Chapter 6 • ENVIRONMENTAL LITIGATION AND TOXIC TORTS
2012 Annual Report[1]

I. *DEEPWATER HORIZON*: SETTLEMENTS AND DECISIONS

In April 2010, the *Deepwater Horizon* oil rig exploded, burned, and sank in the Gulf of Mexico, resulting in the deaths of eleven men and the release of millions of gallons of oil into the Gulf of Mexico from the Macondo well. A myriad of civil and criminal suits ensued for a wide variety of lawsuits, many of which were consolidated into two multi-district litigations (MDLs).[2] In the U.S. District Court for the Eastern District of Louisiana, MDL No. 2179 is a consolidation of numerous lawsuits brought by individuals and government entities, alleging civil and criminal liability for damages that include economic loss, medical claims, civil penalties, criminal penalties, and natural resource damages. Portions of many these suits were settled or decided in 2012. Remaining components of MDL No. 2179 are scheduled to begin trial on February 25, 2013.[3]

BP Exploration and Production, Inc. (BP) was the majority owner and operator of the Macondo well and co-leased the *Deepwater Horizon*.[4] BP agreed to settle numerous claims in April 2012, and the Eastern District of Louisiana approved the settlement on December 21, 2012.[5] This settlement includes monies for economic loss, including approximately $2.3 billion to the Gulf seafood industry, and medical injuries, including $105 million for a Gulf Region Health Outreach Program.[6] On November 15, 2012, BP

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[1]This report was edited by Patrick R. Jacobi of Beveridge & Diamond, P.C., Washington, DC and Megan R. Brillault of Beveridge & Diamond, P.C., New York, NY. Authors of this report included Mr. Jacobi, Ms. Brillault, and Daphne A. Rubin-Vega of Beveridge & Diamond, P.C., Washington, DC. The authors also wish to thank Beveridge & Diamond, P.C. generally, and specifically Toren M. Elsen for his assistance. This report summarizes significant decisions, whether published or unpublished, in toxic tort litigation from 2012 but does not purport to summarize all decisions.

[2]One of the MDLs not covered in this article, *In re BP p.l.c. Securities Litigation*, MDL No. 2185 (S.D. Tex.), is a consolidation of various securities suits assigned to Judge Keith P. Ellison of the U.S. District Court for the Southern District of Texas. On November 15, 2012, the Securities Exchange Commission (SEC) announced that BP agreed to settle certain charges brought by the SEC. *See* Press Release, SEC, BP to Pay $525 Million Penalty to Settle SEC Charges of Securities Fraud During Deepwater Horizon Oil Spill (Nov. 15, 2012), http://www.sec.gov/news/press/2012/2012-231.htm.

[3]For a list of other defendants and their respective roles, see *Legal Claims and Litigation*, ENVTL. LAW INST., http://eli-ocean.org/gulf/understanding-litigation/ (last updated Jan. 11, 2013).

[4]*In re* Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on Apr. 20, 2010, 844 F. Supp. 2d 746, 747 (E.D. La. 2012) (order and reasons as to cross-motions for partial summary judgment regarding liability under the Clean Water Act and Oil Pollution Act).

[5]*In re* Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on Apr. 20, 2010, MDL No. 2179, 2012 WL 6652608 (E.D. La. Dec. 21, 2012) (order and reasons granting final approval of settlement agreement).

[6]*See* Notice of Filing of the Economic and Property Damages Settlement Agreement as Amended on May 2, 2012, and as Preliminarily Approved by the Court on May 2, 2012, *In re* Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on Apr. 20, 2010, MDL No. 2179 (E.D. La. May 3, 2012); Notice of Filing of the Medical Benefits Class Action Settlement Agreement as Amended on May 1, 2012, and as Preliminarily Approved by the Court on May 2, 2012, *In re* Oil Spill by the Oil Rig

resolved all pending criminal charges filed by the U.S. Department of Justice, including a guilty plea to fourteen counts of criminal action, by agreeing to pay $4 billion and to be on certain probations for five years.[7]

Many of the MDL No. 2179 claims are alleged violations of the Clean Water Act (CWA), some of which have been addressed either by settlement or court decisions. Transocean Holdings, Inc. and its various subsidiaries and related entities (collectively, Transocean), including Transocean Deepwater, Inc. and Triton Asset Leasing—which owned the *Deepwater Horizon*, are also named in various suits consolidated in MDL No. 2179. On January 3, 2013, Transocean agreed to settle civil and criminal claims with the federal government for $1.4 billion.[8] Transocean agreed to plead guilty to one criminal misdemeanor violation of the CWA and pay an initial fine of $100 million plus $1 billion in civil penalties over the next five years.[9] Another defendant named in MDL No. 2179 suits, MOEX Offshore 2007 LLC, which was a minority owner and co-lessee of the Macondo well, settled CWA charges in June 2012 by agreeing to pay $70 million.[10]

In February 2012, the U.S. District Court for the Eastern District Court of Louisiana found BP, Anadarko Petroleum Corporation, and Anadarko E&P Company LP (collectively, Anadarko), which was a minority owner and co-lessee of the Macondo well, liable for CWA violations in the form of civil penalties, amounting to as much as $1,100 per barrel, as part of a decision in MDL No. 2179.[11] Judge Barbier found that BP and Anadarko were both liable for the subsurface discharge of oil below the water because they co-leased the Transocean-owned *Deepwater Horizon* drilling unit. Both companies are jointly and severally liable for Oil Pollution Act removal costs and damages for subsurface discharge.[12]

II. CLIMATE-BASED TORT ACTIONS

Further limiting available grounds for plaintiffs to seek redress for injuries allegedly due to climate change, the U.S. Court of Appeals for the Ninth Circuit upheld the dismissal of an action brought by the Native Village of Kivalina and the City of Kivalina (collectively, Kivalina) against multiple oil, energy, and utility companies (the Energy Companies) in *Native Village of Kivalina v. ExxonMobil Corp.*[13] Consistent with

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"Deepwater Horizon" in the Gulf of Mexico, on Apr. 20, 2010, MDL No. 2179 (E.D. La. May 3, 2012).

[7] Guilty Plea Agreement at 3–6, United States v. BP Exploration & Prod., Inc., No. 2:12-cr-00292-SSV-DEK (E.D. La. Nov. 15, 2012). Judge Vance approved the agreement on January 29, 2013 and February 8, 2013. *See* United States v. BP Exploration & Prod., Inc., No. 2:12-cr-00292-SSV-DEK (E.D. La. Jan. 29, 2013) (order approving agreement); United States v. BP Exploration & Prod., Inc., No. 2:12-cr-00292-SSV-DEK (E.D. La. Feb. 8, 2013) (amended reasons accepting plea agreement).

[8] Press Release, DOJ, Transocean Agrees to Plead Guilty to Environmental Crime and Enter Civil Settlement to Resolve U.S. Clean Water Act Penalty Claims from Deepwater Horizon Incident (Jan. 3, 2013), http://www.justice.gov/opa/pr/2013/January/13-ag-004.html.

[9] *Id.*

[10] *See generally* Consent Decree Between the United States and MOEX Offshore 2007 LLC at 10, *In re* Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2010, MDL No. 2179 (E.D. La. 2012). MOEX agreed to pay another $20 million to facilitate land acquisition projects in several Gulf states. *Id.* at 12.

[11] *In re* Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on Apr. 20, 2010, 844 F. Supp. 2d 746, 756 & n.22 (E.D. La. 2012).

[12] *Id.* at 761.

[13] 696 F.3d 849 (9th Cir. 2012).

the Supreme Court's decision in *American Electric Power Co. v. Connecticut* (*AEP*),[14] the panel found that Kivalina's federal common law nuisance claims were displaced by the Clean Air Act (CAA).[15] The decision was perhaps most notable for concluding that federal common law claims seeking monetary damages for alleged climate-related injuries—in addition to claims seeking injunctive relief, which the Supreme Court addressed in *AEP*—are displaced by federal statutory law.

Kivalina based its public nuisance claim on allegations that it faced destruction because of a reduction in the protective sea ice formed on the city's coastline and the resulting erosion from wave action and sea storms due to the Energy Companies' emissions of carbon dioxide and other greenhouse gases.[16] Kivalina also alleged that the Energy Companies "[acted] in concert to create, contribute to, and maintain global warming and [conspired] to mislead the public about the science of global warming."[17] The district court dismissed Kivalina's claims on political question grounds and because Kivalina lacked standing to bring a public nuisance suit, noting doubts as to the causation and traceability of the alleged injuries to the conduct of the Energy Companies.[18]

In affirming the district court, the majority opinion followed the *AEP* decision, in which the Supreme Court determined that Congress, through the CAA, "has directly addressed the issue of domestic greenhouse gas emissions from stationary sources and has therefore displaced federal common law."[19] The Ninth Circuit recognized the distinction between the injunctive remedy sought by plaintiffs in *AEP* and the monetary damages sought by Kivalina but found this distinction to be immaterial to the displacement analysis because "under current Supreme Court jurisprudence, if a cause of action is displaced, [then] displacement is extended to all remedies."[20] The court held that Kivalina's civil conspiracy claim fell on these same grounds.[21] In a lengthy concurrence, Judge Pro agreed with the court's ultimate decision but found that the relevant Supreme Court jurisprudence did not necessarily dictate that displacement of a claim for injunctive relief calls for displacement of a damages claim and that Kivalina had not met the burden of alleging facts allowing the village and city to plausibly trace the alleged injuries to the Energy Companies.[22]

In a new wave of climate change litigation that could pave the way for state-level regulation of greenhouse gas emissions, at least two courts have extended the "public trust" doctrine to include protection of the air and atmosphere. Plaintiffs in these cases argue that the atmosphere, like groundwater and surface water, is a natural resource held in trust for the benefit of the public, and therefore state governments, as trustees of such resources, have a duty to protect the atmosphere for the public good. The plaintiffs in these cases seek injunctive relief in the form of more stringent regulation of greenhouse gas emissions.

In *Bonser-Lain v. Texas Commission on Environmental Quality*, for example, the Texas Environmental Law Center sued the state's lead environmental agency, the Texas Commission on Environmental Quality (TCEQ), asserting that Texas, as a common law trustee of public resources—here, the air and atmosphere, had a fiduciary duty to reduce

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[14]131 S. Ct. 2527 (2011).
[15]696 F.3d at 856–58.
[16]*Id.* at 853–54.
[17]*Id.* at 854.
[18]Native Vill. of Kivalina v. ExxonMobil Corp., 663 F. Supp. 2d 863, 877, 880–81 (N.D. Cal. 2009).
[19]*Kivalina*, 696 F.3d at 856 (citing *AEP*, 131 S. Ct. at 2530, 2537).
[20]*Id.* at 857.
[21]*Id.* at 857–58.
[22]*Id.* at 858–59, 866, 868 (Pro, J., concurring).

greenhouse gas emissions.[23] Although the court deferred to the TCEQ's decision to deny plaintiff's petition for rulemaking at this time, the court held that the public trust doctrine is not exclusively limited to the conservation of water; rather, the "doctrine includes all natural resources of the State."[24] In addition, the court determined that the public trust doctrine was incorporated into the Texas constitution and that TCEQ had authority to act "to protect against adverse effects including global warming."[25]

Days later, a trial court in New Mexico denied defendant's motion to dismiss, allowing plaintiffs' public trust doctrine claim to proceed on its merits in *Sanders-Reed v. Martinez*.[26] Akilah Sanders-Reed and WildEarth Guardians sued New Mexico, seeking to compel it to recognize the application of the public trust doctrine to greenhouse gas emissions and to take actions to reduce those emissions. In denying defendant's motion to dismiss, the court held that plaintiffs made a "substantive allegation that, notwithstanding statutes enacted by the New Mexico Legislature which enable the state to set state air quality standards, the process has gone astray and the state is ignoring the atmosphere with respect to greenhouse gas emissions."[27]

The U.S. District Court for the Western District of Pennsylvania, however, closed the door on claims based on state tort law. In *Bell v. Cheswick Generating Station*, plaintiffs brought claims based on nuisance, negligence, trespass, and strict liability, alleging that emissions from defendant's coal-fired electric-generating facility damaged the plaintiffs' property.[28] Answering the question left open by the Supreme Court in *AEP*, the district court concluded that plaintiffs' common law claims spoke to and attacked emission standards governed by the standards of the CAA.[29] The court also rejected plaintiffs' argument that the CAA's "savings clause" allowed these claims, finding that "to permit the common law claims would be inconsistent with the dictates of the Clean Air Act."[30]

III. TRESPASS

Striking a blow to landowners who may wish to sue over pesticide drift onto their land, the Minnesota Supreme Court held in *Johnson v. Paynesville Farmers Union Cooperative Oil Co.* that such an invasion does not involve a physical invasion or interference with a landowner's exclusive possessory interest in his or her land and, therefore, cannot constitute a trespass.[31] Plaintiffs operated a certified organic farm adjacent to a farm where defendants applied commercial pesticides, which contaminated a portion of plaintiffs' soybean and alfalfa fields via drift, leading plaintiffs to plow under some of their fields and take portions out of cultivation.[32] Plaintiffs sued for damages under trespass, nuisance, and negligence per se theories of liability.[33] The trial court held that plaintiffs' trespass claim failed as a matter of law.[34] The Minnesota Court of Appeals reversed, concluding that particulates that travel onto property can constitute trespass

[23]No. D-1-GN-11-002194 (Tex. Dist. Ct. July 9, 2012) (mem.).
[24]*Id.* at 1.
[25]*Id.*
[26]No. D-101-CV-2011-1514 (N.M. Dist. Ct. July 14, 2012) (order denying motion to dismiss).
[27]*Id.* at 2.
[28]No. 2:12-cv-929, 2012 WL 4857796, at *1–2 (W.D. Pa. Oct. 12, 2012).
[29]*Id.* at *7–8.
[30]*Id.* at *9.
[31]817 N.W.2d 693, 705 (Minn. 2012).
[32]*Id.* at 696–98.
[33]*Id.* at 698.
[34]*Id.* at 699.

where it is "reasonably foreseeable that the intangible matter [could] 'result in an invasion of [the] plaintiff's possessory interest,'" and the invasion caused substantial property damage.[35]

The Minnesota Supreme Court reversed the appellate court, holding that intangibles cannot support a claim for trespass because they do not interfere with a landowner's exclusive possession of land in the same way as invasions by physical objects.[36] The court did not specifically define "intangible" but did conclude that particulate matter, including pesticide drift, is "an intangible agency," and that plaintiffs, therefore, did not adequately allege a tangible physical invasion to their land sufficient to support a claim for trespass.[37]

IV. EXPERTS / CAUSATION

Emphasizing that expert causation testimony must be based on reliable scientific grounds, the U.S. Court of Appeals for the Fifth Circuit upheld the exclusion of expert testimony that failed to demonstrate a causal link between chemical exposure and chronic lung disease in *Johnson v. Arkema, Inc.*[38] Plaintiff alleged that in 2007 he was twice exposed to monobutyltin trichloride (MBTC) and hydrochloric acid (HCl) in his work as a machine repairman at a bottling plant in Waco, Texas and offered the testimony of two expert witnesses.[39] The court excluded the first expert's opinion because he relied on insufficiently comparable animal studies and because he failed to cite any reliable scientific literature indicating that MBTC or HCl exposure could cause plaintiff's lung diseases.[40] Although the court found that differential diagnosis—ruling out other possible causes of a patient's symptoms and finding that the alleged cause at issue cannot be ruled out—may be an appropriate methodology, it nevertheless affirmed the exclusion of the opinion of the plaintiff's second expert because the plaintiff did not first establish general causation between MBTC or HCl and chronic lung disease.[41]

Underscoring the importance of a trial judge's gatekeeping responsibility to determine whether expert testimony is relevant and reliable, the U.S. Court of Appeals for the Ninth Circuit vacated a $9.4 million mesothelioma award in *Barabin v. AstenJohnson*.[42] The district court initially excluded plaintiffs' expert because of his "'dubious credentials and his lack of expertise with regard to dryer felts and paper mills'" but later reversed its decision, allowing plaintiffs' expert to testify at trial.[43] Although the district court determined that the plaintiffs had "clarified [their expert's] credentials, including that he had testified in other cases,"[44] it did not hold a hearing pursuant to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[45] On appeal, the Ninth Circuit held that "the district court abused its discretion when it failed to conduct a *Daubert* hearing or otherwise make relevance and reliability determinations regarding [the expert's]

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[35] *Id.* at 699–700, 703 (quoting Borland v. Sanders Lead Co., 369 So. 2d 523, 529 (Ala. 1979)).
[36] *Id.* at 702, 705.
[37] *Id.* at 702.
[38] 685 F.3d 452 (5th Cir. 2012).
[39] *Id.* at 457–58.
[40] *Id.* at 460.
[41] *Id.* at 467–69. The Fifth Circuit reversed the district court's grant of summary judgment, however, finding that plaintiff's claims for acute injuries did not require expert testimony to establish causation. *Id.* at 471.
[42] 700 F.3d 428, 430–31 (9th Cir. 2012).
[43] *Id.* at 430 (quoting the district court).
[44] *Id.*
[45] 509 U.S. 579 (1993).

testimony."[46] Because the lower court "failed to assess the scientific methodologies, reasoning, or principles [the expert] applied," the court improperly "left it to the jury to determine the relevance and reliability of the proffered expert testimony."[47]

A pair of state court appellate decisions provides further obstacles to a common theory of plaintiffs in toxic tort cases—that exposure to any amount of a hazardous substance can cause an injury. First, in *Dixon v. Ford Motor Co.*, the Maryland Court of Special Appeals vacated a $3 million judgment awarded to a plaintiff, concluding that plaintiff's expert failed to quantify the probability of causation or provide a meaningful assessment of the risk imparted by the exposure at issue.[48] Plaintiff's wife contracted mesothelioma allegedly as a result of exposure to defendants' products containing asbestos that were used in construction and renovation projects.[49] The appellate court held that the trial court erred in admitting plaintiff's expert testimony on whether exposure to defendant's products was a substantial contributing factor to the death of his wife because the doctrine of probabilistic causation implies some test of magnitude—i.e., "how much must exposure have *increased* one's *risk* of harm in order to hold the responsible party liable."[50] Because risk is a "measure of causation, and substantiality is a threshold for risk," the court concluded that "'substantiality' is essentially a burden of proof."[51] Thus, plaintiff's expert testimony that "*every exposure* to asbestos is a *substantial contributing cause*," without opining how much risk it imparted, was not helpful to the jury and was admitted improperly.[52]

Second, in *Betz v. Pneumo Abex LLC*, the Pennsylvania Supreme Court similarly rejected expert testimony that any exposure to asbestos—regardless of the amount, duration or frequency—could have caused plaintiff's injury.[53] Plaintiff brought suit against four auto product manufacturers, alleging that his exposure to defendants' asbestos-containing auto products, such as brake linings, caused him to contract mesothelioma.[54] At trial, plaintiff presented expert testimony from a pathologist to support an "any exposure" theory of causation, under which each asbestos fiber inhaled can substantially contribute to the development of asbestos-related diseases.[55] The trial court precluded the testimony, concluding that the expert had not properly applied reliable scientific methodologies to support his theory of causation.[56] The appellate court reversed the trial court's decision, finding that the trial court judge had abused his discretion by making conclusions that were not supported by the record.[57] In a unanimous opinion, the Pennsylvania Supreme Court concluded that the trial court appropriately applied the standard of scientific reliability established in *Frye v. United States*[58] given the controversial nature of the methodology underlying the "any exposure" theory and its role in asbestos cases.[59] In its reasoning, the court noted that application of the *Frye* standard was appropriate as the "any exposure" theory allowed plaintiffs to circumvent

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[46] *Barabin*, 700 F.3d at 431.
[47] *Id.* at 432, 433.
[48] 47 A.3d 1038, 1050 (Md. Ct. Spec. App. 2012), *cert. granted*, 55 A.3d 906 (Md. Nov. 16, 2012).
[49] *Id.* at 1039–40.
[50] *Id.* at 1043, 1046 (emphasis in original).
[51] *Id.* at 1046.
[52] *Id.* at 1047 (emphasis in original).
[53] 44 A.3d 27 (Pa. 2012).
[54] *Id.* at 30.
[55] *Id.* at 31.
[56] *Id.* at 39–40.
[57] *Id.* at 42.
[58] 293 F. 1013 (D.C. Cir. 1923).
[59] *Betz*, 44 A.3d at 52–54.

"the more conventional route of establishing specific causation (for example, by presenting a reasonably complete occupational history and [reasonably addressing] potential sources of exposure other than a particular defendant's product)."[60]

V. FRACKING

In a decision that reaffirmed the importance of having plaintiffs establish causal connections for their claims prior to full discovery, a Colorado court used a so-called *Lone Pine*[61] order to dismiss plaintiffs' hydraulic fracturing-related toxic tort suit against three natural gas drilling companies in *Strudley v. Antero Resources Corp.*[62] Landowners filed suit against three natural gas drilling companies alleging that exposure to chemicals from the companies' drilling activities had caused their health injuries, as well as damage to their property.[63] The defendants requested the court enter a case management order requiring plaintiffs to make a pre-discovery prima facie showing of exposure and causation, following the procedure set out in *Lone Pine*. "Cognizant of the significant discovery and cost burdens" of toxic tort cases, the court granted the defendants' request and required the plaintiffs to submit evidence demonstrating, among other things, the identity and quantity of each hazardous substance to which plaintiffs were exposed, that those substances can cause injuries like those alleged by plaintiffs, and that plaintiffs' illnesses were in fact caused by their exposure to those substances.[64] The court found that this pre-discovery requirement did not prejudice plaintiffs because they would eventually need to provide the same evidence to establish their claims.[65]

The court found that plaintiffs' submissions did not adequately establish general or specific causation.[66] The court was not persuaded by the general assertions of plaintiffs' experts that "sufficient environmental and health information exists to merit *further* substantive discovery," and that plaintiffs' injuries "*could* be consistent with contamination from gas well chemicals or production waters."[67] In making its finding, the court also considered the Colorado Oil and Gas Conservation Commission's report, which indicated that plaintiffs' water supply was not affected by nearby oil and gas operations.[68] Noting "this case's serious persisting causation problem," the court dismissed plaintiffs' claims with prejudice.[69] The case is "believed to be the first hydraulic fracturing tort case in the nation to reach a final decision."[70]

VI. DAMAGES

In *Arabie v. Citgo Petroleum Corp.*, the Louisiana Supreme Court vacated a punitive damage award to workers exposed to toxins from a 2006 oil spill, based primarily on Louisiana's policy disfavoring punitives and the fact that the exposure

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[60] *Id.* at 54.
[61] Lore v. Lone Pine Corp., No. L-33606-85, 1986 N.J. Super. LEXIS 1626 (N.J. Super. Ct. Law Div. Nov. 18, 1986).
[62] No. 2011CV2218 (Colo. Dist. Ct. May 9, 2012).
[63] *Id.* at 1–2.
[64] *Id.* at 2–3.
[65] *Id.* at 2.
[66] *Id.* at 3.
[67] *Id.* at 4–6 (emphasis in original).
[68] *Id.* at 2.
[69] *Id.* at 6–7.
[70] Joanne Rotondi, *Antero Resources Secures First Hydraulic Fracturing Toxic Tort Decision*, LEXBLOG NETWORK (May 21, 2012), http://lxbn.lexblog.com/tag/strudley-v-antero-resources-corporation/.

occurred in Louisiana.[71] The case was brought by fourteen construction employees who worked at a company located less than three miles south of a refinery owned by the defendant. Due to heavy rainfall, a spill storage tank overflowed, releasing over twenty-one million gallons of waste and contaminating over 100 miles of Calcasieu River shoreline.[72] Two lower courts allowed the award of punitive damages based on the application of Texas and Oklahoma law, which both allow punitives, because the defendant's former and current headquarters were located in those states.

The Louisiana Supreme Court reversed, reasoning that because the spill and injuries occurred in Louisiana, it was proper to apply Louisiana law, and that neither Texas nor Oklahoma had any particular interest in applying their respective laws.[73] The court noted that all of the plaintiffs lived and were employed in Louisiana, that neither Texas or Oklahoma had contacts with the plaintiffs,[74] and that persuasive authority supported its holding that "in determining the location where injurious conduct occurred, management or corporate level decisions must outweigh tortious activity which occurs locally in order for the location of the corporate or management decision to be considered the locale of the injurious conduct."[75]

VII. CLASS ACTIONS

Striking a blow against the certification of class actions in low-level exposure cases, the Louisiana Supreme Court denied class certification in a mass tort action, holding that the plaintiffs failed to meet the predominance requirement in *Alexander v. Norfolk Southern Corp.*[76] In 2001, ethyl acrylic fumes leaked from two parked railroad tank cars.[77] Approximately twenty people in the surrounding area were treated for exposure to the fumes, "and hundreds of others complained about eye, nose, throat, and respiratory irritations."[78] Plaintiffs filed a class action against defendants for their injuries, and the district court certified the class.[79]

On appeal, the Louisiana Supreme Court held that the lower court failed to take into account undisputed evidence by plaintiffs' toxicologist, who testified that injuries from exposure to low levels of ethyl acrylate are extremely rare and that determining the occurrence of such a rare injury to a particular person would require a significant amount of individualized proof.[80] The court concluded that "each member of the proposed class [would] have to offer different facts to establish liability and damages" and reversed the grant of class certification.[81]

VIII. OTHER TORT-BASED ACTIONS

Deferring to the U.S. Government's discretion in matters of military policy, the U.S. Court of Appeals for the First Circuit dismissed tort claims brought by several thousand residents of the Puerto Rican island of Vieques who claimed they were harmed by hazardous and toxic waste emitted by the U.S. Navy during training exercises in

[71] 89 So. 3d 307 (La. 2012).
[72] *Id.* at 310–11.
[73] *Id.* at 324.
[74] *Id.* at 316–17.
[75] *Id.* at 317.
[76] 82 So. 3d 1234 (La. 2012) (per curiam).
[77] *Id.* at 1235.
[78] *Id.*
[79] *Id.*
[80] *Id.* at 1236.
[81] *Id.*

Sanchez v. United States.[82] The Navy's operations on the island included live-munitions training (including with depleted uranium bullets) and other combat-simulation exercises, as well as the incineration and detonation of unused ordinance.[83] Pursuant to the Federal Tort Claims Act (FTCA), the 7,125 named plaintiffs asserted various causes of action under Puerto Rico law against the United States, including claims that the United States negligently failed to warn the plaintiffs of harmful pollution.[84] The plaintiffs also claimed that the Navy's actions violated the CWA, various federal permits, and regulations and policies.[85]

The First Circuit dismissed the lawsuit for lack of jurisdiction on two principal grounds. With respect to plaintiffs' tort claims, the court found that they were barred by the "discretionary function exception to the FTCA, which precludes FTCA actions against government conduct which is both within the discretion of the relevant government party and susceptible to policy-related judgments."[86] The court held that the Navy's challenged conduct on Vieques constituted an exercise of its discretion and noted the great deference courts must give to the military in weighing competing interests between "'secrecy and safety, national security and public health.'"[87] As to the CWA-related claims, the court found that "Congress did not intend that the CWA authorize civil tort actions against the federal government for damages."[88] The court nevertheless noted the "serious health concerns" raised by the plaintiffs' claims, and took the unusual step of directing the court clerk to send a copy of its opinion to the leadership of the House of Representatives and the Senate.[89]

Rejecting a special rule that would have imposed strict liability for any activity resulting in the contamination of water resources, the Kansas Supreme Court reversed a trial court judge's ruling that defendant's refining activities and resulting groundwater contamination were abnormally dangerous as a matter of law and rendered the defendant strictly liable in *City of Neodesha v. BP Corp. North America Inc.*[90] Defendant's predecessors operated an oil refinery near Neodesha, Kansas, for more than seventy years. In the 1990s, defendant entered into a consent agreement with the State of Kansas to remediate contamination at the site.[91] In 2004, plaintiffs (the City of Neodesha, Kansas and landowners within the city) brought an action against the defendant asserting various tort claims, including strict liability, and seeking almost $478 million in damages from hazardous waste allegedly released from defendant's operations at the former refinery site.[92] Applying the abnormally dangerous activity test from the Restatement of Torts, the jury ruled in favor of defendant.[93]

On a post-trial motion, the trial court granted judgment as a matter of law, concluding that (i) under Kansas law, the abnormally dangerous activities test generally used in tort law to determine strict liability did not apply when the claim relates to water contamination; instead, the law provides for a special rule wherein any "conduct involving contamination of water resources" is necessarily subject to strict liability; and

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[82] 671 F.3d 86, 88–89 (1st Cir. 2012), *petition for cert. filed* (U.S. Sept. 13, 2012) (No. 10-1648).
[83] *Id.* at 89.
[84] *Id.* at 89–90.
[85] *Id.* at 90.
[86] *Id.* at 89.
[87] *Id.* at 100, 103 (quoting Abreu v. United States, 468 F.3d 20, 26 (1st Cir. 2006)).
[88] *Id.* at 94.
[89] *Id.* at 103.
[90] 287 P.3d 214 (Kan. 2012).
[91] *Id.* at 218.
[92] *Id.* at 219.
[93] *Id.* at 220–21.

(ii) even if the Restatement test relating to abnormally dangerous activities applied, defendant's remediation activities were abnormally dangerous.[94] On appeal, the Supreme Court of Kansas reversed, holding that Kansas law does not include a second form of strict liability for water pollution cases, but rather the Restatement's abnormally dangerous activity test applied.[95] Because the jury applied the correct test in determining whether defendant's activities constituted abnormally dangerous activities, the trial court erred in vacating the verdict.[96]

[94] *Id.* at 217, 221–22.
[95] *Id.* at 224–25, 227–28.
[96] *Id.* at 231.