *available at* http://www.uscourts.gov/rules/Reports/CV_Report.pdf.

expert.[48] The proposed rule would still require disclosure of lawyer-expert communications related to compensation, as well as communications related to the identification of facts and assumptions considered by the expert in forming opinions.

The other proposed change stems from confusion as to whether courts should impose the existing rule requiring reports on those experts who fall outside the parameters of Rule 26(a)(2)(B). Typically, these experts are treating physicians, whom some courts have required to submit a full report.[49] Under the current rule, expert witnesses must prepare and disclose a written report regarding their testimony only if the witness "is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony."[50] The amended rule would require parties to disclose a document of much less breadth and scope than a full expert report—a summary of the expected subject matter, facts, and opinions—for any witness not covered by Rule 26(a)(2)(B) if that witness is expected to be used at trial to present evidence under Federal Rule of Evidence 702, 703, or 705. The Committee believes this amendment would foster better preparation for witness depositions and, in some cases, would eliminate the need for depositions altogether.[51]

IV. MEDICAL MONITORING

In *Rhodes v. E.I. Du Pont de Nemours & Co.* (*Rhodes II*),[52] the United States District Court for the Southern District of West Virginia denied certification of a putative class, finding that the plaintiffs' fact and expert evidence failed to prove an exposure and injury distinct from that of the general population. In *Rhodes II*, the court evaluated whether the plaintiffs could "commonly prove that each and every class member has been exposed to [the chemical known as] C-8 above so-called 'background levels' of exposure, that is, exposure levels experienced by the general population."[53] Discounting the plaintiffs' expert's reliance on a risk assessment, the court reasoned that "a risk assessment overstates the risk to a population to achieve its protective and generalized goals," whereas the court must evaluate "proximate causation as to each individual in the proposed class."[54] Similarly, the court rejected the plaintiffs' second expert's opinion as relating only to the general population, not the plaintiffs in the case, because he relied on general epidemiological analyses and a study showing that C-8 can cause various diseases.[55] Because it would destroy the cohesiveness of the class, the court also rejected the expert's notion that individual determinations of injury could be deferred until later in the trial.[56]

In *Lowe v. Phillip Morris USA*, the Supreme Court of Oregon rejected a smoker's claim that tobacco companies should be liable for costs of medical monitoring where the plaintiff failed to allege a present physical injury.[57] The plaintiff, who smoked the equivalent of one pack of cigarettes every day for more than five years, sought monitoring damages either for the increased risk of developing cancer or for the costs of medical care to determine the extent of any potential injury and contended that the economic costs of such monitoring constituted a present harm giving rise to a negligence

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[48] *Id.* at 3-4.
[49] *Id.* at 2.
[50] Fed. R. Civ. P. 26(a)(2)(B).
[51] Rosenthal, *supra* note 47, at 2.
[52] 253 F.R.D. 365 (S.D. W. Va. 2008).
[53] *Id*. at 374-75.
[54] *Id*. at 378.
[55] *Id.* at 378-79.
[56] *Id.* at 380.
[57] 183 P.3d 181 (Or. 2008).

claim.[58] Affirming the appellate court decision, the Oregon Supreme Court ruled against the plaintiff on both theories.[59] In response to the claim of increased risk of future physical injury, the court stated that a cause of action does not accrue until a plaintiff suffers an actual loss and emphasized that the plaintiff had alleged neither present physical harm nor the certainty of future physical harm.[60] On economic loss, the court noted that Oregon precedent does not recognize negligence liability for purely economic loss and concluded that contrary decisions from other jurisdictions do not provide adequate grounds for overruling Oregon's negligence requirements.[61]

V. CITIZEN SUITS

In a case of first impression, the United States Court of Appeals for the Fifth Circuit held that the citizen suit provisions of the Clean Air Act (CAA) do not provide a cause of action for citizens alleging pre-permit, preconstruction or pre-operation CAA violations.[62] In *Cleancoalition v. TXU Power*, the defendant applied for a preconstruction permit from the state permitting authority. After the state reviewed the defendant's permit application and issued a draft permit, the state conducted a hearing and found the draft permit complied with all relevant regulatory requirements.[63] Before the final permit issued, however, the plaintiffs filed a lawsuit claiming the permit application failed to comply with Prevention of Significant Deterioration regulatory requirements under the CAA. The court affirmed the district court's dismissal, holding that the citizen suit provisions do not provide a cause of action where a state has yet to issue a preconstruction permit. The court explained that a facility cannot be deemed to have violated "any condition or requirement of a permit" merely by filing an incomplete permit application.[64] Additionally, the court interpreted the provision authorizing citizen suits against entities that construct or propose to construct major facilities under the CAA without a permit as authorizing suits against only those entities that propose or construct a facility without any permit whatsoever, and not against entities in the process of obtaining a permit.[65]

Two notable judicial opinions considered the scope of section 113(h) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and its preclusive effect on citizen suits brought under the Resource Conservation and Recovery Act (RCRA). CERCLA section 113(h) bars judicial review of challenges—often interpreted to include RCRA citizen suits—suits to ongoing cleanup actions "selected under" CERCLA section 104.[66] In *OSI v. United States*,[67] the United States Court of Appeals for the Eleventh Circuit considered whether section 113(h) precluded a RCRA citizen suit because the subject property was a "federal facility," and therefore the cleanup action was "selected under" CERCLA section 120 instead of section 104.[68] The court held that the suit was barred, interpreting section 120 to authorize activity only at

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[58] *Id*. at 182-83.
[59] *Id*. at 187.
[60] *Id*. at 182-85.
[61] *Id*. at 186.
[62] 536 F.3d 469 (5th Cir. 2008).
[63] *Id.* at 470.
[64] *Id.* at 474.
[65] *Id.* at 478-79.
[66] Comprehensive Environmental Response, Compensation, & Liability Act (CERCLA) § 113(h), 42 U.S.C. § 9613(h) (2000); CERCLA § 104, 42 U.S.C. § 9604 (2000).
[67] 525 F.3d 1294 (11th Cir. 2008).
[68] CERCLA § 120 purports to cover application of CERCLA to the federal government.

sites listed on the National Priorities List (NPL) which the site at issue was not.[69] Although the court applied the section 113(h) bar, it left undecided whether a remedial action at a federal facility that *was* listed on the NPL would be deemed "selected under" section 120 of CERCLA and therefore not subject to section 113(h).[70]

Four months later, in *River Village West L.L.C. v. Peoples Gas Light & Coke Co.*, a federal district court interpreted section 113(h) broadly, holding that it precluded a RCRA citizen suit filed *before* the initiation of a government cleanup action.[71] That court specifically noted that section 113(h) makes no reference to timing and that its preclusive effect applies to *any* challenge to an ongoing cleanup action.

Two similar citizen suits brought under the Clean Water Act (CWA) resulted in divergent outcomes. In *Blackwarrior Riverkeeper v. Cherokee Mining*, the plaintiffs provided the prerequisite notice of intent to sue and filed suit seven days after the state initiated an enforcement action against the defendant.[72] The state enforcement action resulted in a consent decree, prompting the defendant to seek dismissal of the citizen suit. The United States Court of Appeals for the Eleventh Circuit denied the defendant's request, finding that although the CWA would bar a citizen suit where the notice of intent to sue follows commencement of a government enforcement action, the bar does not apply in this case because the required notice preceded commencement of a government enforcement action.[73]

By contrast, in a case involving similar facts, the United States Court of Appeals for the Fifth Circuit applied the constitutional doctrine of mootness and reached a different outcome. In *Environmental Conservation Organization v. City of Dallas*, the defendant entered into a consent decree with the EPA after the plaintiff filed a citizen suit, and the court deemed the citizen suit moot unless the plaintiff could establish a "realistic prospect" that the violations alleged in the compliant would continue despite the government-backed consent decree.[74] The plaintiff was unable to meet this burden, and the court therefore dismissed the suit.

VI. COMMON LAW

In *Rhode Island v. Lead Industries Ass'n*, the Rhode Island Supreme Court unanimously overturned a landmark verdict from 2006 that found three former lead paint companies liable for creating a public nuisance by manufacturing and selling lead paint decades earlier.[75] The 2006 verdict had marked the first time in the United States that a jury imposed liability on lead paint manufacturers for creating a public nuisance.[76] In overturning the lower court's decision, the Rhode Island Supreme Court agreed with the defendants that the State's public nuisance claim "should have been dismissed at the outset" because the State did not allege facts that could have demonstrated that the

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[69] *OSI*, 525 F.3d at 1298-99.

[70] *Id.* at 1299 n.2. The Eleventh Circuit opinion comports with the view of the United States Court of Appeals for the Seventh Circuit in *Pollack v. Dep't of Defense*, 507 F.3d 522 (7th Cir. 2007), where the federal facility was not listed on the NPL. However, the United States Court of Appeals for the Ninth Circuit has held that challenges to federal cleanups for sites listed on the NPL are not subject to CERCLA § 113(h). *See* Fort Ord Toxics Project v. Cal. EPA, 189 F.3d 828 (9th Cir. 1999).

[71] No. 05 C 2103, No. 06 C 4465, No. 06 5901, 2008 U.S. Dist. LEXIS 77796 (N.D. Ill. Sept. 25, 2008).

[72] 548 F.3d 986 (11th Cir. 2008).

[73] *Id.* at 992.

[74] 529 F.3d 519 (5th Cir. 2008).

[75] 951 A.2d 428 (R.I. 2008).

[76] *Id.* at 434.

"defendants' conduct interfered with a public right or that defendants were in control of lead pigment at the time it caused harm to children in Rhode Island."[77] The court also noted that public nuisance law "never before has been applied to products, however harmful" and that products liability law, which "has its own well-defined structure," is the proper means of commencing a lawsuit against a manufacturer of lead paint for the sale of an allegedly unsafe product.[78] "It is essential," the court stated, that public nuisance claims and products liability claims remain "two separate and distinct causes of action."[79]

VII. VAPOR INTRUSION

In *United States v. Apex Oil*, the United States District Court for the Southern District of Illinois held that chemical vapors emanating from a contaminated refinery may present an imminent and substantial endangerment to health under the Resource Conservation and Recovery Act (RCRA), and the refinery owner was therefore subject to an injunction to monitor and abate the contamination.[80] The court's broad interpretation of RCRA's endangerment provision may open the door for similar suits attempting to hold companies liable for so-called vapor intrusion—chemical vapors emanating from contaminated sites.

Emphasizing courts' broad authority to grant relief under RCRA, the court found that the vapor intrusion was sufficient to establish liability under RCRA because, based on clear evidence presented by the plaintiff, the Environmental Protection Agency (EPA), and an Illinois Department of Health Study, the vapors "may present an imminent and substantial endangerment to health."[81] Noting that the operative word was "may," the court stressed that the EPA need demonstrate only "a potential for an imminent threat of serious harm."[82] The court interpreted "imminent" broadly, stating that imminence is not limited only to emergency situations but also refers to any threat that "is near-term even though the perceived harm will only occur in the distant future."[83] The court also defined "substantial" to encompass "any reasonable cause for concern that someone or something may be exposed to a risk of harm . . . if remedial action is not taken."[84] In its conclusions of law, the court found that the vapors emanating from the hydrocarbon-contaminated soils exposed residents to potential adverse health effects that presented an imminent and substantial endangerment to health.[85]

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[77] *Id*. at 443.
[78] *Id*. at 456.
[79] *Id*. at 457.
[80] No. 05-CV-242-DRH 2008, U.S. Dist. LEXIS 59973 (S.D. Ill. July 28, 2008).
[81] *Id*. at *199.
[82] *Id*. at *200.
[83] *Id*. at *202.
[84] *Id*. (quoting United States v. Union Corp., 259 F. Supp. 2d 356, 400 (E.D. Pa. 2003)).
[85] *Id*. at *166-*79.