# ENVIRONMENTAL LITIGATION AND TOXIC TORTS
# 2010 Annual Report[1]



## I. DEEPWATER HORIZON OIL SPILL

On April 20, 2010, BP PLC's Macondo well exploded during the operation of the Deepwater Horizon oil drilling rig located off the coast of Louisiana, resulting in the largest oil spill in history.[2] For eighty-seven days, crude oil leaked into the Gulf of Mexico for an estimated total release of 4.93 million barrels of oil.[3] The spill triggered a number of legal actions, at least three of which will impact the future of environmental litigation and toxic torts.

First, on June 16, 2010, BP agreed to pay $20 billion into a response fund to compensate affected individuals and businesses.[4] The fund will require approximately three-and-one-half years for completion pursuant to the following guidelines: (1) BP paid $3 billion during the Third Quarter of 2010, paid $2 billion in the Fourth Quarter of 2010, and will continue to pay $1.25 billion per quarter until BP has paid $20 billion into the fund; (2) while BP continues to pay into the fund, the United States government will set aside assets totaling $20 billion to pay out claims; (3) monies in the fund can be used to satisfy legitimatized claims against BP, "including natural resource damages and state and local response costs" but excluding fines and penalties, which will be paid separately; (4) the Independent Claims Facility, established to adjudicate all Oil Pollution Act (OPA) and tort claims (excluding federal and state claims), will be administered by attorney and mediator Kenneth Feinberg; and (5) if any money remains in the fund after resolution of all legitimized claims, the remainder will revert to BP.[5]

Second, of the approximately 472 spill-related lawsuits filed against BP and other entities involved in the operation of the Deepwater Horizon, the Judicial Panel on Multidistrict Litigation consolidated seventy-seven suits and recognized the existence of over 200 tag-along suits in a multidistrict litigation before Judge Carl Barbier in the U.S. District Court for the Eastern District of Louisiana.[6] Most suits allege a range of injuries and claims, including economic, environmental, or personal injuries, for violations of the

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[1]This report was edited by Patrick R. Jacobi and Mackenzie S. Schoonmaker of Beveridge & Diamond, P.C., Washington, D.C. Authors of this report included Mr. Jacobi, Ms. Schoonmaker, and Annise K. Maguire of Beveridge & Diamond, P.C., Washington, D.C. The authors also wish to thank Toren M. Elsen of Beveridge & Diamond, P.C. for his assistance. This report summarizes significant decisions, whether published or unpublished, in toxic tort litigation from 2010 but does not purport to summarize all decisions.

[2]Transfer Order at 1, In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, MDL No. 2179 (J.P.M.L. Aug. 10, 2010) [hereinafter Transfer Order]. Orders and related proceedings are available at http://www.laed.uscourts.gov/OilSpill/OilSpill.htm.

[3]OPERATIONAL SCI. ADVISORY TEAM, UNIFIED AREA COMMAND, U.S. COAST GUARD, SUMMARY REPORT FOR SUB-SEA AND SUB-SURFACE OIL AND DISPERSANT DETECTION: SAMPLING AND MONITORING 6 & n.3 (Dec. 17, 2010).

[4]Press Release, BP, BP Establishes $20 Billion Claims Fund for Deepwater Horizon Spill and Outlines Dividend Decisions (June 16, 2010).

[5]*Id.*

[6]*Deepwater Horizon Oil Spill Litigation Database*, ENVTL. LAW INST., http://www.eli.org/Program_Areas/deepwater_horizon_oil_spill_litigation_database.cfm (follow "download the data in an Excel spreadsheet" hyperlink) (last visited Jan. 10, 2011); Transfer Order, *supra* note 2, at 1–2.

Oil Pollution Act, negligence, and public nuisance.[7] Judge Barbier set a comprehensive schedule through July of 2012, which includes deadlines for filing complaints, answers, third-party and cross claims, and various trial dates.[8]

Finally, on December 15, 2010, the U.S. Department of Justice (DOJ) filed a civil suit against BP Exploration & Production, Inc., and eight other entities in the U.S. District Court for the Eastern District of Louisiana.[9] The DOJ alleges violations of federal regulations concerning the operation and safety of oil rigs, including the failure to take necessary precautions in securing the rig before the explosion and the failure to use the safest drilling technology, and seeks: (1) civil penalties in an unspecified amount pursuant to section 311(b)(7) of the Clean Water Act;[10] (2) a declaratory judgment holding all defendants joint and severally liable for all removal costs and damages pursuant to section 1002(a) of the OPA;[11] and (3) injunctive relief.[12] The DOJ indicated that the case will become part of the multidistrict litigation and that it has not eliminated the possibility of criminal charges for those alleged to be responsible for the oil spill.[13]

## II. CLIMATE-BASED NUISANCE ACTIONS

The Supreme Court of the United States granted certiorari on December 6, 2010 to review the decision of the U.S. Court of Appeals for the Second Circuit in *Am. Elec. Power Co. v. Connecticut* (*AEP*), which addressed whether plaintiffs may rely on nuisance law, among other causes of action, to redress injuries plaintiffs claimed resulted from defendants' alleged contribution to climate change.[14] In 2009, the Second Circuit held in *AEP* that states may bring public nuisance actions against privately owned electric utilities for greenhouse gas emissions and alleged environmental impacts.[15] The decision overturned a 2005 district court dismissal of the claims as presenting a non-justiciable political question.[16] 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.[17] The Supreme Court granted certiorari without order and without the participation of Justice Sonya Sotomayor, which was likely due to her

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[7]Oil Pollution Act, 33 U.S.C. §§ 2701–2761 (2006); Transfer Order, *supra* note 2, at 2–3.
[8]*See* Mins. at 1–2, *In re* Oil Spill, MDL No. 2179 (E.D. La. Sept. 16, 2010); *see also* Order at 2–3, In re Oil Spill, MDL No. 2179 (E.D. La. Oct. 6, 2010); Mins. for Status Conf. at 2, *In re* Oil Spill, MDL No. 2179 (E.D. La. Oct. 15, 2010); Pretrial Order No. 11 at 5–7, 11–12, In re Oil Spill, MDL No. 2179 (E.D. La. Oct. 19, 2010); Pretrial Order No. 19 at 1, In re Oil Spill, MDL No. 2179 (E.D. La. Dec. 2, 2010); Status Conf. at 1–3, In re Oil Spill, MDL No. 2179 (E.D. La. Dec. 17, 2010). Orders and related proceedings are available at http://www.laed.uscourts.gov/OilSpill/OilSpill.htm.
[9]Complaint, United States v. BP Exploration & Prod. Inc., No. 2:10-cv-04536 (E.D. La. Dec. 15, 2010).
[10]Clean Water Act § 311(b)(7), 33 U.S.C. § 1321(b)(7) (2006).
[11]Oil Pollution Act § 1002(a), 33 U.S.C. § 2702(a) (2006).
[12]Complaint at 26, *BP Exploration & Prod. Inc.*, No. 2:10-cv-04536.
[13]Press Release, U.S. Dep't of Justice, Attorney General Eric Holder Announces Civil Lawsuit Regarding Deepwater Horizon Oil Spill (Dec. 15, 2010).
[14]582 F.3d 309 (2d Cir. 2009), cert. granted sub nom., Am. Elec. Power Co. v. Connecticut, 131 S. Ct. 813 (Dec. 6, 2010).
[15]*Id.* at 392.
[16]Connecticut v. Am. Elec. Power Co., 406 F. Supp. 2d 265 (S.D.N.Y. 2005).
[17]*Am. Elec. Power*, 582 F.3d at 392–93.

participation on the Second Circuit panel that heard oral arguments in the case in 2006.[18] The petition for certiorari presents three questions: (1) whether States and private parties have standing to seek injunctive relief to limit or to cap emissions that allegedly contribute to global climate change; (2) whether federal common law allows for a public nuisance claim for alleged contributions to climate change; and (3) whether a public nuisance claim for alleged contributions to climate change is justiciable under *Baker v. Carr*.[19]

Another federal appellate decision on the issue of climate change and public nuisance, *Comer v. Murphy Oil USA*,[20] involved claims similar to those at issue in *AEP*. In 2009, a three-judge panel of the U.S. Court of Appeals for the Fifth Circuit agreed with the Second Circuit's *AEP* opinion of 2009, when it reversed the district court and held that a class of Gulf Coast private plaintiffs could assert public nuisance claims against oil companies, utilities, and chemical companies alleging the greenhouse gases they released injured the plaintiffs by contributing to climate change and the severity of Hurricane Katrina.[21] Following the recusal of the eighth of its sixteen judges on April 30, 2010, the en banc Fifth Circuit determined that it had lost the requisite quorum to decide *Comer* and, on that basis, dismissed the appeal.[22] In its May 28, 2010 order, a majority of the non-recused judges on the Fifth Circuit found they could not reinstate the prior ruling of the three-judge panel and instead restored the district court's dismissal of the case.[23] On January 10, 2011, the Supreme Court denied the plaintiffs' petition for mandamus in *Comer*, which effectively leaves the district court's dismissal in place.[24]

## III. PUBLIC NUISANCE

In a decision that may both weaken public nuisance claims and strengthen preemption defenses, the U.S. Court of Appeals for the Fourth Circuit in late July barred a public nuisance action brought by North Carolina against the Tennessee Valley Authority (TVA) based on interstate air emissions from TVA's power plants, finding that the State's action was preempted by the comprehensive air pollution scheme under the Clean Air Act.[25] The three-judge panel dissolved the district court's injunction, which would have required TVA to spend $1 billion on pollution controls at its coal-fired power plants in Alabama and Tennessee.[26] The Fourth Circuit found that a patchwork of nuisance injunctions based on interstate air emissions would frustrate Congress's judgment, supplant agencies' conclusions, and upset the reliance interests of both permit holders and source states — especially where an activity explicitly permitted by one state could be deemed a nuisance by another state.[27] The Fourth Circuit further held the district court's decision was an affront to the principles of federalism because it applied the law

[18]*Id.* at 314; Order Granting Certiorari, *Am. Elec. Power*, 131 S. Ct. 813 (Dec. 6, 2010).
[19]Petition for Writ of Certiorari at i, *Am. Elec. Power*, No. 10-174 (U.S. Aug. 2, 2010) (citing Baker v. Carr, 369 U.S. 186, 217 (1962)).
[20]585 F.3d 855 (5th Cir. 2009).
[21]Id. at 859–60.
[22]Comer v. Murphy Oil USA, 607 F.3d 1049, 1054 (5th Cir. 2010).
[23]*Id.* at 1054–55.
[24]Supreme Court Order List for Jan. 10, 2011 at 26, Order Denying Mandamus, In re Ned Comer, No. 10-294 (U.S. Jan. 10, 2011), *available at* http://www.supremecourt.gov/orders/courtorders/011011zor.pdf.
[25]North Carolina ex rel. Cooper v. TVA, 615 F.3d 291 (4th Cir. 2010).
[26]*Id.* at 298, 310.
[27]*Id.* at 306, 309.

of North Carolina extraterritorially to TVA plants located in Alabama and Tennessee.[28] The Fourth Circuit did not hold that Congress entirely preempted the field of emissions regulation.[29]

The Vermont Supreme Court also issued a ruling that will likely be relied on by defendants in future environmental public nuisance claims when it held in *Vermont v. Howe Cleaners, Inc.* that mere migration of contamination from a property owner's land cannot form the basis of a public nuisance action because it does not impact a right common to the public.[30] In 2000, the Vermont Agency of Natural Resources discovered the presence of the dry cleaning solvent tetrachloroethylene (perc or PCE) on the property, and in 2004, Vermont filed public nuisance and statutory claims against the defendant and other parties.[31] In upholding the trial court's dismissal of all claims against the defendant property owner, the Vermont Supreme Court held the State failed to allege contamination had impacted or threatened groundwater or affected any other public right.[32]

## IV. CLASS ACTIONS

Two class action decisions allow courts to examine the validity of the claims underlying a putative class action prior to class certification and may have significant implications for toxic tort cases. First, in *American Honda Motor Co. v. Allen*, the U.S. Court of Appeals for the Seventh Circuit vacated a district court's certification of a class and remanded the case, holding that the district court should have rendered a decision on the admissibility of an expert opinion that was essential to class certification prior to deciding whether to certify the class.[33] The putative class of motorcycle owners claimed that a design defect caused their motorcycles to shake excessively, and the defendants challenged as unreliable a plaintiffs' expert report on the alleged design defect.[34] Following the district court's denial of the defendants' motion to exclude the expert's testimony and subsequent grant of class certification, the Seventh Circuit reversed and held that when an expert's testimony is critical to class certification, a district court must rule on any challenge to the expert's qualifications or submissions prior to ruling on class certification.[35] In this case, the expert's testimony was "necessary to show that Plaintiffs' claims [were] capable of resolution on a class-wide basis and that the common defect in the motorcycle predominate[d] over the class members' individual issues."[36]

Second, in *Gates v. Rohm & Haas Co.*, the U.S. District Court for the Eastern District of Pennsylvania denied certification of a proposed medical-monitoring class because the plaintiffs failed to establish a common minimum level of exposure to vinyl chloride in a town aquifer as part of their claim of alleged increase in the risk of brain cancer.[37] Plaintiffs thereby failed to satisfy Rule 23(b)(3) of the Federal Rules of Civil Procedure, which requires that questions of law or fact common to class members predominate over any questions affecting only individual members.[38] To certify a class with respect to a claim for medical monitoring in Pennsylvania, plaintiffs must present

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[28] *Id.* at 306.
[29] *Id.* at 302.
[30] 2010 VT 70, ¶ 49, 9 A.3d 276, 294.
[31] *Id.* ¶¶ 2–3, 9 A.3d at 278.
[32] *Id.* ¶¶ 48–52, 9 A.3d at 294–95.
[33] 600 F.3d 813, 814 (7th Cir. 2010).
[34] *Id.* at 814 (citing Daubert v. Merrell Dow Pharms. Inc., 509 U.S. 579 (1993)).
[35] *Id.* at 815–16 (internal citations omitted).
[36] *Id.* at 817.
[37] 265 F.R.D. 208, 225 (E.D. Pa. 2010).
[38] *Id.* The court also denied certification of plaintiffs' proposed property-damage class.

common proof that each member of the class was exposed to the hazardous substance at greater than background levels and at a level sufficient to significantly increase each plaintiff's risk of contracting a latent disease.[39] The court rejected the plaintiffs' argument that a local health agency's safe level of exposure constituted the threshold for a significant risk of harm and deemed insufficient the plaintiffs' offer of evidence of minimum average daily exposure without common proof of individual exposure above a threshold of significant risk.[40]

By contrast, one federal appellate decision may have eased the burdens of plaintiffs seeking class certification in environmental litigation. In *Gintis v. Brouchard Transportation Co.*, the United States Court of Appeals for the First Circuit reversed a district court's denial of class certification for more than 1,000 waterfront property owners alleging damages from defendants' fuel-barge oil spill.[41] The plaintiffs sought recovery of alleged property damages under Massachusetts laws imposing both strict liability for vessel oil spills and double damages for negligent discharge of petroleum, as well as common law nuisance.[42] Despite Massachusetts precedent denying certification of a proposed class of downstream landowners seeking damages for contamination from a defendant's toxic discharge due to parcel-by-parcel questions of injury and damages, the First Circuit reversed and remanded to the district court for reconsideration of plaintiffs' claim that common evidence will suffice to prove injury, causation, and compensatory damages.[43] In a similar case, the U.S. District Court for the Middle District of Alabama in *Johnson v. International Paper Co.* reached the opposite conclusion, denying certification for a putative class of property owners within two miles of a paper mill who alleged at least $100 in individual damages because, among other reasons, common proof would not allow the court to determine property ownership, damages, and causation.[44]

## V. EXPERTS

A number of federal appellate and district courts excluded expert testimony pursuant to *Daubert v. Merrell Dow Pharmaceuticals Inc.*[45] and granted related summary judgment motions on causation in cases involving exposure to chemicals in the environment. At the federal appellate level, the U.S. Court of Appeals for the Tenth Circuit clarified the standard to establish causation in toxic tort actions under New Mexico law in *Wilcox v. Homestake Mining Co.*, when it held that plaintiffs must prove they would not have contracted cancer but for the defendant's acts or omissions.[46] Plaintiffs alleged that they or their decedents had developed cancer due to exposure to radioactive substances released from the defendant's uranium mining mill.[47] In support of their allegation, plaintiffs' experts opined that defendant's operations were "a substantial

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[39] *Id.* at 219–21, 226.
[40] *Id.* at 226–27.
[41] 596 F.3d 64, 65 (1st Cir. 2010).
[42] *Id.* at 66.
[43] *Id.* at 66–68. Writing for the First Circuit majority, retired Supreme Court Justice David H. Souter indicated that there is no "general rule that pollution torts charged against a single defendant escape class treatment," that the sufficiency of the evidence is a substantive issue common to the entire proposed class, and that such claims may be better addressed in a single action involving the entire class. *Id*. at 66–67.
[44] No. 2:09cv232-WHA, 2010 U.S. Dist. LEXIS 111936 (M.D. Ala. Oct. 20, 2010).
[45] 509 U.S. 579 (1993).
[46] 619 F.3d 1165, 1166–67 (10th Cir. 2010).
[47] *Id.* at 1166.

factor contributing to each [plaintiff] developing cancer."[48] Plaintiffs did not allege, however, that they would not have developed cancer in the absence of defendant's activities.[49] The Tenth Circuit affirmed the district court's determination that the expert's report did not satisfy the requirement of but-for causation.[50]

The U.S. District Court for the Western District of Pennsylvania granted defendants' motion to exclude the testimony of a plaintiff's expert that attempted to link the plaintiff's non-Hodgkins Lymphoma (NHL) to Dursban, which is the trade name for a group of insecticide products, in *Pritchard v. Dow Agro Sciences*.[51] Asserting claims of negligence and strict liability, the plaintiff offered an expert report to establish general and specific causation based in part on a differential diagnosis.[52] On general causation, the court rejected the expert's opinion that Dursban can cause NHL because the epidemiological studies relied on by the expert were not statistically significant (i.e., the results could have occurred by chance) and because the expert ignored published studies demonstrating a lack of an association between chlorpyrifos — an active ingredient in Dursban — and NHL.[53] On specific causation, the court also rejected the expert's opinion as unreliable because he failed to review much of the plaintiff's medical records, discovery responses, deposition testimony, application records, or other evidence regarding the plaintiff's exposure to chlorpyrifos or other pesticides.[54] Significantly, the court also found unreliable the expert's failure to address the widely accepted view that the cause of NHL is unknown and the overwhelming input of plaintiff's counsel in the preparation of the expert report.[55] In December 2010, the U.S. Court of Appeals for the Eighth Circuit rendered a similar opinion with respect to Dursban in *Junk v. Terminix International Co.*, when it excluded expert opinions as unreliable to prove specific causation between Dursban exposure and a child's cerebral palsy and other neurological problems.[56]

In *Baker v. Chevron USA, Inc.*, the U.S. District Court for the Southern District of Ohio excluded a plaintiffs' expert's testimony as not sufficiently reliable to prove causation for illnesses allegedly caused by airborne benzene exposure from a former oil refinery.[57] The court found that none of the studies cited by a medical expert supported his opinion that each plaintiff's exposure to small amounts of benzene caused their diseases.[58] To the contrary, many of the studies involved subjects exposed to much higher levels of benzene than the plaintiffs.[59]

## VI. DAMAGES

Courts reduced or reversed damage awards in a number of major toxic tort cases in 2010. Striking a blow to plaintiffs who rely on alleged subclinical physical injuries to support damage claims in toxic tort actions, the U.S. Court of Appeals for the Tenth Circuit reversed a district court ruling that ordered Dow Chemical Co. and the former

[48] *Id.*
[49] *Id.* at 1167.
[50] *Id.* at 1169–70.
[51] 705 F. Supp. 2d 471, 473 (W.D. Pa. 2010).
[52] *Id.* at 473–74.
[53] *Id.* at 487–89.
[54] *Id.* at 490–92.
[55] *Id.* at 491–92.
[56] 628 F.3d 439, 444 (8th Cir. 2010).
[57] 680 F. Supp. 2d 865, 878 (S.D. Ohio 2010).
[58] *Id.* at 887.
[59] *Id.*

Rockwell International Corp. to pay nearly $926 million for the alleged release of plutonium particles onto property near the former Rocky Flats Nuclear Weapons Plant in Colorado in a class action filed pursuant to the Price Anderson Act (PAA).[60] The Tenth Circuit reversed and remanded the case with instructions to vacate the judgment and conduct further proceedings because the jury was never instructed on the necessity for plaintiffs to show actual physical damage as required under the PAA.[61]

In Garner v. BP Amoco Chemical Co., a federal district court set aside a jury's punitive damages award of $100 million to ten plaintiffs for workplace exposure to a refinery gas leak because evidence failed to establish a legal connection between the leak and a known, extreme risk sufficient to support gross negligence and the punitive damage award.[62] More than 100 refinery workers alleged injury from exposure to an unidentified toxic substance at the defendant's refinery.[63] In addition to a compensatory award, the jury awarded $10 million in punitive damages to each plaintiff.[64] On a post-trial challenge, the court found that because refinery work generally subjects employees to toxic odors, the injuries were not likely to have been caused by each individual exposure event or by the same source.[65] The court further held the plaintiffs had not demonstrated the specific intent element of gross negligence because of safety precautions implemented by the defendant, including monitors that detect toxic chemicals at the refinery.[66]

The Supreme Court of Appeals of West Virginia reduced from $196 million to $98 million a punitive-damage verdict in *Perrine v. E.I. DuPont de Nemours & Co.* for contamination at a former zinc-smelting plant, holding that punitive damages may not be awarded to claimants seeking future medical monitoring costs from past toxic exposure.[67] Following trial, DuPont was found liable to class members for approximately $382 million, including $196 million in punitive damages, for property damages, medical monitoring, and punitive damages from the alleged off-site migration of arsenic, cadmium, and lead from a smelter facility.[68] The Supreme Court of Appeals of West Virginia reduced punitive damages to $118 million because "punitive damages may not be awarded on a cause of action for medical monitoring" in West Virginia and further reduced the punitive damages award by $20 million, which was the amount that DuPont spent to remediate the smelter site.[69] In addition to the reductions, the court ordered a new trial solely on the issue of whether the suit was filed within the two-year statute of limitations based on when the plaintiffs knew of the alleged harm.[70]

At least one decision expanded the types of damages available in environmental litigation under Florida law and will likely be relied upon in litigation relating to the Deepwater Horizon oil spill. In *Curd v. Mosaic Fertilizer, LLC*, the Supreme Court of Florida held that, under Florida law, commercial fishermen may assert both statutory and common law causes of action against alleged polluters for purely economic losses

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[60]Cook v. Rockwell Int'l Corp., 618 F.3d 1127, 1132–33 (10th Cir. 2010). The Price Anderson Act governs liability for nonmilitary nuclear facilities. *See* 42 U.S.C. § 2210 (2006).
[61]*Cook*, 618 F.3d at 1140–42.
[62]No. G-07-221, 2010 U.S. Dist. LEXIS 28782, at *19 (S.D. Tex. Mar. 16, 2010).
[63]*Id.* at *4.
[64]*Id.* at *5–6.
[65]*Id.* at *19.
[66]*Id.* at *19–20.
[67]694 S.E.2d 815, 881 (W. Va. 2010).
[68]*Id.* at 828.
[69]*Id.* at 881, 893–94.
[70]*Id.* at 849–53.

associated with injury to marine life.[71] The Florida Supreme Court reversed the trial court's dismissal of the claim, holding that a Florida statute allows a cause of action "for all damages resulting from a discharge or other condition of pollution," including economic damages.[72] The court also recognized the fishermen's economic interest in marine life as a protectable property interest and reasoned that the defendant owed a duty of care to the fishermen because it was foreseeable that the release of hazardous contaminants into public waters would affect their unique interests.[73]

## VII. MEDICAL MONITORING

In a pair of consolidated cases, the U.S. Court of Appeals for the Third Circuit affirmed the dismissal of two proposed classes and held that a plaintiff must show a genetic predisposition toward developing beryllium-related lung disease as a prerequisite to pursuing a medical-monitoring claim under Pennsylvania law.[74] Both plaintiff classes claimed exposure to dust from manufacturing facilities that allegedly increased the risk for contracting chronic beryllium disease (CBD) and requested medical monitoring damages.[75] The plaintiffs' experts opined that anyone who had lived or worked in the area surrounding the facilities was at a significantly increased risk from beryllium emissions.[76] The Third Circuit affirmed the dismissal of both claims because, among other things, plaintiffs did not have a genetic predisposition or sensitization toward developing CBD.[77] The opinion may be significant in future medical-monitoring cases where plaintiffs have not developed any objective indicia of physical harm or change as a result of an alleged exposure. In a similar decision involving claims for medical monitoring for CBD based on alleged exposure to beryllium by employees at an industrial plant, the U.S. District Court for the Northern District of Georgia excluded the testimony of plaintiffs' expert in *Parker v. Brush Wellman, Inc.* for failing to provide any information regarding individual exposure and granted summary judgment for defendants on a failure to warn claim because the owner and operator of the plant was deemed to be a sophisticated user.[78]

## VIII. OTHER COMMON LAW TORTS

In one of the largest mass tort actions in U.S. history, a federal judge in the Southern District of New York approved a revised settlement that would provide up to $712.5 million from WTC Captive Insurance Co. to more than 10,000 rescue and recovery workers injured during the September 11, 2001 attacks and aftermath.[79] The court rejected an earlier proposed settlement after finding that the percentage of attorneys' fees sought by plaintiffs' counsel violated the rules of ethics and that WTC Captive Insurance was not paying enough to the workers.[80] Claimants' individual

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[71] 39 So. 3d 1216, 1228 (Fla. 2010).
[72] *Id.* at 1220.
[73] *Id.* at 1224–28.
[74] Sheridan v. NGK Metals Corp., 609 F.3d 239 (3d Cir. 2010).
[75] *Id.* at 244.
[76] *Id.* at 249.
[77] *Id.* at 251–54 (citing Pohl v. NGK Metals Corp., 936 A.2d 43 (Pa. Super. Ct. 2007)).
[78] No. 1:08-CV-2725-RWS, 2010 U.S. Dist. LEXIS 97702 (N.D. Ga. Sept. 17, 2010).
[79] Order Approving Modified and Improved Agreement of Settlement, In re World Trade Center Lower Manhattan Disaster Site Litigation, Nos. 21-MC-100, 21-MC-102, and 21-MC-103 (S.D.N.Y. June 23, 2010).
[80] Opinion and Order Regulating Fee Allowances and Disapproving Settlements, In re Sept. 11 Litigation, No. 21-MC-101 (S.D.N.Y. July 24, 2008).

recoveries will be based on the severity of their injuries, among other considerations.[81] Attorneys' fees will be capped at 25 percent of the settlement amount, which is estimated to save plaintiffs more than $50 million.[82]

In the first of what will likely be many lawsuits alleging groundwater contamination from hydraulic fracturing operations near the Marcellus Shale in Dimock, Pennsylvania, the U.S. District Court for the Middle District of Pennsylvania denied a motion to dismiss filed by defendant Cabot Oil & Gas Corporation for three out of four challenged claims.[83] Hydraulic fracturing, also known as "fracking" or "hydrofracturing," is the "process in which pressurized fluids are used to dislodge and release natural gas from deep underground formations."[84] The plaintiffs allege that spills and discharges from Cabot's hydraulic fracturing operations have exposed plaintiffs to hazardous chemicals.[85] The court denied the defendants' motion to dismiss the plaintiffs' strict liability claim, a claim pursuant to Pennsylvania's Hazardous Sites Cleanup Act,[86] and medical-monitoring damages but granted the defendants' motion to dismiss plaintiffs' gross negligence claim.[87] Plaintiffs allege various other tort claims, including fraudulent misrepresentation, and seek both an injunction and monetary damages.[88]

[81]World Trade Center Litigation Settlement Process Agreement, as Amended at 32–36, In re World Trade Center Litigation, Nos. 21-MC-100, 21-MC-102, and 21-MC-103 (S.D.N.Y. June 12, 2010).
[82]*Id.* at 14–16.
[83]Fiorentino v. Cabot Oil & Gas Corp., No. 3:09-cv-02284, 2010 U.S. Dist. LEXIS 120566 (M.D. Pa. Nov. 15, 2010).
[84]*Id.* at *8 n.1.
[85]*Id.* at *7.
[86]35 PA. CONS. STAT. ANN. §§ 6020.101–.1305 (West 2003).
[87]*Fiorentino*, 2010 U.S. Dist. LEXIS 120566, at *2, *26.
[88]*Id.*