ENVIRONMENTAL LITIGATION AND TOXIC TORTS
2009 Annual Report[1]

I. CLIMATE-BASED NUISANCE ACTIONS

In a one-month span in the fall of 2009, three federal courts addressed whether plaintiffs may rely on nuisance law (among other causes of action) to redress plaintiffs' claimed injuries resulting from defendants' alleged contribution to global warming or climate change. Two federal circuit courts recognized standing for plaintiffs, but a federal district court declined to do the same.

In *Connecticut v. American Electric Power Co.* (*AEP*), the Second Circuit held that states may bring public nuisance actions against privately-owned electric utilities for greenhouse gas (GHG) emissions.[2] The decision overturned a 2005 district court order that had dismissed the claims as presenting a non-justiciable political question.[3] The Second Circuit held 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.[4] Expanding upon *Massachusetts v. EPA*,[5] in which the U.S. Supreme Court found State standing under the parens patriae doctrine, the Second Circuit also found that states had a right to sue under traditional standing principles in the context of environmental law, relying on *Lujan v. Defenders of Wildlife*,[6] and its progeny.[7]

In *Comer v. Murphy Oil USA, Inc.*, the Fifth Circuit agreed with the Second Circuit's *AEP* opinion.[8] *Comer* was filed against energy companies by Plaintiffs who owned property on the Gulf Coast and who alleged that climate change increased the intensity of Hurricane Katrina, which, in turn, damaged their property.[9] The district court found that the plaintiffs did not have standing and that the case raised non-justiciable political questions.[10] In its reversal, the *Comer* court applied the Article III "fairly traceable" standard to the standing issue and relied on the Supreme Court's observation in *Massachusetts v. EPA* that "rising ocean temperatures may contribute to the ferocity of hurricanes."[11] The court reasoned that since *Massachusetts v. EPA* met the fairly traceable standard, then the case before it did as well, given that the causal chain was "virtually identical."[12]

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[2]Connecticut v. Am. Elec. Power Co., 582 F.3d 309, 392 (2d Cir. N.Y. 2009) [hereinafter *AEP*].

[3]Connecticut v. Am. Elec. Power Co., 406 F. Supp. 2d 265 (S.D.N.Y. 2005).

[4]*AEP*, 582 F.3d at 392–93.

[5]Massachusetts v. EPA, 549 U.S. 497, 498 (2007).

[6]Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).

[7]*AEP*, 582 F.3d at 333–48. The Defendants-Appellees in *AEP* filed a petition for rehearing en banc on November 5, 2009, which the Second Circuit granted on February 26, 2010.

[8]Comer v. Murphy Oil USA, Inc., *585 F.3d 855 (5th Cir. 2009).*

[9]*Id*. at 859–61.

[10]*Id. at 865.*

[11]*Id.* at 864–68.

[12]*Id.* at 865.

Taken together, *Comer* and *AEP* expand upon *Massachusetts v. EPA* in three significant ways. First, while *Massachusetts v. EPA* relied heavily on the parens patriae doctrine to find special standing for state plaintiffs, *Comer* and *AEP* found standing for private landowners and land trusts, respectively. Second, with regard to the political question doctrine, the Fifth Circuit in *Comer* agreed fully with the *AEP* decision that climate-change nuisance actions pose no issues that would render the court unable to adjudicate actions brought before it. Third, where *Massachusetts v. EPA* and *AEP* addressed injunctive relief only, *Comer* establishes a precedent that would allow plaintiffs to seek compensatory and punitive damages for injury allegedly caused by climate change, which is likely to encourage additional climate-related lawsuits.

The U.S. District Court for the Northern District of California, however, reached the opposite conclusion in *Native Village of Kivalina v. Exxon Mobil Corp.*[13] In *Kivalina*, the court held that Article III standing was not present and that the claims presented non-justiciable political questions.[14] *Kivalina* arose from a suit filed by the Alaskan village of Kivalina against more than twenty oil and power generation companies for GHG emissions that allegedly led to a rise in sea level, which was resulting in the gradual submersion of the low-lying village and the forced relocation of its indigenous residents.[15] The *Kivalina* court expressly disagreed with *AEP*, finding that although the Second Circuit concluded climate change could "be addressed through principled adjudication," the Northern District Court of California was "not so sanguine."[16] While the court agreed with the Second Circuit that the case did not present issues of foreign policy committed to another branch of government, it decided that the case could not be adjudicated using the tools available to the court.[17] On standing, the *Kivalina* Court applied the "fairly traceable" standard, but in contrast to *Comer*, concluded that Kivalina's injuries were not fairly traceable to GHGs emitted by the defendants.[18]

II. CLASS ACTIONS

In a decision that could significantly limit federal removal jurisdiction under the Class Action Fairness Act of 2005 (CAFA), the Ninth Circuit in *Tanoh v. Dow Chemical Co.* affirmed a federal district court's remand of seven related toxic tort actions, refusing to rule that the actions constituted a single "mass action" under CAFA.[19] CAFA extends federal jurisdiction to mass actions — defined as civil actions "in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact," the aggregate amount of all plaintiffs' alleged damages exceeds $5 million, and at least one class member is a citizen of a state diverse from the defendant; but CAFA also specifies that claims joined by motion of a defendant should not be included in a mass action.[20] In 2006, 664 workers on

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[13]Native Vill. of Kivalina v. Exxon Mobil Corp., 663 F. Supp. 2d 863 (N.D. Cal. 2009).
[14]*See generally id.*
[15]*Id.* at 869.
[16]*Id.* at 875.
[17]*Id.* at 874–75.
[18]*Id.* at 880. *See also* Ctr. for Biological Diversity v. DOI, 563 F.3d 466, 476–79 (D.C. Cir. 2009) (finding procedural standing for a citizen group's climate change claims, which challenged a government leasing plan for offshore oil and gas development, but limiting, in what may be dicta, the finding of standing in Massachusetts v. EPA to only those instances where a sovereign entity sues to protect its own particular harmed interests and not to protect a generalized harm that is widely shared).
[19]Tanoh v. Dow Chem. Co., 561 F.3d 945, 950 (9th Cir. 2009), *cert. denied*, 130 S. Ct. 187 (2009).
[20]28 U.S.C. § 1332(d)(2), (d)(11)(B)(i).

fruit plantations in West Africa filed seven actions against Dow and several other defendants in Los Angeles Superior Court alleging negligence, product liability, fraud, and battery related to on-the-job exposure to a pesticide containing 1,2-dibromo-3-chloropropane (DBCP).[21] Dow removed the case to federal court and opposed plaintiffs' motion to remand, arguing, among other things, that the separate actions together qualified as a mass action removable under CAFA and that plaintiffs were essentially gaming the system.[22] The U.S. District Court for the Central District of California rejected these arguments and remanded the case to state court. On appeal of the remand, the Ninth Circuit relied on the plain language and legislative history of CAFA to conclude that the "fairly narrow" mass action provision did not apply to the plaintiffs' claims because Congress considered and rejected federal jurisdiction for claims joined by motion of a defendant.[23]

In contrast to the result reached by the Ninth Circuit in the *Tanoh* case, the Sixth Circuit held in *Freeman v. Blue Ridge Paper Products, Inc.* that federal jurisdiction was proper where the same group of plaintiffs had divided their claims by time period into five separate lawsuits in an effort to avoid federal jurisdiction under CAFA.[24] In a prior lawsuit, the plaintiffs, who owned land downstream from a paper mill, won $2 million in damages from the defendant for injuries suffered between 1999 and 2005.[25] In October 2005, the same plaintiffs filed an identical lawsuit in state court against the same defendant, except that the lawsuit alleged damages that had accrued since the previous trial ended in August 2005. Each plaintiff sought $74,000 in damages and the class sought less than $5 million in damages. In the next two years, after removal, remand, and an amendment to the original complaint, the plaintiffs filed four new complaints alleging the same operative facts for separate six-month periods and seeking $74,000 in damages per plaintiff and less than $5 million for plaintiffs as a class.[26] After removal of the four new cases to federal court, the district court remanded all five consolidated cases to state court because the statutory deadline for removal of the original case had expired, and because the other four cases did not meet the amount in controversy requirement under CAFA. The defendants appealed the federal district court's remand. The Sixth Circuit held that all five cases must be aggregated for purposes of determining the amount in controversy; therefore, the district court should treat the case as if the plaintiffs claimed $24.5 million in damages.[27] The Sixth Circuit's decision in *Freeman* is distinguishable from the Ninth Circuit's decision in *Tanoh* (discussed above) in that *Freeman* involved multiple actions filed by the same plaintiffs, whereas *Tanoh* involved multiple actions filed by different groups of plaintiffs.

The Tenth Circuit explored CAFA's "local controversy exception" in *Coffey v. Freeport McMoran Copper & Gold*.[28] Plaintiffs filed a putative class action in Oklahoma State court asserting state-law claims based on the defendants' alleged contamination of their property through the operation of defendant Blackwell Zinc Company's (Blackwell) smelter in Oklahoma. Defendants removed the action to federal court, and the plaintiffs then sought to remand it back to state court.[29] Despite meeting CAFA's requirements for federal jurisdiction, the district court held that plaintiffs met the three main requirements for CAFA's local controversy exception to federal jurisdiction: (1) all of the members of

[21] *Tanoh*, 561 F.3d at 950–51.
[22] *Id.* at 952–57.
[23] *Id.* at 952–53.
[24] Freeman v. Blue Ridge Paper Prods., Inc., 551 F.3d 405 (6th Cir. 2008).
[25] *Id.* at 406.
[26] *Id.* at 407.
[27] *Id.* at 407–09.
[28] Coffey v. Freeport McMoran Copper & Gold, 581 F.3d 1240 (10th Cir. 2009).
[29] *Id.* at 1241–42.

the plaintiff class are citizens of the state in which the action was originally filed (Oklahoma); (2) the principal injuries occurred in that state; and (3) there is at least one "local defendant" from whom significant relief is sought, whose alleged conduct forms a significant basis of the claims, and who is a citizen of the state in which the action was originally filed.[30] On appeal, the defendants argued that Blackwell was neither a defendant from whom significant relief was sought nor a citizen of the State.[31] The Tenth Circuit agreed with the district court that Blackwell's principal place of business was in Oklahoma due to significant transactions in the State and that it qualified as a defendant from which significant relief was sought, even though Blackwell had no assets to satisfy a potential judgment.[32]

Outside of CAFA, federal courts issued a number of significant opinions on class certification in toxic tort cases. For example, in *Kelecseny v. Chevron U.S.A., Inc.*, the U.S. District Court for the Southern District of Florida denied a motion for class certification in a putative class action brought against petroleum companies for the failure to adequately warn of the potential for damage to fiberglass fuel tanks and boat equipment allegedly caused by ethanol-blended gasoline.[33] The plaintiff sought certification of separate damages and warnings classes, but the court denied certification altogether.[34] Notably, for the warnings class, the court concluded that a class representative with pre-existing knowledge of the alleged danger could never have standing for injunctive relief in a failure to warn claim, and that, even if the class definition were narrowed to those unaware of any alleged danger, the court would still have to conduct individual inquiries of each owner's actual knowledge prior to using ethanol-blended gasoline.[35]

III. EXPERTS

Adopting the Third Circuit's differential diagnosis test, the Sixth Circuit in *Best v. Lowe's Home Centers, Inc.* reversed a lower court's exclusion of an expert witness and the resulting grant of summary judgment.[36] The plaintiff alleged injury from exposure to a chemical due to the actions of defendant's employee.[37] The plaintiff's expert offered causation testimony based on his analysis of the chemical's material safety data sheet, elimination of other potential causes, and the temporal relationship between the incident and the symptoms.[38] The district court excluded the expert testimony as speculative and unreliable.[39] Recognizing that "[n]ot every opinion that is reached via a differential-diagnosis method will meet the standard of reliability required" under *Daubert v. Merrell Dow Pharms.*,[40] the Sixth Circuit adopted the Third Circuit's three-prong test for proper differential-diagnosis testimony: (1) objective determination of the nature of the injury; (2) valid methodology to rule in one or more causes of the injury; and (3) use of standard diagnostic techniques to rule out alternative causes.[41] The court held that the plaintiff's

[30] *Id.* at 1243 (discussing 28 U.S.C. § 1332(d)(4)(A)(i)).
[31] *Id.* at 1244.
[32] *Id.* at 1245–46.
[33] Kelecseny v. Chevron U.S.A., Inc., 262 F.R.D. 660 (S.D. Fla. 2009).
[34] *Id.* at 666–82.
[35] *Id.* at 677–78.
[36] Best v. Lowe's Home Ctrs., Inc., 563 F.3d 171 (6th Cir. 2009).
[37] *Id.* at 175.
[38] *Id.* at 175–76.
[39] *Id.* at 176–78.
[40] Daubert v. Merrell Dow Pharms., 509 U.S. 579 (1993).
[41] *Best*, 563 F.3d at 176–79 (citing *In re* Paoli R.R. Yard PCB Litig., 35 F.3d 717 (3d Cir. 1994)).

expert had met all three prongs of the Third Circuit's test and that the expert was not required to rule out every conceivable cause or employ perfect methodology.[42]

In a case with potentially broad implications, the Sixth Circuit ruled that, under Michigan law, a plaintiff need not present expert testimony for a jury to find defendants negligent in certain toxic tort cases.[43] In *Gass v. Marriott Hotel Services, Inc.*, plaintiffs claimed that exterminators sprayed their occupied hotel room and belongings with an unknown pesticide.[44] The lower court excluded the subject of specific causation from the expert testimony of plaintiffs' examining physicians and granted the defendants' motion for summary judgment, holding that no reasonable jury could have found negligence absent expert testimony linking the illness to a particular pesticide.[45] In a two-to-one decision, the Sixth Circuit affirmed the lower court's decision with respect to the limited admissibility of plaintiffs' expert testimony but nonetheless reversed the grant of summary judgment to the defendants with regard to causation because expert testimony was not necessary for a jury to find negligence based on the jury's ordinary experience.[46]

Significant decisions from the Seventh and Fourth Circuits and the Texas Supreme Court demonstrate that inadequate expert testimony may be fatal to plaintiffs' claims in certain toxic tort cases. Based on a lack of expert causation evidence, the Seventh Circuit in *Cunningham v. Masterwear Corp.* affirmed a district court's grant of summary judgment against a couple claiming damages for perchloroethylene (PCE) in their home.[47] The plaintiffs claimed that PCE leaked into their home from a nearby dry cleaning business and sought damages for alleged personal injuries (headaches and respiratory ailments) and property damages (diminution in the value of their home).[48] Writing for the court, Judge Posner noted that the plaintiffs' medical expert had never treated an illness caused or exacerbated by PCE and held that the expert failed to present any theory linking the plaintiffs' illnesses to PCE exposure.[49] Similarly, the plaintiffs failed to establish the sale price of their home absent the presence of any PCE because they did not provide any testimony from a real estate agent or appraiser on comparable home prices.[50]

The Fourth Circuit in *Miller v. Mandrin Homes, Ltd.* affirmed a district court's opinion that plaintiffs' expert failed to establish causation in a groundwater contamination suit against previous owners of certain property.[51] The plaintiffs alleged that volatile organic compounds (VOCs) had leached from a former landfill into the plaintiffs' sump water and land and provided expert testimony in support of the allegation.[52] Relying solely on aerial photographs of the property and data from tests performed by others, the expert opined that the photos were consistent with the historical presence of a landfill on the property and that the detection of VOCs in the plaintiffs' sump water was consistent with leaching from a nearby landfill.[53] The Fourth Circuit held that the opinions failed to establish that the plaintiffs' theory of contamination was

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[42] *Id.* at 180–85.
[43] Gass v. Marriott Hotel Servs., Inc., 558 F.3d 419 (6th Cir. 2009).
[44] *Id.* at 422–23.
[45] *Id.* at 429.
[46] *Id.* at 435.
[47] Cunningham v. Masterwear Corp., 569 F.3d 673 (7th Cir. 2009).
[48] *Id.* at 674.
[49] *Id.* at 674–75.
[50] *Id.* at 676.
[51] Miller v. Mandrin Homes, Ltd., 305 Fed. Appx. 976 (4th Cir. 2009).
[52] *Id.* at 977–78.
[53] *Id.* The district court excluded the testimony of the expert as speculative. *Id.* at 979–80.

probable, as opposed to merely possible and therefore did not establish a genuine issue of material fact.[54]

The Texas Supreme Court reversed a lower court's judgment of $20 million for plaintiffs against the City of San Antonio for alleged benzene exposure because the opinion of the plaintiffs' expert was conclusory and speculative and therefore insufficient to support the judgment.[55] The plaintiffs claimed both personal injury, in the form of acute lymphoblastic leukemia, and loss of property value from alleged migration of benzene onto their property from an adjacent, inactive waste-disposal site.[56] In the testimony at issue, the plaintiffs' expert provided analysis of gas levels reported in a sealed monitoring well near the plaintiffs' property and epidemiological studies that found high rates of cancer among workers occupationally exposed to benzene.[57] The court found that the experts not only failed to prove that the high levels present in the monitoring well were present on the plaintiffs' property but also improperly relied on studies in which the subjects had been exposed to significantly higher levels of benzene than those claimed by the plaintiffs.[58]

IV. MEDICAL MONITORING

Two putative class actions brought against DuPont for alleged contamination of water by perfluorooctanoic acid (PFOA) led to significant decisions on medical monitoring in federal district courts. In *Rowe v. E.I. Dupont De Nemours & Co.*, the court denied certification of medical monitoring classes for a second time in the same set of cases.[59] Despite a previous denial, the plaintiffs sought certification of a medical monitoring class on a more narrow basis under Rule 23(c)(4) of the Federal Rules of Civil Procedure, including whether class members were exposed to PFOA, whether PFOA is toxic, and the availability of medical monitoring for PFOA exposure.[60] The court again denied certification for the medical monitoring class, reasoning 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."[61] In the same set of cases, the court later certified classes for claims of public and private nuisance, as well as whether the release of PFOA constitutes an abnormally dangerous activity, but declined to certify all other proposed classes.[62]

In *Rhodes v. E.I. Du Pont De Nemours & Co.*, the U.S. District Court for the Southern District of West Virginia addressed various tort and medical monitoring claims from the allegedly-heightened risk of disease due to PFOA exposure despite a lack of physical injury.[63] Ruling on the defendants' summary judgment motion, the court held that the plaintiffs medical monitoring claim survived but that the plaintiffs failed to demonstrate the requisite injury for all other claims, including negligence, public and

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[54]*Id.* at 980.
[55]City of San Antonio v. Pollack, 284 S.W.3d 809 (Tex. 2009).
[56]*Id.* at 811–12.
[57]*Id.* at 814–16.
[58]*Id.* at 819–20.
[59]Rowe v. E.I. Dupont De Nemours & Co., Nos. 06-1810, 06-3080, 2009 U.S. Dist. LEXIS 67389 (D.N.J. July 29, 2009).
[60]*Id.* at *3–6.
[61]*Id.* at *10.
[62]Rowe v. E.I. Dupont De Nemours & Co., 262 F.R.D. 451 (D.N.J. 2009).
[63]Rhodes v. E.I. Du Pont De Nemours & Co., 657 F. Supp. 2d 751 (S.D. W. Va. 2009).

private nuisance, trespass, and battery.[64] The court reasoned 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.[65]

V. CITIZEN SUITS

The U.S. Supreme Court held in *Summers v. Earth Island Institute* that citizen groups lack standing to challenge federal agency regulations when the alleged "imminent and concrete harm" no longer exists.[66] Citizen groups filed a complaint in the Eastern District of California challenging the U.S. Forest Service's Burnt Ridge Project and the regulations that exempted this and other fire-rehabilitation projects from notice, comment, and appeal procedures.[67] While acknowledging that the then-settled Burnt Ridge Project challenge was no longer at issue, the district court nevertheless held that the regulations applicable to the Burnt Ridge Project and other regulations at issue were invalid and that a nationwide injunction against their application was warranted. The Ninth Circuit affirmed the district court's holding regarding the regulations applicable to the Burnt Ridge Project but held that the other regulations were not ripe for adjudication. With Justice Scalia writing for the five justice majority, the Supreme Court held that the citizen groups lacked standing to challenge the regulations still at issue because the citizen groups did not identify a threatened imminent, concrete, and particularized harm to their members' interests from application of the regulations.[68] The Court further held that an alleged procedural injury alone, such as the inability to file comments, cannot not create standing.[69]

In 2009, federal district courts issued a number of rulings regarding the parameters of citizen suit provisions in environmental laws. In *Board of County Commissioners v. Brown Group Retail, Inc.*, the U.S. District Court for the District of Colorado held that a citizen suit under section 7002(a)(1)(A) of the Resource Conservation and Recovery Act (RCRA), which authorizes suit against any person alleged to be in violation of RCRA, cannot proceed against an alleged polluter who no longer owns or operates the site at issue.[70] The court rejected the plaintiff's argument that past actions constitute "'continuous violations' whenever the pollution has not been remediated," noting that the defendant had neither owned nor operated the site for more than twenty years.[71]

In *Sierra Club v. Powellton Coal Co.*, the U.S. District Court for the Southern District of West Virginia allowed the plaintiff's claims for injunctive relief and civil penalties to proceed against alleged National Pollutant Discharge Elimination System permit violators despite an ongoing state-law prosecution against them by West Virginia authorities.[72] The court found that a West Virginia law was not comparable to Clean Water Act (CWA) section 309(g) — which bars suits when a state is diligently prosecuting an action under comparable state law — because the West Virginia law

[64] *Id.* at 777–78.
[65] *Id.* at 777 (emphasis in opinion) (discussing Bower v. Westinghouse Elec. Corp., 522 S.E.2d 424 (W. Va. 1999)). The court denied a motion for class certification as moot. *Id.* at 777–78.
[66] Summers v. Earth Island Inst., 129 S. Ct. 1142, 1146 (2009).
[67] *Id.* at 1148.
[68] *Id.* at 1149–50.
[69] *Id.* at 1151.
[70] Bd. of County. Comm'rs v. Brown Group Retail, Inc., 598 F. Supp. 2d 1185 (D. Colo. 2009).
[71] *Id.* at 1198.
[72] Sierra Club v. Powellton Coal Co., 662 F. Supp. 2d 514 (S.D. W. Va. 2009).

"does not provide for the assessment of administrative penalties without the violator's consent."[73]

In a holding similar to *Powellton*, the U.S. District Court for the District of Puerto Rico held in *Marrero Hernandez v. Esso Standard Oil Co.* that a CWA citizen suit was not barred by administrative orders issued by the Puerto Rico Environmental Quality Board (PREQB) because the defendant had successfully obtained a permanent injunction from the First Circuit enjoining the PREQB from imposing civil penalties on the defendant.[74] In contrast to the *Brown Group Retail* court's holding, the *Marrero Hernandez* court held that the failure to remediate contamination can be deemed an ongoing violation, and therefore plaintiff's citizen suit was not barred under the citizen suit provisions of various federal environmental statutes.[75]

VI. PUNITIVE DAMAGES

In *Ponca Tribe of Indians of Oklahoma v. Continental Carbon Co.*, the U.S. District Court for the Western District of Oklahoma held that evidence from previous lawsuits involving a defendant may be admissible to support a claim for punitive damages when the evidence shows that a defendant's conduct at issue in the ongoing case "replicates their conduct with respect to the incidents giving rise to" the prior cases.[76] The court held that a defendant's conduct as a polluter at out-of-state plants was admissible to "show the deliberateness and reprehensibility" of the tortfeasor's conduct when the current conduct mirrored the previous conduct because it demonstrated notice of potential liability and a conscious choice not to cease the polluting activity.[77] Such evidence may be limited, however, if it is "cumulative or unduly time-consuming."[78]

In *Santa Clara Valley Water District v. Olin Corp.*, the Northern District of California held that evidence of a party's failure to abate the threat of pollution, issue warnings, and conduct sampling after contemplating establishment of an operations liability fund would not support an award of punitive damages under the California Civil Code.[79] The plaintiff water district sued defendant property owner for recovery of the costs it incurred in response to perchlorate contamination in groundwater pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).[80] The court granted the property owner's motion for summary judgment on punitive damages because the evidence presented regarding knowledge of potential pollution releases and resultant inaction on the part of the property owner did not constitute clear and convincing evidence of malice.[81]

VII. OTHER COMMON LAW TORTS

In *Taylor v. American Chemistry Council*, the First Circuit 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.[82] The

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[73]*Id.* at 530.
[74]Marrero Hernandez v. Esso Standard Oil Co., 597 F. Supp. 2d 272, 279 (D.P.R. 2009).
[75]*Id.* at 286–87.
[76]Ponca Tribe of Indians of Okla. v. Continental Carbon Co., No. CIV-05-445-C, 2009 U.S. Dist. LEXIS 8578, at *7 (W.D. Okla. Feb. 5, 2009).
[77]*Id.* at *6–7 (citing State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 423 (2003)).
[78]*Id.* at *7.
[79]Santa Clara Valley Water Dist. v. Olin Corp., 655 F. Supp. 2d 1066 (N.D. Cal. 2009).
[80]*Id.* at 1069.
[81]*Id.* at 1080.
[82]Taylor v. Am. Chemistry Council, 576 F.3d 16, 21 (1st Cir. 2009).

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 at issue.[83] 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.[84] 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 and that the decedent's former employer qualified as a sophisticated user.[85]

The Illinois Supreme Court set aside a $1.2 million judgment and ordered a new trial, holding that a defendant is permitted to submit evidence of a plaintiff's exposure to asbestos at a nonparty site when pursuing a "sole proximate cause" defense.[86] Illinois recognizes the sole proximate cause defense, which "seeks to defeat a plaintiff's claim of negligence by establishing proximate cause in the act of solely another not named in the suit."[87] In a five-to-one decision, the Illinois Supreme Court held that exclusion of the plaintiff's exposure to other types of asbestos from different products during his thirty-eight year career was reversible error because it "made the case 'undefendable' for [the] defendant" and presented a partial story to the jury.[88]

Following a remand by the United States Supreme Court holding that the trial court erred by not instructing the jury that fear-of-cancer damages are only recoverable under the Federal Employees Liability Act if the fear is "genuine and serious,"[89] the Tennessee Court of Appeals held in *Hensley v. CSX Transportation, Inc.* that the erroneous jury instructions at issue constituted harmful error and ordered a new trial on damages.[90] Applying the federal harmless error rule — which requires the probability of a different result "sufficient to undermine confidence in the outcome" — the Tennessee Court of Appeals found that the amount of the damages award and the closeness of the evidence indicated that the instructional error may have contributed to "some overcompensation."[91] In addition, the court found little support for a genuine and serious fear of cancer in the record and reasoned that the missing instruction, while not the "heart" of the case, was a "vital" matter upon which the jury probably based its award.[92]

A California superior court judge dismissed two lawsuits filed on behalf of Nicaraguan agricultural workers against Dole Food Company and other U.S. companies for alleged exposure to 1,2-dibromo-3-chloropropane (DBCP), a pesticide used at banana plantations that the plaintiffs claimed can cause sterility and other health problems.[93] The court found that plaintiffs' counsel recruited individuals who had never worked on the plantations to serve as plaintiffs in the case and took numerous steps to perpetuate the

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[83]*Id.* at 23. The former employer was no longer a party to the action at the time of the grant of summary judgment by the district court.
[84]*Id.* at 24.
[85]*Id.* at 26–29.
[86]*See generally* Nolan v. Weil-McLain, 910 N.E. 2d 549, 550 (Ill. 2009).
[87]*Id.* at 562 (citation omitted).
[88]*Id.* at 565–67.
[89]CSX Transp., Inc. v. Hensley, 129 S. Ct. 2139, 2140 (2009).
[90]*Hensley v. CSX Transp., Inc.*, No. E2007-00323-COA-R3-CV, 2009 Tenn. App. LEXIS 568, at *1–2 (Tenn. Ct. App. Aug. 26, 2009).
[91]*Id.* at *14–15 (citing United States v. Benitez, 542 U.S. 74 (2004)).
[92]*Id.* at *18–22.
[93]*See* Transcript of Oral Ruling, at 1, Mejia v. Dole Food Co., Inc., No. BC 340049 (Cal. Super. Ct. Apr. 23, 2009).

fraud, including fabricating employment records and falsifying laboratory tests.[94] The court singled out not only attorneys in Los Angeles and Nicaragua but also a Nicaraguan judge as participants in the conspiracy.[95] According to the court, "[w]hat has occurred here is not just a fraud on this court, but it is blatant extortion of the defendants."[96]

On a related note, a federal district court in Florida has denied recognition of a $97 million Nicaraguan judgment against defendants Dole and The Dow Chemical Company for alleged DBCP exposure at a banana plant.[97] The judgment at issue was rendered by a trial court in Nicaragua under a Nicaraguan law that, among other things, provides sterile plaintiffs with an irrefutable presumption that DBCP-exposure caused their sterility, sets a minimum damages award of $125,000 for prevailing plaintiffs, and eliminates any relevant statutes of limitations.[98] The U.S. District Court for the Southern District of Florida denied the judgment on several bases, including that: the Nicaragua trial court did not have jurisdiction over the defendants; the tribunal was not impartial; the proceedings did not include "procedures compatible with the international concept of due process of law"; and the cause of action or claim for relief on which the judgment is based is repugnant to the public policy of Florida.[99]

[94] *Id.* at 1–4.
[95] *Id.* at 1–2.
[96] *Id.* at 10.
[97] Osorio v. Dole Food Co., 665 F. Supp. 2d 1307 (S.D. Fla. 2009).
[98] *Id*. at 1314–15.
[99] *Id*. at 1321.