# RECENT DEVELOPMENTS IN TOXIC TORTS AND ENVIRONMENTAL LAW

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## I. INTRODUCTION

The general contours of the environmental and toxic tort areas continue to rapidly evolve. In the past year, judicial decisions from state and federal courts changed where cases may be filed, what procedural devices can be used to keep cases in particular forums, and even the substantive law that governs common law and statutory claims. Toxic tort-related topics covered by this article include class action decisions discussing procedural as-

pects of damage calculations and whether plaintiffs can stipulate to damages to avoid jurisdiction. Key toxic tort subjects covered in this update include "duty to warn" and medical monitoring, punitive damages, and new asbestos-related decisions. Key decisions in fracking- and greenhouse gas-related cases are summarized, as are major Supreme Court and federal appellate decisions under major environmental statutes, including the Clean Air Act (CAA), Clean Water Act (CWA), Resource Conservation and Recovery Act (RCRA), and Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).

## II. CLASS ACTIONS

### A. *Method of Calculating Damages at Certification Stage Must Match Theory of Liability*

Although many thought *Comcast Corp. v. Behrend* would be the Supreme Court case to finally address whether a class must satisfy *Daubert* requirements at the class certification stage, that expectation failed to materialize. In *Behrend*, the Supreme Court could not address the *Daubert* issue because Comcast had not preserved the issue for appeal.[1] While the Court did not address whether *Daubert* analysis is required at the class certification stage, it did announce that plaintiffs must demonstrate that "damages are capable of measurement on a classwide basis."[2] In *Behrend*, plaintiffs sought to rely exclusively on a damages model that incorporated the four theories of damages and did not isolate the damages due to one individual theory.[3] The district court accepted only one of the four theories as capable of classwide certification.[4] The Supreme Court held that the damages model could not satisfy Federal Rule of Civil Procedure 23(b)'s predominance requirement because "[q]uestions of individual damages determination [would] inevitably overwhelm questions common to the class."[5]

### B. *Named Plaintiff Cannot Stipulate to Damages to Avoid CAFA Jurisdiction*

The Supreme Court held that a named plaintiff could not stipulate that the class would not seek damages in excess of $5 million to avoid jurisdiction under the Class Action Fairness Act (CAFA).[6] Federal circuit courts had split regarding whether the named plaintiff could stipulate that the class would seek less than $5 million to avoid the CAFA's jurisdiction

1. *See, e.g.*, Comcast Corp. v. Behrend, 133 S. Ct. 1426, 1436 (2013) (Ginsburg, J., dissenting).
2. *Id.* at 1433.
3. *Id.*
4. *Id.* at 1431.
5. *Id.* at 1433.
6. Standard Fire Ins. Co. v. Knowles, 133 S. Ct. 1345 (2013).

and keep the case in state court.[7] In *Standard Fire Insurance Co. v. Knowles*, plaintiff stipulated that he would not seek more than $5 million.[8] The district court conducted an independent review of the likely amount of damages and determined that the " 'sum or value' of the 'amount in controversy' would, in the absence of the stipulation, have fallen just above the $5 million threshold."[9] The Eighth Circuit agreed with the district court's determination that the named plaintiff could stipulate to the amount of damages sought by the class.[10] The Supreme Court overturned both, holding that the stipulation could not satisfy the amount-in-controversy requirement because it did not bind the remainder of the class.[11]

## III. DUTY TO WARN

Maryland's highest court recently decided to follow the emerging trend of cases that refuse to find a duty to warn of the hazards of take-home asbestos exposure. In *Georgia Pacific, LLC v. Farrar*, the Maryland Court of Appeals held that Georgia Pacific did not have a duty to warn plaintiff of the harm of take-home asbestos exposure in 1968 and 1969.[12] The trial court entered a jury verdict of approximately $5 million against Georgia Pacific, which the intermediate appellate court affirmed.[13] The Maryland high court reversed, framing the question as whether "Georgia Pacific [was] under a duty to protect [plaintiff] from injury by reason of any exposure she may have to asbestos fibers that were embedded in" the product.[14] The court held that whether the harm of take-home asbestos exposure was foreseeable "must be based on facts that were known or should have been known to the defendant at the time the warning should have been given, not what was learned later."[15]

The court noted that even after the potential risk of take-home asbestos exposure was known, "it is not at all clear how the hundreds or thousands of manufacturers and suppliers of products containing asbestos could have directly warned household members who had no connection with the product."[16] Even if there were a duty to warn, Georgia Pacific would have had

7. *Compare* Frederick v. Hartford Underwriters Ins. Co., 683 F.3d 1242, 1247 (10th Cir. 2012) (holding that plaintiff could not stipulate to damages to avoid CAFA jurisdiction), *with* Rolwing v. Nestle Holdings, Inc., 666 F.3d 1069, 1072 (8th Cir. 2012) ("[A] binding stipulation limiting damages sought to an amount not exceeding $5 million can be used to defeat CAFA jurisdiction.").
8. 133 S. Ct. at 1347.
9. *Id.* at 1348.
10. *Id.*
11. *Id.* at 1351.
12. 69 A.3d 1028, 1039 (Md. 2013).
13. *Id.*
14. *Id.* at 1032.
15. *Id.* at 1035.
16. *Id.* at 1039.

no way to carry out that duty.[17] Accordingly, the court reversed the intermediate appellate court.[18]

## IV. MEDICAL MONITORING

### A. *New York May Create or Extinguish Medical Monitoring Claims*

The Second Circuit certified two questions for New York's highest court in a putative tobacco class action, *Caronia v. Philip Morris USA Inc.*, asking whether New York will "recognize an independent cause of action for medical monitoring" and what the applicable standards would be.[19] The Court of Appeals of New York heard extensive oral argument in November 2013 and has taken these pivotal questions under advisement.[20]

In *Caronia*, the Second Circuit affirmed the district court's judgment against plaintiffs' strict liability, negligence, and implied warranty claims[21] and examined at length whether their medical monitoring existed as an independent cause of action in New York.[22] It pointed to a 1984 case from New York's Appellate Division, *Askey v. Occidental Chemical Corp.*, holding that medical monitoring was available as consequential damages for a present injury with an increased risk of disease.[23] The Second Circuit also examined decisions by other states' highest courts on medical monitoring. Some states, such as Massachusetts, New Jersey, Utah, and California, have either recognized an independent cause of action for medical monitoring or simply allowed medical monitoring as a tort remedy.[24] Other states, including Mississippi, Kentucky, and Michigan, have refused to recognize any medical monitoring claim because plaintiffs lacked any present injury.[25] In general, the Second Circuit also found the states with medical monitoring claims required reliable expert testimony (with some proof that monitoring was both reasonable and necessary) and imposed traditional defenses (such as assumption of risk and contributory negligence).[26] As

17. *See id.*
18. *Id.*
19. 715 F.3d 417 (2d Cir. 2013).
20. *Id.* at 448–49.
21. *Id.* at 425–27.
22. *Id.*
23. *Id.* at 427–31 (citing Askey v. Occidental Chem. Corp., 477 N.Y.S.2d 242 (App. Div. 1984)).
24. *Id.* at 438–49 (citing, inter alia, Donovan v. Philip Morris USA, 914 N.E.2d 891 (Mass. 2009); Ayers v. Twp. of Jackson, 525 A.2d 287 (N.J. 1987); Hansen v. Mountain Fuel Supply, 858 P.2d 970 (Utah 1993); Potter v. Firestone Tire & Rubber, 863 P.2d 795 (Cal. 1993)).
25. *Id.* (citing Paz v. Brush Engineered Materials, 949 So. 2d 1 (Miss. 2007) (en banc); Wood v. Wyeth-Ayerst Labs., 82 S.W.3d 849 (Ky. 2002); Henry v. Dow Chem., 701 N.W.2d 684 (Mich. 2005)).
26. *Id.* at 448–49.

the Second Circuit itself recognized, the forthcoming decision will have a significant impact on products liability litigation in New York courts and could put pressure on courts nationwide with a growing line of precedent.[27]

B. *Maryland Establishes Medical Monitoring*

The Court of Appeals of Maryland for the first time recognized a remedy for medical monitoring in a groundwater case, *Exxon Mobil Corp. v. Albright*.[28] In reversing the medical monitoring award, however, Maryland's highest court imposed four rigorous elements:

> (1) that the plaintiff was significantly exposed to a proven hazardous substance through the defendant's tortious conduct; (2) that, as a proximate result of significant exposure, the plaintiff suffers a significantly increased risk of contracting a latent disease; (3) that increased risk makes periodic diagnostic medical examinations reasonably necessary; and (4) that monitoring and testing procedures exist which make the early detection and treatment of the disease possible and beneficial.[29]

Thus, Maryland has joined the growing number of jurisdictions that recognize medical monitoring as a form of relief.[30] Based on its new elements, however, the court rejected medical monitoring for the *Albright* plaintiffs. First, plaintiffs whose wells tested below governmental action levels were unable to "prove as a matter of law that they suffer[ed] a significantly increased risk of developing a latent disease justifying an award of damages for medical monitoring."[31] Second, plaintiffs whose wells tested above the governmental action levels failed to quantify their risk with expert testimony of a "particularized, significantly-increased risk of developing a disease in comparison to the general public."[32] Maryland ultimately now recognizes damages for medical monitoring, but only with rigorous plaintiff-specific evidence on four newly created elements, which did not exist in *Albright* as a matter of law.

C. *Sixth Circuit Affirms Sanctions for Frivolous Medical Monitoring Claims*

The Sixth Circuit upheld Rule 11 sanctions against two plaintiffs' firms in *Baker v. Chevron USA, Inc.*[33] for pursuing medical monitoring damages without any individualized proof of exposure. In 2005, hundreds of cur-

27. *Id.* at 449–50. For instance, in *Donovan v. Philip Morris USA, Inc.*, 914 N.E.2d 891 (Mass. 2009), an almost identical case brought by the same plaintiff lawyers, the District of Massachusetts certified similar questions, and the Supreme Judicial Court of Massachusetts held there was a cognizable claim for medical monitoring.

28. 71 A.3d 30, *modified on other grounds*, 71 A.3d 150 (Md. 2013).

29. *Id.* at 81–82.

30. *Id.* at 75–85.

31. *Id.* at 83.

32. *Id.* at 84.

33. Nos. 11-4369, 12-3995, 2013 WL 3968783 (6th Cir. Aug. 2, 2013).

rent and former residents from Hooven, Ohio, sued Chevron USA and its related entities and alleged exposure to benzene from the Gulf Oil refinery causing monoclonal gammopathy of unknown significance, Hodgkin's disease, and acute myelogenous leukemia.[34]

Five years later, the district court excluded plaintiffs' causation experts and granted summary judgment.[35] The causation evidence hinged on epidemiologic studies, which the court found scientifically and medically unreliable under *Daubert* because the doses in the occupational studies were far greater than the estimated doses received by the *Baker* plaintiffs.[36] The district court also granted Chevron's motion for Rule 11 sanctions against plaintiffs' counsel, who unreasonably pursued their medical monitoring damages without the individualized exposure data necessary to substantiate their allegations under Ohio law.[37] The district court identified the "most serious" problem was "counsel's complete failure to adduce proof of dose."[38] In affirming the sanctions, the Sixth Circuit held that plaintiffs' counsel failed to produce any evidence of individualized exposure, even though they acknowledged the evidence was necessary, and they continued to litigate meritless medical monitoring claims.[39]

## V. PUNITIVE DAMAGES

The Second Circuit's decision in *In re Methyl Tertiary Butyl Ether (MTBE) Products Liability Litigation* provides an example of where an award of punitive damages may not be appropriate in an environmental case.[40] *In re MTBE* stemmed from litigation arising "from the intensive use of MTBE as a gasoline additive by Exxon and other companies in . . . New York . . ." before MTBE was banned by law.[41] As is relevant to this discussion, the decision upheld a district court decision precluding submission of consideration of an award of punitive damages where plaintiffs failed to present evidence that Exxon, the defendant, consciously understood that contamination at spill sites could potentially affect sites

34. *Id.* at *1–2.
35. *Id.* at *1–8 (discussing Baker v. Chevron USA, Inc., 680 F. Supp. 2d 865, 873 (S.D. Ohio 2010)).
36. *Id.* at *14.
37. *Id.* at *8 (quoting district court).
38. *Id.*
39. *Id.* at *17–18.
40. 725 F.3d 65, 128–130 (2d Cir. 2013).
41. *Id.* at 78. MTBE was used until the mid-2000s as a gasoline additive in various regions of the United States to reduce tailpipe emissions. *See id.* at 80. Its use, however, was stopped because MTBE spills proved to be highly mobile in the environment, and MTBE caused drinking water to have a "very unpleasant turpentine-like taste and odor that at low levels of contamination can render drinking water unacceptable for consumption." *Id.* (citing EPA's notice of intent for rulemaking to ban use of MTBE as a gasoline additive).

located physically removed from them.[42] Further, because Exxon presented evidence that it believed MTBE, the involved contaminant, would dissipate to extremely low levels over time, there was no evidence that "Exxon's conduct constituted a gross deviation from the standard of conduct that a reasonable person would observe in the situation[,]" as would be required to support an award of punitive damages under New York law.[43]

## VI. ASBESTOS

### A. *Ohio Legislature Passes Asbestos Trust Transparency Law*

On March 27, 2013, Ohio became the first state to enact a law that seeks to close a loophole that exists when an asbestos trust claim is filed after an asbestos lawsuit. A plaintiff who files a new asbestos trust claim during a pending lawsuit must disclose that information to defendants within thirty days of filing the claim.[44] If a plaintiff files a claim against an asbestos trust after a lawsuit concludes, a defendant may reopen the case to obtain a setoff in the judgment equal to the amount plaintiff received from an asbestos trust.[45]

The Ohio law also requires plaintiffs to provide an affidavit and all asbestos trust claim materials filed by plaintiff to all defendants in an asbestos lawsuit.[46] Defendants may seek further discovery related to asbestos trust claims, including exposure allegations plaintiff provided to support the claims.[47] The Ohio law declares all asbestos trust claim documents relevant, discoverable, and nonprivileged.[48] Because Ohio has a form of several liability, defendants may then introduce asbestos trust claim materials at trial to allocate responsibility to the bankrupt entities.[49] The law also allows a defendant to request a stay in an asbestos lawsuit if plaintiff has not pursued all of its trust claims.[50]

### B. *Illinois Appellate Court Affirms JNOV for Defendants Following $90 Million Jury Verdict*

In light of the bankruptcy of many of the manufacturers of asbestos-containing materials, plaintiffs in Illinois have alleged a conspiracy among some of the still-solvent former manufacturers of asbestos-containing products in order to expand liability to companies that did not manufacture or sell the products that allegedly harmed plaintiffs. Despite the Illi-

42. *Id.* at 130.
43. *Id.* (quoting Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 843 (2d Cir. 1967)).
44. OHIO REV. CODE ANN. § 2307.952(A)(2).
45. *Id.* § 2307.954(E).
46. *Id.* § 2307.952(A)(1)(a).
47. *Id.* § 2307.954(C).
48. *Id.* § 2307.954(B).
49. *Id.*
50. *Id.* § 2307.953(A).

nois Supreme Court's grant of judgment to these defendants in *McClure v. Owens-Illinois, Inc.*,[51] the lower courts had not granted judgments to defendants until *Rodarmel v. Pneumo Abex, LLC*,[52] which was decided by the Illinois Appellate Court in 2011. The application of *McClure* has now been extended in *Gillenwater v. Honeywell International Inc.*, in which the court has granted judgment for conspiracy defendants Owens-Illinois, Pneumo Abex, and Honeywell International despite a jury verdict in plaintiff's favor.[53]

In *Gillenwater*, plaintiffs alleged that the three alleged conspirators were liable for Charles Gillenwater's mesothelioma despite the fact that plaintiff's disease was not caused by their products.[54] Instead, plaintiffs contended that Gillenwater had worked with a product manufactured by Owens-Corning Fiberglas, a nonparty.[55] Plaintiffs alleged Honeywell, Pneumo Abex, and Owens-Illinois were liable because of a conspiracy between each of them and Owens-Corning.[56] Plaintiffs succeeded at trial, obtaining a verdict against each of the three defendants.[57]

Each of the defendants filed a motion for judgment notwithstanding the verdict, which the trial court granted and the appellate court affirmed.[58] The appellate court held that plaintiffs' conspiracy claims required clear and convincing evidence that defendants "planned, assisted or encouraged" Owens-Corning in providing asbestos-containing products without a sufficient warning.[59] As to Pneumo Abex and Honeywell, the appellate court held there was insufficient evidence of any conspiracy between them and Owens-Corning. There was no evidence that Pneumo Abex and Honeywell ever communicated with Owens-Corning, making them "nothing but bystanders."[60] The court also held that Owens-Illinois was not liable on plaintiffs' conspiracy theory, but noted that a distribution agreement between Owens-Illinois and Owens-Corning Fiberglas under which Owens-Corning distributed the Owens-Illinois product between 1953 and 1958 could impliedly include an agreement to sell the product without a warning.[61] Even if that distribution agreement permits an inference of agreement, the sale of the product line by Owens-Illinois to Owens-Corning Fiberglas in 1958 would then act as Owens-Illinois's

51. 720 N.E.2d 242 (Ill. 1999).
52. 957 N.E.2d 107 (Ill. Ct. App. 2011).
53. 996 N.E.2d 1179 (Ill. Ct. App. 2013).
54. *Id.* at 1182.
55. *Id.* at 1183.
56. *Id.*
57. *Id.* at 1182.
58. *Id.*
59. *Id.* at 1183 (quoting Adcock v. Brakegate, Ltd., 164 Ill. 2d 54, 62 (1994)).
60. *Id.*
61. *Id.* at 1195.

withdrawal from any such conspiracy.[62] Plaintiff's exposure allegations did not begin until 1972, fourteen years after Owens-Illinois sold the product line. Judgment, therefore, was required for Owens-Illinois.[63]

The Illinois Appellate Court emphasized that "a manufacturer is responsible only for the defects in the products it manufactured"[64] and also held that no loss of consortium claim existed in favor of Gillenwater's spouse, where the marriage postdated the alleged exposure to asbestos, even though the marriage predated the manifestation of disease.[65] Although there was no notice to Mrs. Gillenwater of her future husband's injury at the time of the marriage, the court held that defendants owed her no duty prior to the marriage and therefore had no ability to prevent injury to her.[66]

### C. *Texas Supreme Court Grants Review in Case with Potential to Change Causation Standards for Asbestos Litigation in Texas*

In its 2007 decision of *Borg-Warner v. Flores*, the Texas Supreme Court greatly curtailed asbestos litigation in Texas.[67] On February 15, 2013, the Texas Supreme Court granted petition for review in *Georgia-Pacific Corp. v. Bostic*,[68] a case that could potentially overturn the causation standard announced in *Flores*. The trial court in *Bostic* entered a judgment awarding plaintiff nearly $12 million in damages due to alleged exposure to asbestos contained in Georgia-Pacific joint compound.[69] Plaintiff's expert testified at trial that "he could not opine that [plaintiff] would not have developed mesothelioma absent exposure to Georgia-Pacific, asbestos-containing joint compound."[70] Upon review, the Texas Court of Appeals held that plaintiff had failed to prove that exposure to Georgia-Pacific's product "was in amounts sufficient to increase [plaintiff's] risk of developing mesothelioma. Therefore, appellees' evidence is legally insufficient to establish substantial-factor causation mandated by *Flores*."[71] It is unclear how the Texas Supreme Court will rule in this case or when the decision will be handed down.

### D. *Ninth Circuit Holds Risk of Take-Home Asbestos Exposure Not Foreseeable Under Oregon Law*

In *Hoyt v. Lockheed Martin Corp.*, the Ninth Circuit held that a shipyard owner was not liable for plaintiff's exposure to asbestos brought home

62. *Id.* at 1200.
63. *Id.* at 1196.
64. *Id.* at 1200.
65. *Id.* at 1208.
66. *Id.*
67. 232 S.W.3d 765 (Tex. 2007).
68. 320 S.W.3d 588 (Tex. App. 2010).
69. *Id.* at 592.
70. *Id.* at 596.
71. *Id.* at 601.

on the clothing of her father and husband from 1948 through 1958.[72] The court noted that literature acknowledging the risk of take-home asbestos exposure was first published in the 1960s.[73] Therefore, "no reasonable factfinder could conclude that harm from take-home exposure to asbestos should have been foreseeable to Lockheed by 1958."[74] The Ninth Circuit also noted that Washington law addresses whether the harm was foreseeable independent of whether defendant owes a duty to plaintiff.[75] Because the decision that the harm of take-home asbestos exposure was not foreseeable disposed of the case, the court did not address whether Washington law would recognize a legal duty of care based on the risk of take-home asbestos exposure.[76]

### E. *California Supreme Court Holds That Bankrupt Foreign Corporations May Not Be Sued if State of Incorporation Would Not Allow Suit*

A previous split among the California appellate courts left some bankrupt corporations subject to liability for asbestos-exposure claims in California long after the laws of the state of incorporation would have terminated tort liability.[77] The majority of states have corporate survival statutes with a specified time period after which a bankrupt company's affairs are considered "wound up," terminating tort liability against the company.[78] Under California's survival statue, however, the winding-up period does not have a set duration.[79] In the context of asbestos litigation, this means that an insurer with coverage that was not exhausted during the corporation's life continues to be subject to liability for future tort lawsuits when California's winding-up statute applies.[80] In *Greb v. Diamond International Corp*., plaintiffs sought to hold a bankrupt defendant liable on the theory that California's winding-up statute applied to Diamond, a bankrupt Delaware corporation.[81] Under Delaware law, Diamond could not be sued for tort claims more than three years after filing bankruptcy, which would bar plaintiff's claims.[82] Under California law, Diamond was subject to suit indefinitely.[83]

72. No. 13-35573, 2013 WL 4804408, at *2 (9th Cir. Sept. 10, 2013) (affirming trial court's grant of summary judgment).
73. *Id*.
74. *Id*.; *see also* Part III, *supra*.
75. *Hoyt*, 2013 WL 4804408, at *1.
76. *Id*. at *2.
77. *Compare* N. Am. Asbestos Corp. v. Superior Ct., 180 Cal. App. 3d 902 (1986) (holding that dissolved Illinois corporation continued to be liable in California for asbestos-exposure allegations despite the fact that under Illinois law liability had ceased), *with* Riley v. Fitzgerald, 178 Cal. App. 3d 871 (1986) (holding that the winding-up statute of the place of incorporation controls).
78. *See*, *e.g*., DEL. CODE ANN. tit. 8, § 278 (providing a three-year winding-up period).
79. CAL. CORP. CODE § 2010.
80. Greb v. Diamond Int'l Corp., 295 P.3d 353, 354 (Cal. 2013).
81. *Id*.
82. DEL. CODE ANN. tit. 8, § 278.
83. CAL. CORP. CODE § 2010.

The Supreme Court of California resolved the split among the California appellate courts and held that California's winding-up statute "does not apply to foreign corporations."[84] The court held this to be the case even if that corporation conducts business in California and has received a certificate to conduct business in California.[85] Therefore, because Diamond was a Delaware corporation, Delaware's three-year winding-up statute applied and barred plaintiffs' lawsuit.

### F. *Illinois Appellate Court Holds That Vague Product Identification Allegations Are Insufficient to Survive Summary Judgment*

In *Bowles v. Owens-Illinois, Inc.*, the Illinois Appellate Court held that testimony placing a manufacturer's asbestos-containing product aboard a ship on which plaintiff served during the Navy, without more, was insufficient to survive summary judgment.[86]

## VII. EMERGING TORT CLAIMS

### A. *Developments in Greenhouse Gas Cases*

The U.S. Environmental Protection Agency's authority to regulate the emission of greenhouse gases (GHGs) has been the subject of significant litigation following the 2007 Supreme Court decision in *Massachusetts v. Environmental Protection Agency*.[87] In a unanimous decision, the U.S. Court of Appeals for the District of Columbia in *Coalition for Responsible Regulation, Inc. v. Environmental Protection Agency*[88] upheld EPA's authority to continue to regulate GHGs under the CAA. On October 15, 2013, the Supreme Court consolidated a number of GHG appeals, including *Coalition for Responsible Regulation*, and granted certiorari to hear challenges to EPA's authority to regulate GHGs from stationary sources.[89] Review is limited to the question of "[w]hether EPA permissibly determined that its regulation of greenhouse gas emissions from new motor vehicles triggered permitting requirements under the CAA for stationary sources that emit greenhouse gases."[90]

84. *Greb*, 295 P.3d at 372.
85. *Id.* at 365.
86. 996 N.E.2d 1267 (Ill. Ct. App. 2013).
87. 549 U.S. 497, 529 (2007) (finding that GHGs may be regulated as an "air pollutant" under the Clean Air Act).
88. 684 F.3d 102 (D.C. Cir. 2012), *rehearing en banc denied*, Nos. 09-1322, 10-1024, 2012 WL 6681996 (D.C. Cir. Dec. 20, 2012), *cert. granted in part*, 134 S. Ct. 468 (Oct. 15, 2013) (consolidating nine petitions for writ of certiorari).
89. Chamber of Commerce v. Envtl. Prot. Agency, 134 S. Ct. 468 (2013).
90. *Id.*

B. *Developments in Fracking-Related Litigation*

*Strudley v. Antero Resources Corporation*[91] involved claims that drilling companies "caused property damage and 'personal and physical injuries, known and unknown' " alleged to be tied to chemicals originating from drilling operations near plaintiffs' home.[92] Shortly after the parties filed initial disclosures, upon defendants' request, the trial court modified the case management order to require plaintiffs to provide expert affidavits specifying (1) the hazardous substance to which each plaintiff had been exposed; (2) whether each substance could result in plaintiffs' claimed injuries; (3) the dose, duration, and location of exposure; (4) the specific disease that each plaintiff suffers from; and (5) a conclusion that exposure to a chemical was the cause for a particular illness.[93] The trial court, in part, imposed this order "not[ing] that [an EPA] report contradicted the plaintiffs' claims."[94]

After the plaintiffs failed to provide expert testimony that complied with this order, the court dismissed the case with prejudice.[95] In reviewing this decision, the Colorado Court of Appeals found that the Colorado Rules of Civil Procedure failed to include language permitting courts the broad discretion necessary to impose a *Lone Pine* order.[96] Further, the court noted that the involved defendants failed to use procedures like motions to dismiss to exclude claims that lacked sufficient merit to proceed into discovery.[97] The case was, therefore, remanded to the trial court for discovery.[98]

*Magers v. Chesapeake Appalachia, LLC* is another notable fracking-related decision.[99] *Magers* involved claims by homeowners who alleged that their residential water well was contaminated by drilling activities on "near or adjacent" properties.[100] The court, applying West Virginia law in evaluating a motion to dismiss, found that plaintiffs failed to state a statutory cause of action because drilling-related damages were limited damages occurring on the property where drilling occurred.[101] Common law negligence claims failed because, as plaintiffs were pursuing multiple defendants for the same injury, they needed to allege a basis for which to hold each defendant liable, as would be necessary to plead a negligence claim.[102]

91. 2013 WL 3427901 (Colo. Ct. App. July 3, 2013).
92. *See id.* at *1. These chemicals included hydrogen sulfide, hexane, n-heptane, toluene, propane, isobutene, n-butane, isopentane, n-pentane, among others. *See id.*
93. *See id.* at *2.
94. *See id.* at *3.
95. *See id.* at *2.
96. *See id.* at *7–8. The term *Lone Pine* originates from *Lore v. Lone Pine Corp.*, Case. No. L-33606-85, 1986 WL 637507 (N.J. Super. Ct. Nov. 18, 1986) (unpublished opinion).
97. *See id.* at *9.
98. *See id.*
99. No. 5:12-CV-49, 2013 WL 4099925 (N.D. W. Va. Aug. 13, 2013).
100. *Id.* at *3–5.
101. *Id.* at *6.
102. *Id.* at *7–8.

*Hiser v. XTO Energy Inc.* upheld an award of compensatory and punitive damages against a drilling company in a fracking-related action alleging negligence, private nuisance, and trespass.[103] The claimed damages involved costs to repair a home. In a post-trial ruling, Judge Baker from the Eastern District of Arkansas upheld a $100,000 compensatory award and an award of $200,000 in punitive damages.[104]

## VIII. RESOURCE CONSERVATION AND RECOVERY ACT

### A. *Notice Provisions and RCRA's Definition of "Discarded"*

RCRA, like CWA and CAA, contains "citizen suit" provisions that permit private parties to file actions against companies for alleged violations of the statute. In *Ecological Rights Foundation v. Pacific Gas & Electric Co.*, the Ninth Circuit upheld a dismissal with prejudice of a case where an environmental group using statutory citizen suit provisions alleged that wood-treated utility poles are subject to the federal CWA and RCRA.[105] This suit stems from a long-running dispute between various environmental groups and EPA over whether treating utility poles with wood treatment preservative should be permitted.

The Ninth Circuit held that neither CWA nor RCRA was applicable to in-use utility poles. The court found that utility poles were neither "point sources" as the term is defined under CWA nor "associated with industrial activity," as would be required to trigger federal permitting obligations.[106] Poles were not "point sources," in the Ninth Circuit's view, because they do not "discretely collect[] and convey[] to the waters of the United States" CWA "pollutants."[107] In concluding that utility poles were not "associated with industrial activity," the Ninth Circuit relied on evidence including the fact that EPA had explicitly excluded "major electrical powerline corridors" from stormwater regulation. The Ninth Circuit also considered the wording of 40 C.F.R. § 122.26(b)(14), the regulation that defines "associated with industrial activity" for CWA.[108]

The Ninth Circuit also held RCRA to be inapplicable. RCRA's applicability hinges on something being "abandoned" or "discarded." The Ecological Rights Foundation alleged that the "leakage" of pentachlorophenol from the poles constituted an RCRA "imminent and substantial endangerment."[109] The Ninth Circuit explicitly rejected that "leakage" from poles resulted in "waste" being "discarded." Instead, the court found

103. No. 4:11CV00517 KGB, 2013 WL 5467186 (E.D. Ark. Sept. 30, 2013).
104. *Id.* at *1.
105. *See* 713 F.3d 502 (9th Cir. 2013).
106. *Id.* at 508–13.
107. *Id.* at 508–11.
108. *Id.* at 511–13.
109. *Id.* at 514.

that "escaping" pentachlorophenol from in-use poles is "neither a manufacturing waste by-product nor a material that the consumer . . . no longer wants and has disposed of or thrown away." Any "leakage" was a residue from an EPA-approved pesticide that is released as a part of its intended use.[110]

### B. *Contractor Not Responsible for Subcontractor's RCRA Liability*

In *National Exchange Bank and Trust v. Petro-Chemical Systems, Inc.*,[111] the district court judge held that an environmental contractor is not liable under RCRA simply because it hired a subcontractor that may have contributed to the alleged harm.[112]

The plaintiff alleged that a contractor was responsible for damages under RCRA because it "contributed" to a spill when it failed to properly supervise and inspect the subcontractor's work. Failure to supervise has produced liability under RCRA, but only in a case where defendant was aware of the problems. Here the court found that the contractor was not liable because it "did not generate the waste, nor is there any evidence that [the subcontractor] had a record of unlawful actions, much less that [the contractor] knew this."[113] The court went on to note that while the statutory term "contributed" is "to be interpreted liberally," there was no "reason to conclude that Congress intended the term . . . to be an invitation to string together an expansive causal chain of tangential defendants."[114]

### C. *Materials Intended for Recycling Do Not Create RCRA Liability*

In *Premier Associates, Inc. v. EXL Polymers, Inc.*, the Eleventh Circuit affirmed a finding that a company that sent materials for recycling was not liable for damages from its storage.[115] The court, relying on defendant's good faith belief that the material would be reused, held that the material in question was a recovered material, not a solid waste, and thus it was not subject to RCRA liability.[116]

## IX. CLEAN WATER ACT

### A. *Draft Revisions to What Constitutes "Waters of the United States" for CWA Purposes*

In September 2013, EPA and the U.S. Army Corps of Engineers prepared a draft proposed rule that would "clarify" the definition of waters of the

110. *Id.* at 515–18.
111. No. 11-c-134, 2013 WL 1858621 (E.D. Wis. Dec. 3, 2012).
112. *Id.*
113. *Id.*
114. *Id.*
115. 507 F. App'x 831, 835 (11th Cir. 2013).
116. *Id.*

United States and their CWA permitting jurisdiction.[117] The details of the proposal are unknown at this time, but given the statements set forth in EPA's draft report on connectivity of water,[118] the proposed rule is expected to add innumerable "water bodies" to the list of federally controlled waters and make CWA section 404 permitting even more onerous and costly.

B. *Definition of "Industrial" for NPDES Purposes*

In 2006, the Northwest Environmental Defense Center sued certain timber-industry-related defendants, claiming that their logging activities resulted in the discharge of pollutants without a permit into streams in state forests in Oregon where timber was being harvested. In 2010, the Ninth Circuit overturned an Oregon federal district court's grant of a motion to dismiss the case, finding that ditches and culverts adjacent to logging roads were point sources that required federal National Pollutant Discharge Elimination System (NPDES) permits.[119] In March, the U.S. Supreme Court issued its decision in *Decker*, discussed below, overturning the Ninth Circuit's decision.[120]

In *Decker*, defendants who operated various logging roads contended that the Silvicultural Rule[121] foreclosed the need for them to secure NPDES permits, and that potential impacts to water quality posed by the roads could be managed by state-level best management practices.[122] Defendants also contended that, even without the Silvicultural Rule, their activities were not "industrial activities" requiring NPDES permits under EPA's Industrial Stormwater Rule, 40 C.F.R. § 122.26.[123] Accepting defendant's arguments, the Court found that EPA's interpretation of the Industrial Stormwater Rule, which exempted "logging roads" from being "industrial" even though other logging-related facilities like sawmills were "industrial," was permissible.[124] The Court noted that the regulatory scheme, taken as a whole, "leave[s] open the rational interpretation that the regulation extends only to traditional industrial buildings, such as factories and associated sites [and] relatively fixed facilities."[125]

117. U.S. Envtl. Prot. Agency, Clean Water Act Definition of "Waters of the United States," *available at* http://water.epa.gov/lawsregs/guidance/wetlands/CWAwaters.cfm (draft rule under review by the Office of Management and Budget).

118. U.S. EPA Scientific Advisory Bd., Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence, *available at* http://yosemite.epa.gov/sab/sabproduct.nsf/fedrgstr_activites/Watershed%20Connectivity%20Report?OpenDocument.

119. Decker v. Nw. Envtl. Def. Ctr., 640 F.3d 1063 (9th Cir. 2011).

120. Decker v. Nw. Envtl. Def. Ctr., 133 S. Ct. 1326 (2013).

121. 40 C.F.R. § 122.27.

122. *See Decker*, 133 S. Ct. at 1336–38.

123. *Id.* at 1338.

124. *Id.* at 1337.

125. *Id.*

### C. *Flow from One Portion of a Water Body to Another Is Not a "Discharge of a Pollutant"*

In *Los Angeles County Flood Control District v. Natural Resources Defense Council*,[126] the U.S. Supreme Court reversed a ruling by the Ninth Circuit that Los Angeles County's Flood Control District had violated its system-wide water discharge permit because monitoring stations downstream from discharge points reported pollutants in excess of permit limits. The monitoring stations were located in sections of the Los Angeles and San Gabriel rivers that had been lined with concrete to channel and direct water flow during storm and flooding events.[127] The issue was whether the transfer of water from one portion of a river to another portion via a manmade improvement for the purpose of controlling storm water runoff still could be considered a "discharge" under the CWA.[128] The Supreme Court held that water flowing from a concrete section of the river to another section was not a "discharge" of pollutants under the CWA.[129]

## X. COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT

### A. *Seventh Circuit Affirms Decision for Statute-of-Limitations Trigger in Contribution Claim*

Courts have generally interpreted § 9613(f)(3)(B) of CERCLA to require that a potentially responsible party (PRP) settle its CERCLA liability with the government in order to bring a contribution action.[130] In 2012, the Seventh Circuit held that the statutory trigger for a contribution claim is not the signing of the settlement agreement, but rather the "resolution of liability through settlement."[131] This year, the Seventh Circuit affirmed that decision.[132]

Under the *Bernstein* decision, a court must scrutinize the covenants not to sue in settlement agreements to determine whether a party's liability for clean-up costs has been resolved.[133] Unless the settlement explicitly states that liability is resolved at the time the document is signed, a party's liability has not been resolved until the party completes its obligations.[134]

126. 133 S. Ct. 710, 712–13 (2013).
127. *Id.*
128. *Id.*
129. *Id.*
130. 42 U.S.C. § 9613(f)(3)(B).
131. Bernstein v. Bankert, 702 F.3d 964, 981 (7th Cir. 2012).
132. Bernstein v. Bankert, 733 F.3d 190, 196 (7th Cir. 2013).
133. *Id.* at 204.
134. *Id.*

Therefore, the statute of limitations period does not begin to run until the parties complete their obligations.[135]

### B. *Fourth Circuit Issues Allocation Decision Addressing the Definition of "Facility" Under CERCLA and the "Bona Fide Prospective Purchaser" Exemption*

In *PCS Nitrogen Inc. v. Ashley II of Charleston*,[136] the Fourth Circuit affirmed the district court's allocation of costs among various PRPs. *Ashley II* addressed the definition of "facility" under CERCLA and expanded on what "reasonable steps" are necessary to meet the Bona Fide Prospective Purchaser Exemption under CERCLA.[137]

One PRP argued that it was not liable because its leased property was not "part of the property" undergoing remediation.[138] The court rejected this argument as "irrelevant" because the "question is whether [the PRP's] leasehold is part of a 'facility' as defined by CERCLA," not whether the property has been "targeted for remediation."[139] Because the leased property at issue in *Ashley II* was "contaminated as part of a pattern of widespread contamination across the entire site," it was part of the facility as defined by CERCLA.[140]

*Ashley II* also addressed what "reasonable steps" are necessary to meet the BFPP exemption when purchasing contaminated property.[141] The district court found that the PRP failed to meet various requirements necessary to establish its status as a BFPP.[142] The Fourth Circuit affirmed and noted that the standard of " 'appropriate care' . . . is at least as stringent as 'due care' under" the third-party defense and "should be *higher*."[143] The PRP did not meet this requirement because it "failed to clean out and fill in sumps that should have been capped, filled, or removed when related aboveground structures were demolished, and . . . did not monitor and adequately address conditions relating to a debris pile and the limestone run of crusher cover on the site."[144]

## XI. CLEAN AIR ACT

### A. *Transport Rule*

EPA's regulation of interstate air pollution has also been the subject of major judicial action as of recent. Most notably, in *EME Homer City Gen-*

135. *Id.*at 213–14.
136. 714 F.3d 161 (4th Cir. Apr. 4, 2013).
137. *Id.*
138. *Id.* at 178.
139. *Id.*
140. *Id.*
141. *Id.* at 181.
142. *Id.*
143. *Id.* at 180.
144. *Id.* at 180–81.

*eration LP v. Environmental Protection Agency*, the D.C. Circuit in a two-to-one decision vacated EPA's Cross-State Air Pollution Rule (the Transport Rule).[145] The Transport Rule established an interstate program to require power companies in twenty-eight "upwind" states to reduce emissions of sulfur dioxide and nitrogen oxides that were impacting the ability of "downwind" states to achieve and maintain ambient air quality standards.[146]

In light of the vacatur, the D.C. Circuit instructed EPA to promptly promulgate a new regulation addressing interstate air pollution.[147] However, in the interim, the court directed EPA to "continue administering" the Clean Air Interstate Rule, which was EPA's prior interstate air pollution program, "pending [EPA's] promulgation of a valid replacement."[148]

B. *New Source Review*

A number of significant appellate decisions were issued in 2013. First, in *United States v. DTE Energy Co.*,[149] the Sixth Circuit ruled that EPA did not need to wait until post-construction emissions data became available to challenge DTE's pre-project determination that a construction project was not a "major modification." EPA challenged DTE's pre-projection, alleging that the project resulted in a "significant net emissions increase" and required a New Source Review (NSR) construction permit.[150] DTE argued and the district court agreed that EPA's enforcement action was premature because the controlling 2002 version of EPA's NSR regulations[151] provided DTE with a form of safe harbor until and unless post-construction emissions indicated that actual emissions had significantly increased.[152]

The Sixth Circuit reversed. The court found that nothing under EPA's regulations precluded EPA from bringing an enforcement action at any time to "ensure that the [pre-]project projection [was] made pursuant to the requirements of the regulations."[153] In other words, EPA did not need to wait until post-construction emissions data became available to challenge a source's pre-project emissions projections.

145. 696 F.3d 7 (D.C. Cir. 2012), *rehearing en banc denied* (2013).

146. The CAA addresses interstate air pollution in the so-called Good Neighbor provision, 42 U.S.C. § 7410(a)(2)(D). That provision prohibits states from contributing to, or interfering with, nonattainment or maintenance, respectively, of ambient air quality standards in other states. *See id.*

147. *EME Homer City*, 696 F.3d at 38.

148. *Id.*

149. 711 F.3d 643 (6th Cir. 2013).

150. *Id.* at 648.

151. Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR): Baseline Emisions Determination, Actual-to-Future-Actual Methodology, Plantwide Applicability Limitations, Clean Units, Pollution Control Projects, 67 Fed. Reg. 80,186 (Dec. 31, 2002).

152. *DTE Energy Co.*, 711 F.3d at 648.

153. *Id.* at 652.

The Sixth Circuit, however, disagreed with EPA on several points at issue in the appeal. First, the court affirmed that the NSR regulations cannot be read to provide EPA with the authority to second-guess a source's pre-project projections.[154] And second, the court disagreed with EPA's assertion that a source could not intentionally limit generation to reduce its post-project emissions in an effort to avoid triggering NSR permitting requirements.[155] The court remanded the case to the district court for further proceedings on whether the DTE project required an NSR construction permit.

Second, in separate decisions issued approximately one month apart, the Seventh Circuit in *United States v. Midwest Generation, LLC*[156] and the Third Circuit in *United States v. EME Homer City Generation L.P.*[157] declined to hold current and former owners of coal-fired electric generating stations liable for historic NSR violations. In *Midwest Generation*, Commonwealth Edison had allegedly performed certain modifications at five of its power plants in the mid-1990s without obtaining NSR construction permits. EPA and the State of Illinois brought suit, contending that both ComEd, as the former owner of the plants at the time the modifications were performed, and Midwest Generation, as the successor and current owner of the plants, were liable for civil penalties and injunctive relief because NSR construction permits should have been obtained for those modifications.

The Seventh Circuit upheld the district court's dismissal of the governments' claims under § 7475(a) of the CAA. The court declined to find that a statutory requirement to obtain a construction permit prior to commencing construction created a "continuing-violation" or "continuing harm."[158] Thus, because the alleged violations occurred outside the applicable statute of limitations,[159] the Seventh Circuit dismissed the governments' claims in their entirety against ComEd. Further, the Seventh Circuit found that "Midwest [Generation] cannot be liable when its predecessor in interest would not have been liable had it owned the plants continuously."[160]

Similarly, in *EME Homer City*, the Third Circuit affirmed that the failure to obtain an NSR permit prior to construction of an alleged modification does not constitute an ongoing violation under the CAA. EPA and three state interveners had brought suit against the current and former

154. *Id.* at 649.
155. *Id.* at 651.
156. 720 F.3d 644 (7th Cir. 2013).
157. 727 F.3d 274 (3d Cir. 2013).
158. *Midwest Generation*, 720 F.3d at 647, 648.
159. 28 U.S.C. § 2462.
160. *Midwest Generation*, 720 F.3d at 646.

owners of the Homer City coal-fired generating station for the former owner's alleged modifications that were undertaken in the 1990s without obtaining a construction permit under the NSR provisions of the CAA. With respect to the current owners, the court dismissed both the civil penalty and injunctive relief sought. The court found that, similar to the Seventh Circuit in *Midwest Generation*, the CAA prohibited only constructing or modifying a facility without a construction permit.[161] Because the current owners "have done neither; they have only operated the [p]lant," they could not be held liable.[162]

With respect to the former owners, the Third Circuit similarly found that civil penalties were barred by the statute of limitations.[163] However, the court analyzed 42 U.S.C. § 7413[164] to conclude that the CAA only allows courts to address "forward-looking" relief and therefore cannot impose injunctive relief for wholly past or "completed" violations.[165] Because the alleged violations were entirely historic, i.e., the alleged failure to obtain a construction permit at the time of the projects in the 1990s, injunctive relief was not available under the CAA.[166]



161. *EME Homer City*, 727 F.3d at 290–91.
162. *Id.*
163. *Id.* at 292 n.20.
164. Title 42 U.S.C. § 7413(b) permits a district court to "restrain such violation, to require compliance, to assess such civil penalty . . . and to award any other appropriate relief." *Id.*
165. *EME Homer City*, 727 F.3d at 292.
166. *Id.* at 295.