ENVIRONMENTAL LITIGATION AND TOXIC TORTS
2011 Annual Report[1]

I. CLIMATE-BASED NUISANCE ACTIONS

In a ruling that limits the ability of plaintiffs to hold greenhouse gas (GHG) emitters liable under nuisance law, the U.S. Supreme Court in *American Electric Power Co. v. Connecticut (AEP)* unanimously held that the Clean Air Act (the Act) and EPA rulemaking under the Act displace federal common law nuisance actions seeking to limit GHG emissions from electric power plants.[2] The Supreme Court's decision reversed a 2009 ruling by the Second Circuit, which had held that the plaintiffs — six states, New York City, and several land trusts — had standing to seek injunctive relief under federal public-nuisance common law against private utilities operating fossil-fuel fired electric power plants that release GHGs into the atmosphere.[3] Citing its opinion in *Massachusetts v. EPA*,[4] which held that GHGs qualify as air pollutants subject to regulation under the Act, the Court concluded that the Act displaces federal common law because it speaks directly to the carbon dioxide emissions from the defendants' power plants.[5] The Court went on to state that EPA — and not the federal judiciary — is "best suited to serve as primary regulator of greenhouse gas emissions" due to its "scientific, economic, and technological resources."[6]

While the holding on displacement of federal common law was unanimous, the Court was split four-to-four on whether plaintiffs have standing to bring the suit.[7] As a result, the Second Circuit's holding that the plaintiffs have standing remains intact, leaving open the possibility of future lawsuits involving issues not displaced by the Act or the Federal Government's efforts to regulate GHG emissions. In addition, the Court remanded the question of whether the plaintiffs could proceed under state nuisance law because the parties did not brief this issue.[8]

The reach of the Supreme Court's decision on another climate-based nuisance action is not yet settled. In *Native Village of Kivalina v. ExxonMobil Corp.*, the Alaskan village of Kivalina brought nuisance claims against more than twenty petroleum and power generation companies for greenhouse gas 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.[9] The U.S. District Court for the Northern District of California held that Article III standing was not present as the claims presented

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[1]This report was edited by Patrick R. Jacobi of Beveridge & Diamond, P.C., Washington, D.C. and Megan R. Brillault of Beveridge & Diamond, P.C., New York, NY. Authors of this report included Mr. Jacobi, Ms. Brillault, and Kari L. Twaite 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 torts from 2011 but does not purport to summarize all decisions.

[2]131 S. Ct. 2527, 2529–30 (2011), *available at* http://www.supremecourt.gov/opinions/10pdf/10-174.pdf.

[3]Connecticut v. Am. Elec. Power Co., 582 F.3d 309 (2d Cir. 2009).

[4]549 U.S. 497, 528–29 (2007).

[5]*Am. Elec. Power*, 131 S. Ct. at 2530.

[6]*Id.* at 2539–40.

[7]*Id.* at 2535.

[8]*Id.* at 2540.

[9]663 F. Supp. 2d 863 (N.D. Cal. 2009), *appeal docketed*, No. 09-17490 (9th Cir. Nov. 6, 2009).

non-justiciable political questions because the injuries were not fairly traceable to the actions of the defendants.[10] On appeal, the Ninth Circuit allowed supplemental briefings to discuss the effect of the Supreme Court's decision in *AEP* on *Kivalina* and heard oral arguments on November 28, 2011.[11]

II. DEEPWATER HORIZON OIL SPILL

The United States Court for the Eastern District of Louisiana is moving forward with management of the multi-district litigation resulting from the April 20, 2010 incident involving the Deepwater Horizon drilling unit and has issued decisions of note in the cases. Substantively, the court held that common-law punitive damages extend to maritime claims because the Oil Pollution Act of 1990 (OPA)[12] does not discuss the availability of punitive damages in the context of oil spill liability, and therefore the statute does not preclude a punitive damages award for grossly negligent behavior.[13] Finally, the court noted that the Trans-Alaska Pipeline Authorization Act,[14] which also addresses oil spill liability, "[does] not restrict the availability of punitive damages."[15] Procedurally, the court issued a case management order structuring an upcoming trial in three phases: Phase One, referred to as the Incident Phase, will address conduct of both parties and non-parties relevant to the incident; Phase Two will address "Source Control and Quantification of Discharge"; and Phase Three, referred to as the Containment Phase, will address efforts to control discharge and migration paths.[16]

III. CLASS ACTIONS

In a decision that underscores the importance of expert testimony in the early stages of putative class actions, the Eleventh Circuit in *Sher v. Raytheon Co.* reversed a district court's decision to certify a class without first ruling on conflicting expert testimony presented during the class certification stage.[17] Plaintiffs alleged that the defendant's disposal and storage of hazardous waste at an industrial facility contaminated the groundwater in surrounding neighborhoods.[18] In support of a motion to certify a putative class, plaintiffs presented one expert to testify about the impacted area and a separate expert to testify regarding damages.[19] Although expert testimony presented on behalf of the defendant directly contradicted the testimony of plaintiffs' experts, the trial court certified the class pursuant to Federal Rule of Civil Procedure 23(f), stating that a

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[10] *Id.* at 880–83.

[11] Oral Argument, Native Village of Kivalina v. ExxonMobil Corp., No. 09-17490 (9th Cir. Nov. 28, 2011) (video of the oral argument *available at* http://www.ca9.uscourts.gov/media/view_video_subpage.php?pk_vid=0000006167).

[12] Oil Pollution Act of 1990 § 1004, 33 U.S.C. § 2704(a) (2006).

[13] Order and Responses, *In re* Oil Spill [by] the Oil Rig "Deepwater Horizon" in the Gulf of Mexico on April 20, 2010, MDL No. 2179 at 26 (E.D. La. Aug. 26, 2011) [hereinafter MDL Order and Responses].

[14] Trans-Alaska Pipeline Authorization Act § 204, 43 U.S.C. § 1653 (2006).

[15] MDL Order and Responses, *supra* note 13, at 27 (quoting Exxon Shipping Co. v. Baker, 554 U.S. 471, 518 (2008)).

[16] Amendment Pretrial Order No. 41, *In re* Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico on April 20, 2010, MDL No. 2179 at 2 (E.D. La. Sept. 14, 2011).

[17] 419 F. App'x 887, 888 (11th Cir. 2011), *available at* http://www.ca11.uscourts.gov/unpub/ops/200915798.pdf.

[18] *Id.*

[19] *Id.* at 888–89.

court need not engage in an analysis of the merits under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[20] at such an early stage of the litigation.[21] The Eleventh Circuit reversed, stressing that a class certification hearing may require consideration of expert testimony, and "if the situation warrants, the district court must perform a full *Daubert* analysis before certifying the class."[22]

In a case that limits the availability of class actions for plaintiffs seeking remedies based on their aggregate exposure to a chemical, the Third Circuit in *Gates v. Rohm & Haas Co.* affirmed a district court's denial of plaintiffs' proposed class certification because the common evidence proposed for trial was not sufficiently cohesive and common issues of law and fact did not predominate.[23] One defendant owned and operated an industrial facility in Ringwood, Illinois, where it used vinylidene chloride from 1960 through 1978.[24] Vinylidene or vinylidene byproducts were not detected in any of the residential wells in the nearby village.[25] In 2006, village residents filed a complaint alleging that, as a result of industrial activities, the chemicals may be present in undetectable levels in their drinking water wells and that therefore they had been exposed to vinyl chloride.[26] The plaintiffs proposed both a medical monitoring class that included individuals residing for one year or more in Ringwood between 1968 and 2002 and a property damage class to include all persons who owned property in Ringwood as of April 2006, alleging devaluation of their property due to contamination.[27] Plaintiffs offered no data showing that each member had been exposed to contamination sufficient to warrant preventative medical monitoring or to reduce property values.[28] The Third Circuit affirmed the district court's denial of class certification because plaintiffs relied solely on evidence of the class members' total average exposure to vinylidene and its byproducts, noting that averages and community-wide estimates will not suffice to gain class certification, in part because the effects of any exposures may vary widely based on age, sex, genetics, physical activity, and other factors.[29]

Illustrating the evidentiary burdens on class action plaintiffs seeking certification, the U.S. District Court for Eastern District of Pennsylvania in *Kemblesville HHMO Center, LLC v. Landhope Realty Co.* held that a proposed class of plaintiffs living within 2,500 feet of a gas station was overbroad.[30] In 1998, a plume of methyl tert-butyl ether (MTBE) was discovered in groundwater beneath a gas station that had been in operation since 1978.[31] Subsequent testing of groundwater nearby revealed seventeen affected properties, the majority of which were located within 750 feet of the gas station, and all of which were located within 1,500 feet.[32] Nearby property owners filed suit and sought certification of a class defined as owners of land located within 2,500 feet of the gas station, which included some 179 properties.[33] The district court denied class

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[20]509 U.S. 579 (1993) (applying standard of review for expert testimony).
[21]*Sher*, 419 F. App'x at 889–91.
[22]*Id*. at 890 (citing Am. Honda Motor Co. v. Allen, 600 F.3d 813 (7th Cir. 2010)).
[23]655 F.3d 255, 269, 272 (3d Cir. 2011), *available at* http://www.ca3.uscourts.gov/opinarch/102108p.pdf.
[24]*Id.* at 258.
[25]*Id.* at 258–59.
[26]*Id.* at 259.
[27]*Id.*
[28]*Id.* at 270–72.
[29]*Id.* at 265–68.
[30]No. 08-2405, 2011 U.S. Dist. LEXIS 83324, at *21 (E.D. Pa. July 28, 2011).
[31]*Id.* at *1–3.
[32]*Id*. at *5.
[33]*Id*. at *2, *16.

certification, stating that plaintiffs seeking certification of a class area must demonstrate that a contamination plume "may have traveled, or will ever travel" to the edges of the proposed class area.[34] Plaintiffs, however, did not offer a "model or a concrete expert opinion as to the extent or eventual movement of the alleged MTBE plume."[35] The court held both that plaintiffs' proposed class was overbroad and that plaintiffs could not demonstrate that the putative class would be too numerous to consider individually.[36]

IV. EXPERTS

In a decision that underscores the importance of expert analysis of exposure levels in the context of toxic tort actions alleging personal injury from contamination, the Sixth Circuit in *Pluck v. BP Oil Pipeline Co.* affirmed a district court's decision to exclude an expert's specific causation testimony as unreliable and to grant summary judgment to defendant.[37] Plaintiffs asserted claims for strict liability, negligence, and loss of consortium in connection with benzene contamination in drinking water wells that allegedly caused illnesses, including non-Hodgkin's lymphoma.[38] Plaintiffs' expert on causation did not specify a diagnosis methodology in the initial report, and, after the court's submission deadline, the expert filed a supplemental report specifying a differential diagnosis (i.e., the elimination of potential causes) methodology.[39] The Sixth Circuit affirmed the district court's decision to exclude the testimony as unreliable under the standard set forth in *Daubert*,[40] rejecting the expert's testimony as inadequate because he formulated his opinion without data as to the plaintiffs' exposure to benzene and instead relied on the theory that there is no safe dose when it comes to benzene exposure — a theory that has been rejected by other courts.[41] The Sixth Circuit also deemed the expert's testimony to be conjecture that failed both to consider benzene as the cause of illness and to rule out alternative causes of illness.[42]

Reaffirming the propriety of relying on federal evidentiary law to decide issues of expert admissibility, even when the effect may be tantamount to a ruling on an issue of substantive law, the U.S. Court of Appeals for the Third Circuit in *Pritchard v. Dow Agro Sciences* affirmed a district court's decision to exclude a plaintiff's expert's testimony that exposure to defendant's insecticide product allegedly caused plaintiff's non-Hodgkin's lymphoma.[43] The district court found the expert's proposed testimony unreliable under *Daubert*,[44] and Federal Rule of Evidence 702,[45] because the expert's conclusions were unsupported by the full spectrum of information pertaining to plaintiff's

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[34] *Id.* at *17–18.
[35] *Id.* at *18.
[36] *Id.* at *21, *25–26.
[37] 640 F.3d 671, 673 (6th Cir. 2011), *available at* http://www.ca6.uscourts.gov/opinions.pdf/11a0121p-06.pdf.
[38] *Id.* at 674–75.
[39] *Id.* at 675.
[40] *See generally Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) (applying standard of review for expert testimony).
[41] *Pluck*, 640 F.3d at 676.
[42] *Id.* at 679–80.
[43] 430 F. App'x 102, 104 (3d Cir. 2011), *available at* http://www.ca3.uscourts.gov/opinarch/102168np.pdf.
[44] *See generally Daubert*, 509 U.S. 579 (1993) (applying standard of review for expert testimony).
[45] FED. R. EVID. 702.

exposure.[46] On appeal, plaintiff argued that the district judge improperly applied the doctrine set forth in *Erie Railroad Co. v. Tompkins*,[47] by relying on substantive federal common law to rule on a cause of action that was filed in federal court based on the tenets of federal diversity jurisdiction.[48] Specifically, plaintiff alleged that the factors considered by the district judge were inconsistent with established Pennsylvania substantive law governing causation.[49] The Third Circuit affirmed, finding that the district judge's decision was an "evidentiary ruling, separate and distinct from any substantive question regarding causation."[50] Such a ruling, noted the court, is governed by federal law, and the district judge properly considered a host of factors to determine that the testimony failed to satisfy the admissibility standard under Rule 702.[51]

V. DAMAGES

Applying U.S. Supreme Court due-process precedent, the U.S. District Court for the Northern District of Ohio in *Cooley v. Lincoln Electric Co.* upheld a jury award of $5 million in punitive damages — more than six times the compensatory damage award — in favor of a welder who claimed that four decades of exposure to manganese fumes from defendants' welding rods caused irreversible neurological damage.[52] The jury awarded $787,500 in compensatory damages and $5 million in punitive damages.[53] In its analysis of whether the amount of the punitive damages award comported with constitutional due process, the district court relied on *BMW of North America, Inc. v. Gore*,[54] in which the Supreme Court of the United States offered three guideposts to determine whether a punitive damages award is excessive: "(1) 'the degree of reprehensibility of defendants'' conduct;" (2) the disparity between compensatory and punitive damages; and (3) the difference between the award and "the civil penalties authorized or imposed in comparable cases."[55] In upholding the award, the court identified "evidence of [defendants'] willingness to sacrifice customers' safety in order to preserve profitability" as sufficient to characterize defendants' conduct as highly reprehensible.[56] In addition, the court found that the ratio of punitive damages to compensatory damages – six-point-three to one – was not "unjustifiably large, given the high degree of reprehensibility" of defendants' conduct.[57]

In a decision that could affect the viability of negligence claims based only on economic losses without accompanying physical or property damage, the Fifth Circuit in *Hall v. El Dorado Chemical Co.* vacated a district court's dismissal of a class action after the Texas Supreme Court reversed a lower court's interpretation of the economic loss doctrine.[58] In 2009, a fire at a fertilizer factory in Brazos County, Texas, destroyed a chemical warehouse, caused the evacuation of more than 20,000 residents due to a smoke

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[46] *Pritchard*, 430 F. App'x at 103–05.
[47] 304 U.S. 64 (1938).
[48] *Pritchard*, 430 F. App'x at 103–04.
[49] *Id.*
[50] *Id.*
[51] *Id.*
[52] 776 F. Supp. 2d 511, 548–49 (N.D. Ohio 2011).
[53] *Id.* at 517.
[54] 517 U.S. 559 (1996).
[55] *Cooley*, 776 F. Supp. 2d at 549 (quoting *Gore*, 517 U.S. at 575).
[56] *Id.* at 555.
[57] *Id.*
[58] No. 10-20871, 2011 U.S. App. LEXIS 23451, at *4 (5th Cir. Nov. 22, 2011), *available at* http://www.ca5.uscourts.gov/opinions/unpub/10/10-20871.0.wpd.pdf.

plume, and led to the closure of surrounding businesses.[59] Plaintiff filed a putative class action based on theories of negligence and nuisance, seeking compensatory and exemplary damages.[60] Relying on *City of Alton v. Sharyland Water Supply Corp.*,[61] which barred recovery in tort when only economic loss is alleged, the magistrate judge recommended dismissal of the complaint because, among other reasons, the negligence and nuisance claims did not allege physical or property injury, and exemplary damages were not recoverable without an underlying tort.[62] Thereafter, the Texas Supreme Court heard *City of Alton* on appeal and reversed the intermediate court, holding that the economic loss doctrine did not bar recovery on a negligence theory in the absence of physical or property injury.[63] As a result of this decision, the Fifth Circuit vacated and remanded the case.[64]

VI. MEDICAL MONITORING

A Sixth Circuit decision affirming a district court's grant of summary judgment to the defendant in *Hirsch v. CSX Transportation, Inc.* reaffirmed the one-in-one-million evidentiary standard in tort cases for plaintiffs seeking damages for increased risk of future illness.[65] A train carrying hazardous materials derailed and caught fire in Ohio.[66] Local residents claimed that dioxin levels in their town rose significantly as a result of the fire and filed suit against CSX.[67] In affirming the district court's decision to grant summary judgment and dismiss the medical monitoring claim, the Sixth Circuit emphasized that success on a claim for future illness would require plaintiffs to show that a reasonable physician would order medical monitoring.[68] The court found that the estimate of plaintiffs' elevated risk to only a possible one-in-a-million chance would not suffice for a claim of future illness.[69] The court noted, however, that the plaintiffs might have survived summary judgment if they had obtained conclusive medical evidence that their risk of disease had been elevated by a margin greater than one-in-a-million as a result of the accident.[70]

In a decision that sheds light on medical monitoring in the context of hydraulic fracturing, or fracking, the U.S. District Court for the Middle District of Pennsylvania in *Fiorentino v. Cabot Oil & Gas* held that plaintiffs seeking the creation of a medical monitoring trust fund must make available their personal medical records to the court for the assessment of an increase in the need for medical monitoring due to exposure.[71] Plaintiffs are Pennsylvania residents suing drilling companies engaged in hydraulic

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[59] *Id.* at *1–2.
[60] *Id.* at *2.
[61] 277 S.W.3d 132, 139 (Tex. App. 2009).
[62] *Hall*, 2011 U.S. App. LEXIS 23451, at *2–3.
[63] City of Alton v. Sharyland Water Supply Co., No. 09-0223, 2011 Tex. LEXIS 805 (Tex. Oct. 21, 2011), *available at* http://www.supreme.courts.state.tx.us/historical/2011/oct/090223.pdf.
[64] *Hall*, 2011 U.S. App. LEXIS 23451, at *4.
[65] 656 F.3d 359, 360, 364 (6th Cir. 2011), *available at* http://www.ca6.uscourts.gov/opinions.pdf/11a0258p-06.pdf.
[66] *Id.* at 361.
[67] *Id.*
[68] *Id.* at 363.
[69] *Id.* at 364.
[70] *Id.*
[71] No. 3:09-CV-2284, 2011 U.S. Dist. LEXIS 126314, at *26–27 (M.D. Pa. Oct. 31, 2011).

fracturing, and plaintiffs allege that defendants' operations have exposed them to hazardous substances that increase their likelihood of disease, requiring increased medical monitoring during their lifetimes.[72] The court held that plaintiffs must provide defendants with medical authorizations and all responsive information regarding their medical histories because plaintiffs must show that the prescribed monitoring regime differs from what would be recommended in the absence of exposure, given any pre-existing conditions for each plaintiff.[73]

VII. OTHER COMMON LAW TORTS

The U.S. District Court for the Middle District of Pennsylvania in *Berish v. Southwestern Energy Production Co.* denied defendants' motion to dismiss a claim for strict liability, among other claims stemming from natural gas development in the Marcellus Shale, holding that the fact-specific determination of whether an activity is abnormally dangerous would be better conducted at summary judgment.[74] Plaintiffs claimed that the defendants improperly executed hydraulic fracturing, or fracking, activities and thereby contaminated the plaintiffs' water supply.[75] Defendants asked the court to dismiss claims arising under Pennsylvania strict liability law because the complaint did not provide sufficient facts to demonstrate that fracking is abnormally dangerous and because strict liability has not been found in similar Pennsylvania cases.[76] The court disagreed, citing section 520 of the Restatement (Second) of Torts, which lists six factors to be considered in determining whether an activity is abnormally dangerous.[77] While the court noted plaintiffs may have difficulty satisfying some of the section 520 factors at summary judgment, it was not necessary for plaintiffs to satisfy those factors at the pleadings stage because the complaint need only put the defendant on notice as to the basis of the strict liability claim.[78] The court distinguished the case from decisions that rejected strict liability claims at the summary judgment stage, given that those decisions were made following the completion of fact discovery.[79] Defendants also moved to dismiss plaintiffs' claims for damages for emotional distress because Pennsylvania common law requires a physical injury to sustain such damages.[80] Because only one plaintiff pled physical injury, the court dismissed the other plaintiffs' emotional distress claims but granted those plaintiffs leave to amend the complaint to include damages allegedly caused by the defendants' interference with the plaintiffs' possession of real property.[81]

In *New Jersey Department of Environmental Protection v. Exxon Mobil Corp.*, New Jersey's intermediate appellate court held that the State's statute-of-limitation extension law,[82] which extended the limitations period associated with claims brought by

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[72] *Id.* at *4–5.
[73] *Id.* at *20–21, *27–28.
[74] 763 F. Supp. 2d 702, 705–06 (M.D. Pa. 2011).
[75] *Id.* at 703–04.
[76] *Id.* at 705–06.
[77] *Id.*
[78] *Id.* at 706.
[79] *Id.*
[80] *Id.*
[81] *Id.* at 706–07.
[82] N.J. STAT. ANN. § 58:10B-17.1(b) (West 2006), *available at* http://lis.njleg.state.nj.us/cgi-bin/om_isapi.dll?clientID=24783595&Depth=2&depth=2&expandheadings=on&heading

the State under the "State's environmental laws,"[83] applies to both statutory and common law causes of action and therefore allows the State to seek natural resource damages (NRD) based upon both statutory and common law claims.[84] The State originally alleged statutory claims and common law claims of nuisance and trespass for groundwater contamination, and later added a claim for strict liability.[85] The trial court granted defendant's motion to dismiss the claims as time-barred, and the State appealed.[86] The appellate court reversed, holding that common law is part of the State's environmental laws and noted that the statute's legislative history evinced an intent to expand, not constrain, the ability of the State to initiate NRD litigation.[87] The court compared the statute's terms to the those of the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA),[88] which has been interpreted to stay the tolling of the statute of limitations for NRD claims while remedial work is underway, and concluded that applying the New Jersey statute-of-limitations extension law to a common law claim for strict liability for NRD would be consistent with CERCLA.[89]

In a major international toxic tort action derailed by fraud, the California Superior Court for Los Angeles County issued a Statement of Decision in *Tellez v. Dole Food Co., Inc.* vacating a multi-million dollar judgment and dismissing with prejudice an action filed by Nicaraguan plaintiffs who alleged exposure to pesticides while employed by affiliates of Dole Food Company, Inc.[90] The Statement of Decision follows a July 15, 2010 bench ruling that vacated the jury verdict in favor of the plaintiffs.[91] California Court of Appeal Justice Victoria G. Chaney, sitting by assignment on the Superior Court, found clear and convincing evidence that the judgment for more than $1.5 million was the product of a fraud on the court and extrinsic fraud by the plaintiffs' lawyers and their agents. Many of the plaintiffs had apparently never worked on the subject banana farms, and the Statement of Decision describes how certain of the plaintiffs' attorneys coached

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[83]*Id.*

[84]420 N.J. Super. 395, 410–11 (App. Div. 2011), *available at* http://lawlibrary.rutgers.edu/collections/courts/appellate/a0314-09.opn.html.

[85]*Id.* at 397–98.

[86]*Id.* at 398.

[87]*Id.* at 410–11.

[88]Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601–9675 (2006), *available at* http://uscode.house.gov/uscode-cgi/fastweb.exe?getdoc+uscview+t41t42+6926+0++%28%29%20%20AND%20%28%2842%29%20ADJ%20USC%29%3ACITE%20AND%20%28USC%20w%2F10%20%289601%29%29%3ACITE.

[89]*Exxon Mobil*, 420 N.J. Super. at 409–10.

[90]No. BC 312852, slip op. (Cal. Super. Ct. Mar. 11, 2011); *see also* Press Release, Dole, Dole Food Company Announces That Court Enters Final Order Vacating Judgment, Dismissing Fraudulent Lawsuit Brought by Nicaraguans Claiming to Have Been Banana Workers (Mar. 15, 2011) [hereinafter Dole 2011 Press Release], http://investors.dole.com/phoenix.zhtml?c=231558&p=irol-newsArticle&ID=1539651&highlight=.

[91]Tellez v. Dole Food Co., No. BC 312852, slip op. (Cal. Super. Ct. July 15, 2010); *see also* Press Release, Dole, Dole Food Company, Inc. Announces Los Angeles Superior Court Vacates Judgment and Dismisses Lawsuit Brought by Nicaraguans Claiming to Have Been Banana Workers (July 15, 2010), http://www.dole.com/CompanyInformation/PressReleases/PressReleaseDetails/tabid/1268/Default.aspx?contentid=11722.

the plaintiffs to lie about working on the farms, forged work certificates, and generated fake lab results to create the impression that the plaintiffs had been rendered sterile by exposure to pesticides.[92] Justice Chaney found that the fraud so permeated the action and the viability of any future proceedings that no sanction less than dismissal with prejudice would be adequate.

Underscoring that regulatory standards and compliance can sometimes provide a defense against liability, particularly where the alleged product defects have nothing to do with the intended uses of the product, District of Columbia Superior Court Judge Gregory Jackson issued findings of fact and conclusions of law rejecting claims that the District of Columbia Water and Sewer Authority (DC WASA) was responsible for alleged leaks in five apartment buildings in *Cormier v. District of Columbia Water & Sewer Authority*.[93] Because plaintiffs failed to show an applicable standard of care or that the alleged damages derive from the contemplated uses of the product, the court was not required to choose between competing scientific experts on causation in issuing its defense judgment.[94] Plaintiffs, property owners in the District, alleged that the drinking water sold by the utility caused numerous pinhole leaks in copper plumbing in buildings, and sought $5,000,000 to replace the plumbing.[95] Plaintiffs' expert testimony concluded that the water chemistry would lead to additional pinhole leaks in the buildings and called for the replacement of all plumbing in the buildings.[96] In addition to a defense expert who disagreed that the water was excessively corrosive and explained that building-specific factors lead to pinhole leaks, the defense provided extensive testimony that the overriding mission of water is to provide potable water, not to insure leak-free pipes.[97] Judge Jackson summarized:

> There is no dispute that the water [from DC WASA] is, indeed, safe for drinking, cooking, and bathing. The primary purpose of the water is not to keep Plaintiffs' pipes from corroding. The Court finds persuasive the testimony that *all* types of pipes, including galvanized steel, copper, or plastic, can experience leaks from water, which is a naturally corrosive substance.[98]

Applying section 402A of the Restatement Second of Torts, the court held that the water could not be deemed unreasonably dangerous because it was "safe for its intended, ordinary purpose," consumption for drinking.[99] With respect to the plaintiffs' Uniform Commercial Code (UCC) claim, the court found the same facts showed the water did not breach an implied warranty of merchantability: "The primary purpose of the water is not to keep Plaintiffs' pipes from corroding."[100] Finally, the plaintiffs' negligence claim failed because they could not establish a recognized standard of care for prevention of pinhole leaks or a breach of a standard by the defendant.[101]

In a decision easing pleading requirements for product liability claims under California law, the California Court of Appeals in *Jones v. ConocoPhillips Co.* held that a

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[92]Dole 2011 Press Release, *supra* note 90.
[93]No. 03-1254B, 2011 D.C. Super. LEXIS 7, at *30–31 (D.C. Super. Ct. Sept. 30, 2011).
[94]*Id.* at *24–25.
[95]*Id.* at *1–2, *21–22.
[96]*Id.* at *3–10.
[97]*Id.* at *12–18.
[98]*Id.* at *30.
[99]*Id.* at *28.
[100]*Id.* at *30.
[101]*Id.* at *24–25.

plaintiff at the pleading stage need not identify the specific toxins contained in a product that allegedly injured him, so long as he can identify the product that allegedly caused him harm.[102] An employee of The Upjohn Company and The Goodyear Tire and Rubber Company died in 2008 of heart, liver, and kidney disease.[103] His wife and children filed an action against 19 manufacturers of 34 chemical products, alleging that each product was a substantial factor in his death.[104] Defendants moved to dismiss the complaint on the grounds that it was not sufficiently specific, arguing that plaintiffs had sued the makers of every chemical the plaintiff-employee worked with during his employment and claiming that every product caused his illnesses, without identifying the specific toxins in each product that allegedly caused the injury.[105] The trial court granted defendants' motion and dismissed plaintiffs' claims, holding that plaintiffs' allegations needed "to apprise defendants of the particular toxins and products that allegedly caused [the plaintiff-employee's] illnesses."[106] The California Court of Appeals reversed, rejecting the argument "that a complaint is unacceptably speculative" if it fails to identify "which toxin contained in a particular product caused an alleged injury" or if the plaintiff sues the manufacturers of multiple products.[107] Rather, the court held that, to assert a viable claim, plaintiffs need identify only the specific products —— not the specific chemical compounds —— that allegedly had caused them harm.[108]

[102]130 Cal. Rptr. 3d 571, 576–77 (Ct. App. 2011), *available at* http://statecasefiles.justia.com/documents/california/court-of-appeal-2nd-appellate-district/B225418.PDF?ts=1323888346.
[103]*Id.* at 573.
[104]*Id.*
[105]*Id.* at 574–75.
[106]*Id.* at 575.
[107]*Id.* at 576, 579 (citing Bockrath v. Aldrich Chem. Co., 21 Cal. 4th 71 (1999)).
[108]*Id.* at 578–79.