RECENT DEVELOPMENTS IN TOXIC TORTS AND ENVIRONMENTAL LAW

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I. FEDERAL PREEMPTION

On September 15, 2010, the Ninth Circuit Court of Appeals upheld a district court ruling that guidelines enacted by a California Air Quality District to limit air pollution created by idling trains were preempted by the Interstate Commerce Commission Termination Act of 1995 (ICCTA),[1] a federal act that substantially deregulated the railroad industry.[2]

Under California law, guidelines issued by an Air Quality District within the scope of its regulatory authority have the force and effect of state law.[3] The Association of American Railroads argued that the guidelines

1. Interstate Commerce Commission Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803.
2. Ass'n of Am. R.Rs. v. S. Coast Air Quality Mgmt. Dist., No. 07-55804, 2010 WL 3565261 (9th Cir. Sept. 15, 2010).
3. Cal. Health & Safety Code § 40001.

pertaining to idling trains were preempted by ICCTA.[4] ICCTA delegates to the Surface Transportation Board jurisdiction over the regulation of rail transportation.[5] The statutory language establishes that "remedies provided" in ICCTA "with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal and State law."[6] The Ninth Circuit previously interpreted ICCTA to preempt "a wide range of state and local regulations of rail activity."[7]

In *Association of American Railroads*, the Ninth Circuit explained that "[g]enerally speaking," ICCTA does not preempt state laws of "general applicability that do not unreasonably interfere with interstate commerce."[8] In other words, ICCTA preempts state laws that have "the effect of managing or governing rail transportation" but not those that have a "more remote or incidental effect on rail transportation."[9] In applying ICCTA preemption law to the guidelines enacted by the California Air Quality District, the court held that that the guidelines were not of general applicability.[10] Rather, the court found, the guidelines applied exclusively and directly to railroad activity, requiring specific actions by the railroads under threat of penalties.[11] Accordingly, the Ninth Circuit held that the guidelines are preempted by ICCTA.

The analysis articulated by the Ninth Circuit focuses on a conflict between state or local law and ICCTA. The analysis is different, explained the court, when the conflict is between ICCTA and federal law. There, the Ninth Circuit posited, courts must attempt to "harmonize" the two laws, and, if possible, give effect to both.[12] The California Air Quality District argued that such harmonization should occur here: it alleged that it would submit these guidelines to the California Air Resources Board, which would then submit the guidelines to the U.S. Environmental Protection Agency for inclusion in California's overall state implantation plan under the Clean Air Act.[13] Once approved by EPA, the guidelines would then have "the force and effect of federal law."[14]

While recognizing that ICCTA does not generally preempt EPA-approved state law plans, the Ninth Circuit rejected the Air Quality Dis-

4. *Ass'n of Am. R.Rs.*, 2010 WL 3565261, at *2 (citing 49 U.S.C. § 10501(b)).
5. 49 U.S.C. § 10501(b).
6. *Id.*
7. *Ass'n of Am. R.Rs.*, 2010 WL 3565261, at *2 (citing City of Auburn v. United States, 154 F.3d 1025, 1029–31 (9th Cir. 1998)).
8. *Id.*
9. *Id.* (internal citations and quotations omitted).
10. *Id.* at *3.
11. *Id.*
12. *Id.* at *2.
13. *Id.* at *3.
14. *Id.*

trict's attempt to convert the guidelines into federal law, reasoning that the guidelines do not currently have the force and effect of federal law, "even if they might in the future."[15] The court thus concluded that it lacks authority to attempt to harmonize the guidelines with ICCTA.[16]

II. DUTY TO WARN

California appellate courts are now split on the issue of whether a product manufacturer owes a duty to warn of dangers created by products manufactured by a third party that may be used in conjunction with the manufacturer's own product. There are five relevant California appellate decisions on this point.[17] All five were issued in asbestos cases where the defendant's product (e.g., a valve or pump) did not contain asbestos, but the product was either designed to be used with, or known to be likely used with, asbestos-containing insulation or other asbestos-containing products upon purchase and installation. Four of the five decisions—*Taylor*, *Merrill*, *Hall*, and *Walton*—are consistent with the reasoning of the Washington Supreme Court's 2008 rulings in *Braaten*[18] and *Simonetta*[19] (also asbestos cases), which rejected efforts to impose liability for a third party's product under both negligence and strict liability theories. The fifth, *O'Neil*, found that the use of the defendant's asbestos-free product in conjunction with an asbestos-containing product was a sufficient basis on which to predicate the defendant's liability.[20] In particular, the court in *O'Neil* determined that because the defendant's pumps and valves were neither fungible nor multiuse component parts, but were specifically designed to be used with asbestos insulation (albeit insulation manufactured by a third party), the defendant's pumps and valves were defective in and of themselves.[21]

15. *Id*.
16. *Id*.
17. *See* Taylor v. Elliot Turbomachinery Co., 90 Cal. Rptr. 3d 414, 426 (Ct. App. 2009), *rev. denied* (June 10, 2009) (rejecting strict products liability for manufacturers of equipment used in Navy aircraft carrier propulsion systems); Merrill v. Leslie Controls, Inc., 101 Cal. Rptr. 3d 614, 622–23 (Ct. App. 2009) (following *Taylor* with respect to valve manufacturer); O'Neil v. Crane Co., 99 Cal. Rptr. 3d 533, 542–43 (Ct. App. 2009) (refusing to follow *Taylor* with respect to manufacturer of valves and pumps); Hall v. Warren Pumps LLC, No. B208275, 2010 WL 528489, at *5 (Cal. Ct. App. Feb. 16, 2010), *review granted* (May 12, 2010) (following *Taylor* with respect to pump and valve manufacturers); Walton v. William Powell Co., 108 Cal. Rptr. 3d 412, 419 (Ct. App. 2010) (following *Taylor* with respect to valve manufacturer).
18. Braaten v. Saberhagen Holdings, 198 P.3d 493 (Wash. 2008).
19. Simonetta v. Viad Corp., 197 P.3d 127 (Wash. 2008).
20. *O'Neil*, 99 Cal. Rptr. at 542–43.
21. *Id*.

The California Supreme Court has granted review of *O'Neil*, *Merrill*, *Walton*, and *Hall*.[22] However, pursuant to Rule 8.512(d)(2) of the California Rules of Court, briefing and all further action in *Merrill*, *Walton*, and *Hall* have been deferred pending the California Supreme Court's disposition of *O'Neil*.

III. SCIENTIFIC EVIDENCE

A. *Arizona Finally in the* Daubert *Camp*

Pursuant to legislation passed in Arizona on May 10, 2010, and effective July 29, 2010, Arizona state courts must now follow the federal *Daubert* standard.[23] Previously, Arizona had adhered to the *Frye* standard, which contemplates a "pre-trial inquiry into the general acceptance of a scientific principle or discovery underlying an expert witness's proffered testimony."[24] Unlike many states that adopted the *Daubert* standard through case law, Arizona did so through legislative fiat. Legislation was necessary, in part, because of the Arizona Supreme Court's reluctance to adopt the *Daubert* standard despite repeated requests from lower courts, including the Arizona Court of Appeals.[25] Under the modified *Daubert* standard adopted by Arizona, a court must consider whether the expert's testimony or technique can be tested and has been subject to peer review; the potential rate of error of the expert opinion; and whether the opinion is generally accepted in the field.[26] With this legislation, Arizona joins the majority of states that follow some version of the *Daubert* standard for expert testimony. In January 2011, the Arizona Court of Appeals held § 12-2203 unconstitutional.[27] The Arizona Supreme Court has yet to rule on the matter.

B. *Plaintiffs Cannot Rely Solely on Governmental Classifications to Establish a Causal Link*

The Northern District of Ohio held in *Mann v. CSX Transportation, Inc.*[28] that plaintiffs seeking medical monitoring relief could not meet their burden to show that a railroad defendant proximately caused their damages by relying solely on government classifications and not independent expert assessments of the potential link between chemical exposure and disease.[29] In

22. *O'Neil*, 104 Cal. Rptr. 3d 129 (2009); *Merrill*, 105 Cal. Rptr. 3d 181 (2010); *Walton*, 111 Cal. Rptr. 3d 18 (2010); *Hall* (review granted) (Cal. May 12, 2010).
23. Ariz. Rev. Stat. § 12-2203 (2010).
24. Lohmeier v. Hammer, 148 P.3d 101, 109 (Ariz. Ct. App. 2006) (explaining the *Frye* standard).
25. *Id.* at 115.
26. Ariz. Rev. Stat. § 12-2203(B)(1)–(4).
27. Lear v. Fields, 245 P.3d 911 (Ariz. Ct. App. 2011).
28. No. 1:07-cv-3512, 2009 WL 3766056 (N.D. Ohio Nov. 10, 2009).
29. *Id.* at *3.

Mann, plaintiffs filed a putative class action immediately following the October 10, 2007, derailment in Painesville, Ohio, of a freight train operated by CSX Transportation (CSXT).[30] Thirty-one cars, nine of which contained hazardous materials, went off the tracks.[31] The derailment and subsequent sixty-hour fire resulted in a three-day evacuation of the surrounding community by the local fire department.[32]

At issue in *Mann* was whether plaintiffs could prove both general and specific causation with respect to plaintiffs' claimed exposures and alleged need for medical monitoring. Specifically, plaintiffs were required to show "(1) [that] the dioxins released into the air by the fire are known causes of human disease; and (2) that the named [p]laintiffs were exposed to dioxins in an amount sufficient to cause a significantly increased risk of disease such that a reasonable physician would order medical monitoring."[33]

In granting CSXT summary judgment, the court held first that plaintiffs erred "because their experts rely on carcinogen classifications as their only evidence that dioxins cause the endpoint diseases for which they seek medical monitoring."[34] Absent "an independent assessment of the causal link between dioxins and disease" by plaintiffs' experts, this reliance was inappropriate.[35] Moreover, although plaintiffs also relied on the Veterans Administration's Agent Orange program "as evidence that dioxins are presumptively linked to cancer,"[36] the court found this comparison "groundless" because that VA program was designed to measure mere associations between dioxins and endpoint diseases, and *not* to determine causation.[37] As the court explained, "association does not satisfy the element of causation."[38] The court thus concluded that plaintiffs had "not demonstrated a causal link between dioxins and cancer."[39]

Second, the court held that "[e]ven if [p]laintiffs could demonstrate a causal relationship between dioxins and cancer, [p]laintiffs have failed to establish that they were exposed to dioxins in an amount warranting a reasonable physician to order medical monitoring."[40] As explained by the court, "[m]ere residence in the impact zone is insufficient evidence of contamination and increased risk because it ignores any individual variables, most notably, at

30. *Id.* at *1.
31. *Id.*
32. *Id.*
33. *Id.* at *3.
34. *Id.*
35. *Id.*
36. *Id.* at *4.
37. *Id.* (internal quotations omitted).
38. *Id.*
39. *Id.*
40. *Id.*

what level the named [p]laintiffs were actually exposed to dioxins."[41] The court went further, concluding that even if plaintiffs could offer evidence of sufficient dioxin exposure, this would not necessarily mean that a "reasonable physician would order medical monitoring based on this exposure."[42]

The court also rejected plaintiffs' reliance on EPA's soil cleanup levels "as a basis for justifying medical monitoring,"[43] finding that a conservative soil cleanup level is not a substitute for a "medically-based risk assessment or evidence of the actual dose level at which dioxin truly causes cancer."[44] In addition, the EPA's threshold soil cleanup level represents an increased risk that the general population would develop cancer of only one in one million.[45] The court observed that "courts have found risks higher than in the instant matter to be insignificant as a matter of law."[46] Accordingly, the district court held that "[p]laintiffs have not presented enough evidence for a reasonable jury to conclude that such a burdensome program is warranted."[47] Plaintiffs have appealed to the Sixth Circuit.[48]

IV. MEDICAL MONITORING

A. *Medical Monitoring Permitted in Massachusetts When, Among Other Requirements, Physiological Changes Are Present*

In a highly anticipated decision, the Supreme Judicial Court of Massachusetts held in *Donovan v. Philip Morris USA, Inc.* that Massachusetts law recognizes medical monitoring claims absent a manifest disease or illness.[49] The court in *Donovan* certified two questions from the District Court of Massachusetts and, upon granting review, held that Massachusetts recognizes medical monitoring claims where a plaintiff can demonstrate toxic exposure resulting in physiological changes that indicate a substantial risk of disease or illness.[50]

In *Donovan*, the plaintiffs sought to certify a class of Massachusetts residents over the age of fifty who smoked a pack a day of Marlboro cigarettes for over twenty years, had not been diagnosed with lung cancer, and were not being monitored for suspected lung cancer.[51] Plaintiffs, alleging that

41. *Id.*
42. *Id.* at *5.
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.* at *6.
48. Hirsch v. CSX Transp., Inc., No. 09-4548 (6th Cir. filed Dec. 21, 2009).
49. 914 N.E.2d 891 (Mass. 2009).
50. *Id.* at 902.
51. *Id.* at 895.

Philip Morris "wrongfully designed, marketed, and sold" cigarettes, asserted claims for breach of implied warranty based on design defect, negligent design and testing, and violations of the Massachusetts consumer protection statute.[52] They also asserted that the cigarettes were defectively designed and were more dangerous than other commercially acceptable cigarettes.[53]

Plaintiffs alleged that cigarette smoke injured their lung tissue and structure but did not assert that they currently suffered from a smoking-related disease. Instead, they alleged that they were at a "significantly increased risk" of developing lung cancer.[54] In lieu of damages, plaintiffs sought court-supervised medical monitoring in the form of low-dose computed tomography chest scans designed to detect lung cancer early.[55]

Massachusetts' highest court concluded that plaintiffs had stated a claim for future medical expenses.[56] The court held that medical expenses can be recovered for "diagnostic tests needed to monitor medically a person who has been substantially exposed to a toxic substance that has created physiological changes indicating a substantial increase in risk that the person will contract a serious illness or disease."[57] The *Donovan* court set forth a seven-factor test to determine when medical monitoring is appropriate and emphasized that expert testimony will usually be required.[58] The court then concluded that the "single controversy rule" would not bar a subsequent action for damages if one of the plaintiffs were eventually to contract cancer.[59]

Turning to the statute of limitations, the court held that the notice relevant to accrual of a medical monitoring claim is the "substantial increase in the risk of cancer."[60] As articulated by the court, substantial increase in risk requires a doctor's finding of subclinical changes that are not obvious to the patient.[61] Thus, the limitations period begins to run when (1) there is a "physiological change resulting in a substantial increase in the risk of cancer; and (2) that increase, under the standard of care, triggers the need for available diagnostic testing that had been accepted in the medical community as an efficacious method of lung cancer screening or surveillance."[62]

52. *Id.*
53. *Id.* at 896.
54. *Id.*
55. *Id.* at 895.
56. *Id.* at 898.
57. *Id.* at 901.
58. *Id.* at 902.
59. *Id.* at 903.
60. *Id.*
61. *Id.*
62. *Id.*

Eight months after the Supreme Judicial Court's ruling, the District of Massachusetts certified a class on the implied warranty and consumer protection claims in *Donovan* under both Rule 23(b)(2) and (3).[63] The court denied plaintiffs' motion to certify on the claim of negligence.[64]

B. *Punitive Damages Cannot Be Awarded on Medical Monitoring Claim in West Virginia*

Although West Virginia has recognized a cause of action for medical monitoring since 1999,[65] the Supreme Court of Appeals of West Virginia recently addressed a related matter of first impression in *Perrine v. E.I. du Pont de Nemours and Co.*:[66] whether punitive damages can be awarded on a claim of medical monitoring. In a lengthy opinion on a variety of legal issues, the court resolved this question in the negative.

In *Perrine*, plaintiffs brought a putative class action alleging contamination from a zinc smelter facility in West Virginia.[67] In the underlying case, defendant was found liable for $381 million to a property class and a medical monitoring class.[68] The court concluded that because medical monitoring claims in West Virginia are based on the "risk" of contracting a disease and not an "actual, present physical injury," punitive damages "may not be awarded on a cause of action for medical monitoring."[69]

V. DAMAGES

A. *Economic Losses for Damages to Marine Life Available to Fishermen Under Florida's Discharge Statute and Common Law Negligence Claims*

In *Curd v. Mosaic Fertilizer, LLC*,[70] the Supreme Court of Florida ruled that fishermen affected by an oil spill off the coast of Tampa Bay did not need to own property to recover damages. Plaintiffs in *Curd* were fishermen who brought an action against a defendant that owned or controlled a phosphogypsum storage area.[71] Pollutants contained in defendant's wastewater spilled into Tampa Bay, allegedly resulting in the "loss of underwater plant life, fish, bait fish, crabs, and other marine life."[72] The fishermen filed a

63. Donovan v. Philip Morris USA, Inc., 268 F.R.D. 1, 30 (D. Mass. 2010).
64. *Id.*
65. Bower v. Westinghouse Elec. Corp., 522 S.E.2d 424 (W. Va. 1999).
66. 694 S.E.2d 815 (W. Va. 2010).
67. *Id.* at 828.
68. *Id.*
69. *Id.* at 880–81.
70. 39 So. 3d 1216, 1218 (Fla. 2010).
71. *Id.* at 1218.
72. *Id.*

putative class action "implicitly" seeking damages "in the nature of lost income and products" under Florida's discharge statute, Florida Statutes § 376.313 (2004), and common law claims of negligence and strict liability.[73] Plaintiffs did not claim to own the damaged property in question.[74]

The lower court held that because the fishermen did not own the relevant property, their claims were invalid.[75] Specifically, the court concluded that the fishermen's claims were for "purely economic damages unrelated to any damage to the fishermen's property" and that defendant "did not owe an independent duty of care to protect the fishermen's expectation of profits."[76] The lower court held further that Florida's discharge statute does not permit recovery for damages when the party seeking relief does not own or have a possessory interest in the property damaged by pollution.[77]

The Florida Supreme Court reversed. First, it held that Florida's discharge statute is part and parcel of a "far-reaching statutory scheme aimed at remedying, preventing, and removing the discharge of pollutants from Florida's waters and lands" and provides a private cause of action to "any person who can demonstrate damages as defined under the statute."[78] According to the court, such damages include " 'the documented extent of any destruction to or loss of any real or personal property or . . . of any destruction of the environment and natural resources, including all living things except human beings, as the direct result of the discharge of a pollutant.' "[79] Because the court determined that this statutory text allows recovery for damages to natural resources including "all living things," lack of property ownership was not a bar to the fishermen's recovery.

Second, the court held that the economic loss doctrine, which prevents recovery in tort for purely economic damages, is applicable in only two situations:

> (1) where the parties are in contractual privity and one party seeks to recover damages in tort for matters arising out of the contract, or (2) where the defendant is a manufacturer or distributor of a defective product which damages itself but does not cause personal injury or damage to any other property.[80]

The *Curd* court found that neither of these two situations applied and that plaintiffs' causes of action were controlled by traditional negligence law

73. *Id*. at 1219.
74. *Id*. at 1218–19.
75. *Id*. at 1223.
76. *Id*.
77. *Id*. at 1219.
78. *Id*. at 1222.
79. *Id*. at 1221 (citing Florida's discharge statute, Fla. Stat. § 376.031(5)).
80. *Id*. at 1223.

and strict liability principles.[81] The court added that defendant owed a duty to the fishermen that arose "out of the nature of [defendant's] business and the special interest of the commercial fisherman [sic] in the use of the public waters."[82] The court concluded that because defendant's discharge of pollutants "constituted a tortious invasion that interfered with the special interest of the commercial fishermen to use those public waters to earn their livelihood," defendant breached its duty, giving rise to a claim of negligence.[83]

B. *Punitive Damage Award Struck Down in Texas Exposure Case Where Plaintiffs Cannot Prove Gross Negligence*

In *Garner v. BP Amoco Chemical Co.*,[84] the Southern District of Texas determined that a jury's award of punitive damages in a toxic release case was unwarranted.[85] In *Garner*, over 100 plaintiffs filed suit alleging that "defendant released an unidentified toxic substance into the atmosphere at its refinery causing personal injuries to workers."[86] The jury awarded $10 million in punitive damages to each of the ten plaintiffs who litigated their claims first. Defendant challenged the award.[87]

By statute, to recover punitive damages in Texas, a plaintiff must prove gross negligence "by clear and convincing evidence."[88] The *Garner* court held that a "jury could conclude that releases, spills or leaks, on average, every third or fourth day means that the defendant knew of a possible peril that its workers were exposed to and that it was, nevertheless, willing to allow them [to] suffer the risk and inconvenience."[89] The court further held that the jury could also "conclude that a decision to repeatedly expose workers to such serious risk of harm could mean that the defendant is indifferent to the welfare and health of its workers."[90] The court, however, held these findings "insufficient to establish gross negligence."[91]

To obtain punitive damages for gross negligence, the Texas statute requires that plaintiffs offer evidence meeting both an objective and a subjective test.[92] Under the objective test, plaintiffs must show "an extreme risk

81. *Id.*
82. *Id.* at 1228.
83. *Id.*
84. No. G-07-221, 2010 WL 1049794, at *1 (S.D. Tex. Mar. 16, 2010).
85. *Id.* at *7.
86. *Id.* at *1.
87. *Id.* at *3.
88. *Id.* at *4, 7 (citing Tex. Prac. & Rem. Code § 41.001(7)).
89. *Id.* at *6.
90. *Id.*
91. *Id.*
92. *Id.* at *6 (citing Tex. Prac. & Rem. Code § 41.001(11)).

of harm," namely, "one that involves both high probability and high potential severity."[93] The court concluded that while there was a high probability of exposure to toxic odors at the refinery, it found no evidence that there were "always" injuries or that the injuries were severe.[94] Thus, the court held, the objective test for gross negligence was not met.

Moreover, the court observed, the punitive damages statute requires that there be a "specific intent" that necessitates a greater showing than that "a defendant had an awareness of the possibility of a spill or release."[95] Here, the court found no "specific intent" or evidence that defendant "ignored the obvious or known risk and took no precautions that would minimize or arrest the harm anticipated."[96] The court held that absent a showing of specific intent or evidence that defendant ignored obvious risk, the requirements of gross negligence were not satisfied.[97] Accordingly, the exemplary damages were set aside.[98]

VI. STATUTE OF LIMITATIONS

In *Krupski v. Costa Crociere S. p. A.*,[99] the U.S. Supreme Court made it clear that a tortfeasor cannot simply take advantage of a plaintiff's mistake of identity to avoid defending a suit to which it is a proper party. The Court in *Krupski* reversed an Eleventh Circuit decision regarding the "relates back" provision of Federal Rule of Civil Procedure 15(c)(1)(C)(ii), which specifies that an amendment to a complaint adding a new party relates back to the first filing date if "the party to be brought in by amendment . . . (ii) knew or should have known that the action would have been brought against it, but for a *mistake* concerning the proper party's identity."[100] The Supreme Court held that determining whether the amendment relates back does not depend on the timeliness of the amendment or whether the plaintiff "knew or should have known the identity of . . . the proper defendant."[101] The correct inquiry is whether the added defendant "knew or should have known that it would have been named as a defendant but for an error."[102]

In *Krupski*, plaintiff was injured while on a vacation cruise ship.[103] She filed suit against the sales and marketing agent for the cruise line. Just

93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.* at *7.
97. *Id.*
98. *Id.*
99. 130 S. Ct. 2485 (2010).
100. *Id.* at 2493 (citing Fed. R. Civ. P. 15(c)(1)) (quotations omitted; emphasis added).
101. *Id.*
102. *Id.*
103. *Id.* at 2490.

after the one-year statute of limitations period had expired, the cruise line informed plaintiff that the correct defendant should be the carrier, not the sales and marketing agent.[104] Plaintiff moved to amend her complaint to add the carrier.[105] The newly named carrier moved to dismiss, arguing that the amendment did not relate back and therefore was filed out of time.[106] The Southern District of Florida agreed.[107]

The Eleventh Circuit affirmed. It held that plaintiff knew or should have known the identity of the proper defendant; affirmatively chose to sue a different defendant; and did not make a mistake.[108] The Eleventh Circuit added that plaintiff delayed in moving to amend her complaint after learning the identity of the proper defendant, further evidencing the absence of mistake.[109]

The Supreme Court rejected both of the Eleventh Circuit's conclusions. First, the Court explained that the applicability of Rule 15(c)(1)(C)(ii) "depends on what the party to be added knew or should have known" and not "the amending party's knowledge or its timeliness in seeking to amend the pleading."[110] As explained by the Court, the "only question under Rule 15(c)(1)(C)(ii), then, is whether party A knew or should have known that, absent some mistake, the action would have been brought against him."[111]

Second, the Court rejected the Eleventh Circuit's conclusion that plaintiff's amended complaint did not relate back because plaintiff had "unduly delayed" her motion for leave to file.[112] The Court observed that Rule 15(c)(1)(C) "plainly sets forth an exclusive list of requirements of relation back, and the amending party's diligence is not among them."[113] Because defendant "should have known" that plaintiff's "failure to name it as a defendant in her original complaint was due to a mistake," the Court held that the amendment adding the carrier defendant related back to plaintiff's original complaint.[114]

VII. PUBLIC NUISANCE

A. *Fourth Circuit Holds Public Nuisance Cannot Displace Federal Regulation of Air Pollution*

In July 2010, the Fourth Circuit waded into the growing debate over the reach of the public nuisance doctrine, reversing the district court decision

104. *Id.* at 2491.
105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.* at 2492.
109. *Id.*
110. *Id.* at 2490.
111. *Id.* at 2494.
112. *Id.* at 2496.
113. *Id.*
114. *Id.* at 2498.

in *Cooper v. Tennessee Valley Authority* and holding that public nuisance suits may not be used to regulate interstate air quality.[115] The Western District of North Carolina had held that emissions from Tennessee Valley Authority (TVA) coal plants in eastern Tennessee and Alabama constitute a public nuisance in North Carolina. The court issued an injunction requiring TVA, the nation's largest public power provider, to immediately install expensive emission control technologies at four power plants, and imposing restrictive emissions caps.[116]

Reversing the district court, the Fourth Circuit cautioned that permitting the decision to stand would "encourage courts to use vague public nuisance standards to scuttle the nation's carefully created system for accommodating the need for energy production and the need for clean air."[117] The result, said the court, "would be a balkanization of clean air regulations and a confused patchwork of standards, to the detriment of industry and the environment alike."[118] In pronouncements that may have ramifications for the success of nuisance claims in other environmental cases, including pending climate change litigation, the court expressed broad concern over the application of the public nuisance doctrine to environmental litigation: "While public nuisance law doubtless encompasses environmental concerns, it does so at such a level of generality as to provide almost no standard of application."[119]

Moreover, the court noted that public nuisance may not apply in heavily regulated industries, as "it is difficult to understand how an activity expressly permitted and extensively regulated by both federal and state government could somehow constitute a public nuisance."[120] The court, however, declined to go so far as to hold that federal law entirely preempts the field of emissions regulations and acknowledged that the savings clause of the Clean Air Act may allow for some common law nuisance suits.[121]

B. *Sixth Circuit Rejects Novel Effort to Expand Public Nuisance Doctrine*

The Sixth Circuit has likewise weighed in on public nuisance, here in the unusual setting of financial services. In *City of Cleveland v. Ameriquest Mortgage Securities, Inc.*,[122] the city pursued a novel course by seeking to ex-

115. 593 F. Supp. 2d 812 (W.D.N.C. 2009), *rev'd*, 615 F.3d 291 (4th Cir. 2010).
116. *Id.* at 832–33.
117. Cooper v. Tenn. Valley Auth., 615 F.3d 291, 296 (4th Cir. 2010).
118. *Id.*
119. *Id.* at 302.
120. *Id.* at 296.
121. *Id.* at 302–04.
122. 615 F.3d 496, 503–06 (6th Cir. 2010), *cert. denied*, 131 S. Ct. 1685 (2011).

trapolate from traditional environmental public nuisance theories to hold members of the financial services industry accountable for the recent rise in residential foreclosures and diminished property values. Asserting that twenty-one banks and financial services companies perpetrated a public nuisance when they created mortgage-backed securities, Cleveland alleged that the "spike in foreclosure activity" was a foreseeable and direct result of these lending practices and sought damages for costs associated with the foreclosed and abandoned properties plaguing Cleveland neighborhoods.[123] Cleveland further asserted that traditional tort defenses, such as bars on tort claims seeking purely economic losses, do not apply to public nuisance litigation, and that the city should not be held to traditional burdens of proving causation.[124] The Northern District of Ohio declined to extend the public nuisance doctrine to such business practices.[125] In July 2010, the Sixth Circuit affirmed.[126]

C. *States May Retain Private Contingency Fee Counsel in Public Nuisance Litigation*

In *County of Santa Clara v. Superior Court*, the California Supreme Court held that public entities are not categorically barred from engaging private counsel under contingent-fee arrangements in public nuisance cases seeking abatement as the sole remedy.[127] In that case, a group of California counties and cities brought a public nuisance claim against lead paint manufacturers seeking abatement. The public entities were represented by their own government attorneys together with several private law firms retained on a contingent-fee basis. Defendants argued that attorneys wielding the government's police power should not have a financial interest in the outcome.

The Superior Court agreed and granted defendants' motion barring public entities from compensating private counsel with contingent fees in public nuisance cases. The court reasoned that all attorneys prosecuting public nuisance actions must be "absolutely neutral."[128] The Superior Court decision thus precluded any arrangement in which private counsel

123. City of Cleveland v. Ameriquest Mortgage Secs., Inc., 621 F. Supp. 2d 513, 516 (N.D. Ohio 2009), *aff'd*, 615 F.3d 496, 503–06 (6th Cir. 2010).

124. *Id*. at 522.

125. *Id*. at 536.

126. *City of Cleveland*, 615 F.3d at 503–06. Inspired by Cleveland's lawsuit, the City of Buffalo, New York, filed a similar lawsuit against thirty-six lenders involved in fifty-seven foreclosures that led to abandoned and demolished properties. City of Buffalo v. ABN Amro Mortgage Co., No. 2008002200 (N.Y. Sup. Ct., Erie Co., filed Mar. 24, 2008).

127. 50 Cal. 4th 35 (2010), *cert. denied*, 131 S. Ct. 920 (2011).

128. *Id*. at 43 (discussing County of Santa Clara v. Atl. Richfield Co., No. 1-00-CV-788657, 2007 WL 1093706 (Cal. Super. Ct Apr. 4, 2007)).

has a financial stake in the outcome of a case brought on behalf of the public.[129]

The California Supreme Court rejected such a categorical bar on contingency arrangements in public nuisance actions. Specifically, the court found that the inherent conflict of interest generated by a contingent-fee arrangement "does not necessarily mandate disqualification in public nuisance cases when fundamental constitutional rights and the right to continue operation of an existing business are not implicated."[130] Noting that the sale of lead paint is now illegal, the court found that abatement posed no risk to an ongoing business interest of the defendants. The court held that "retention of private counsel on a contingent-fee basis is permissible in such cases if neutral, conflict-free government attorneys retain the power to control and supervise the litigation."[131]

VIII. ASBESTOS

Among the pivotal issues looming in asbestos litigation nationwide is the viability of so-called household exposure claims, also known as take-home or second-hand exposure claims, against premises owners and employers. Last year, the highest courts of two states, Iowa and Ohio, considered challenges to claims asserted against premises owners by spouses of workers allegedly exposed to asbestos during their work on the defendant's premises. Appellate courts in a third state, Illinois, split on the same issue, creating a dispute awaiting resolution by the Illinois Supreme Court in some future case.

A. *Iowa Supreme Court Rejects Independent Contractor Employee's Household Exposure Claim Against Premises Owner*

The recent decision in *Van Fossen v. Midamerican Energy Co.*[132] confirmed that under Iowa law a premises owner who hires an independent contractor owes no duty to warn the spouse of the contractor's employee of the dangers of asbestos to which that employee may be exposed. In *Van Fossen*, the contractor's employee alleged that he was exposed to asbestos from 1973 until 1981 when he worked as an iron rigger, then again from 1981 through 1997 when he was hired to perform maintenance services at defendant's power plant. The Iowa Supreme Court held that the power plant owner could not be held liable when the employee's wife developed mesothelioma, a fatal asbestos-related cancer.

129. *Id.*
130. *Id.* at 58.
131. *Id.*
132. 777 N.W.2d 689 (Iowa 2009).

Plaintiff principally grounded his claim against the premises owner on the exceptions to the general rule set forth in §§ 413 and 416 (peculiar risk) and § 427 (inherently dangerous activity) of the Restatement (Second) of Torts that the hirer of an independent contractor is not liable for the negligence of the contractor. The court, however, rejected the notion that the risk of household exposure to asbestos as a result of plaintiff's work was a peculiar risk within the meaning of Restatement (Second) §§ 413 and 416. The court concluded that

> the risk that asbestos fibers would be carried home by [the plaintiff] and cause injury to [his wife] was not a risk that inhered in the construction and maintenance work performed by [the plaintiff] as an iron worker at the [defendant's] facility. It was instead a risk that was occasioned by the failure of [the plaintiff's employers] to employ routine precautionary measures against ordinary and customary dangers that [the defendant premises owner] could reasonably assume would be undertaken by any careful contractor. These routine measures could have, for example, included workplace laundering or other safe management of clothing worn by construction workers exposed to asbestos at the [defendant's facility].[133]

The court also rejected the argument that the risks of household exposure to asbestos were "inherent" in the work plaintiff was hired to perform within the meaning of § 427, finding such dangers not inherent because they did not accompany the work "when properly done."[134] Although the court acknowledged that asbestos exposure poses "grave health risks," it held that the presence of such risks in the workplace, standing alone, is not sufficient to render the work "inherently dangerous" within the meaning of § 427.[135]

The court next rejected plaintiff's contention that the premises owner owed a "general duty" to exercise reasonable care to warn plaintiff's wife of the dangers of asbestos.[136] Significantly, the court's reasoning hinged on its rejection of foreseeability of harm as a foundation for imposing a duty. Having just adopted the framework for establishing a duty of care under the proposed Restatement (Third) of Torts in *Thompson v. Kaczinski*,[137] the *Van Fossen* court noted that the foreseeability of injury to plaintiff's wife was no longer a relevant consideration. Rather, the *Van Fossen* court explained that, under the Restatement (Third) framework, an actor owes a duty of care whenever "the actor's conduct creates a risk of physical harm."[138] However,

133. *Id*. at 695.
134. *Id*.
135. *Id*.
136. *Id*. at 696–98.
137. 774 N.W.2d 829 (Iowa 2009).
138. *Van Fossen*, 777 N.W.2d at 696 (quoting Restatement (Third) of Torts: Liab. for Physical Harm § 7(a)).

the court found that asbestos household exposure cases qualify for the "exception" to this rule occasioned where a "countervailing principle or policy warrants denying or limiting liability in a particular class of cases."[139] The court determined that reasons of policy dictate that the duties of the hirers of independent contractors should be limited to those provided under Restatement (Second) §§ 413, 416, and 427.[140] The court concluded that the contractor, rather than the hiring premises owner, is best placed to understand and protect against the risks inherent in the contractor's own work, whereas imposing a broader duty on a hiring premises owner in the household exposure context would create potentially limitless liability.[141]

B. *Ohio Supreme Court Confirms Asbestos Reform Statute Bars All Household Exposure Claims Against Premises Owners*

Ohio's legislature passed an asbestos reform statute in 2004 that included a bar to household exposure claims against premises owners. Specifically, § 2307.941 of the Ohio Revised Code provides that "a premises owner is not liable for any injury to any individual resulting from asbestos exposure unless that individual's alleged exposure occurred while the individual was at the premises owner's property."[142] In *Boley v. Goodyear Tire & Rubber Co.*,[143] plaintiffs sought to limit the scope of that bar.

In *Boley*, a Goodyear employee's wife, who washed her husband's asbestos-containing clothing, brought claims of negligence against Goodyear, seeking damages for her mesothelioma.[144] She contended that her negligence claims were not barred by § 2307.941. The Ohio Supreme Court disagreed, confirming that § 2307.941 bars all "asbestos claims stemming from exposure that does not occur at the premises owner's property," regardless of their basis.[145] Thus, negligence claims, as well as all other tort-related asbestos claims, are barred if they arise from asbestos exposure that occurred off a defendant's premises.

C. *Illinois Appellate Courts Split on Challenges to Household Exposure Claims*

As noted above, two appellate courts of Illinois have recently split on the viability of household exposure claims. In *Simpkins v. CSX Corp.*, the Fifth

139. *Id.*
140. *Id.* at 697.
141. *Id.* at 698–99.
142. Ohio Rev. Code § 2307.941(A)(1).
143. 929 N.E.2d 448 (Ohio 2010) (affirming dismissal of numerous household exposure claims against employer/premises owner).
144. *Id.* at 449.
145. *Id.* at 453.

District appellate court ruled on a facial challenge to a household exposure claim.[146] Plaintiff alleged that her mother, the wife of a former CSX employee, had been exposed to asbestos by laundering his work clothing, which had been contaminated with asbestos as a result of his work for CSX. She asserted negligence and strict liability claims against CSX based on the contention that CSX engaged in an "ultrahazardous activity" by using asbestos.[147]

The court began its analysis from the premise that in Illinois, "the existence of duty depends on whether the parties stand in such a relationship to each other that the law imposes upon the defendant an obligation to act in a reasonable manner for the benefit of the plaintiff."[148] The court found that the presence of a sufficient relationship depends on four additional factors: (1) the foreseeability of the harm, (2) the likelihood of injury, (3) the magnitude of the burden involved in guarding against the harm, and (4) the consequences of placing on defendant the duty to protect against the harm.[149] Under this framework, the court found that CSX did owe a duty to its employee's spouse. The court reasoned:

> To find that an employer whose workers are exposed to asbestos owes no duty to protect others from exposure—assuming the exposure is both foreseeable and preventable without undue burden—merely because the others do not have any particular special relationship with the employer (such as an employee or a business invitee) would defy logic and lead to grossly unfair results.[150]

The court rejected CSX's forewarning of limitless liability, a concern that is often cited by those courts that have refused to impose a duty in household exposure cases. The *Simpkins* court expressed confidence that "the scope of liability will be inherently limited by the foreseeability of the harm."[151]

The Fifth District's *Simpkins* decision is at odds with the Second District's holding a year earlier in *Nelson v. Aurora Equipment Co*.[152] In that case, the court rejected a household exposure claim brought against a premises owner/employer finding that absent a "special relationship" between defendant and the decedent, defendant owed no duty under a premises liability theory because the decedent—here, the wife of one of the defendant's employees, and the mother of a second employee—was not

146. 929 N.E.2d 1257 (Ill. App. Ct. 2010).
147. *Id*. at 1260.
148. *Id*. at 1261.
149. *Id*.
150. *Id*. at 1263.
151. *Id*. at 1265.
152. 909 N.E.2d 931, 939 (Ill. App. Ct. 2009).

exposed to asbestos while on defendant's premises.[153] In so holding, the court rejected the notion that foreseeability, standing alone, is a sufficient basis on which to predicate a duty. It should be noted, however, that the *Nelson* court analyzed the viability of the household exposure claim only under a premises liability theory—the theory advanced by plaintiffs in the amended complaint and at oral argument—and did not analyze the duty issue under any other theory of liability. Further, all parties agreed that there was no significant relationship between the decedent and the premises owner/employer, an issue that was not conceded in *Simpkins*.

The Illinois Supreme Court denied review of *Nelson*.[154] *Simpkins* has been appealed and the Illinois Supreme Court has allowed review.[155]

IX. CLASS ACTIONS

A. Daubert *Hearings Appropriate at Class Certification Stage*

The trend among the federal circuits to require the resolution of expert issues at the class certification stage continued this year as the Seventh Circuit joined the ranks of the Second, Third, Ninth, Tenth, and Eleventh Circuits.

In *American Honda Motor Co. v. Allen*,[156] the Seventh Circuit reviewed the district court's grant of class certification to purchasers of Honda Gold Wing GL 1800 motorcycles who wanted the defendant manufacturer to fix an alleged design defect that caused the steering assembly to shake excessively. Plaintiffs alleged that a design defect prevented "adequate dampening of 'wobble,' [or] side-to-side oscillation" in the steering assembly.[157] They relied heavily upon a report setting forth a wobble decay standard that their expert had devised himself.[158]

Relying on *Daubert v. Merrell Dow Pharmaceuticals*,[159] Honda moved to strike the expert report, "arguing that . . . [the] standard was unreliable because it was not supported by empirical testing, was not developed through a recognized standard-setting procedure," and "was not generally accepted."[160] The district court concluded that it was proper to determine the admissibility of the expert report before ruling on class certification.[161] While the district court acknowledged that it had reservations about the

153. *Id*.
154. Nelson v. Aurora Equip. Co., 919 N.E.2d 355 (Ill. 2009).
155. Simpkins v. CSX Corp., 942 N.E.2d 462 (Ill. 2010).
156. 600 F.3d 813 (7th Cir. 2010).
157. *Id*. at 814.
158. *Id*.
159. 509 U.S. 579 (1993).
160. *Am. Honda Motor Co*., 600 F.3d at 814.
161. *Id*.

reliability of the standard, it then "'decline[d] to exclude the report . . . at this early stage of the proceedings.'"[162]

The Seventh Circuit held that the district court abused its discretion by not ruling conclusively on the admissibility of plaintiffs' expert's opinion.[163] The court concluded that "when an expert's report or testimony is critical to class certification," the district court "must conclusively rule on any challenge to the expert's qualifications or submissions prior to ruling on a class certification motion."[164] The court explained that this can necessitate "a full *Daubert* analysis" prior to class certification "if the situation warrants."[165] The Seventh Circuit further noted that while a trial court is given great latitude in measuring the reliability of proposed expert testimony, it must "provide more than just conclusory statements of admissibility to show that it adequately performed a *Daubert* analysis."[166] Because the district court did not determine whether plaintiffs' expert report was reliable prior to certifying the class, the Seventh Circuit vacated the certification order.

B. *Ninth Circuit Finds* Daubert *Hearing Not Required at Class Certification Stage*

The Ninth Circuit seemingly reached a rather different conclusion than the Seventh Circuit with regard to the propriety of conducting *Daubert* hearings at the class certification stage. It nevertheless clarified the standard its district courts must apply in resolving motions for class certification, confirming that courts are required to analyze underlying facts and legal issues concerning class certification questions regardless of any overlap with the merits.

In *Dukes v. Wal-Mart Stores, Inc.*,[167] a gender discrimination case, the Ninth Circuit explained that its clarification of the standards governing Rule 23 analyses was needed in part to address the debate over such standards as reflected in the parties' briefs and to correct recent district court decisions within the circuit that appeared to "drift away from" the circuit's previous case law.[168] The court observed that other circuit courts recently have attempted to clarify Rule 23 standards and found "it prudent to follow suit given evidence of confusion."[169]

162. *Id.* at 815 (citations omitted).
163. *Id.* at 814.
164. *Id.* at 815–16.
165. *Id.* at 815.
166. *Id.* at 816 (citation and quotation omitted).
167. 603 F.3d 571 (9th Cir. 2010), *cert. granted in part*, Wal-Mart Stores, Inc. v. Dukes, No. 10-277, 79 U.S.L.W. 3128 (Dec. 6, 2010).
168. *Id.* at 580.
169. *Id.*

The Ninth Circuit confirmed that, as in most other circuits and consistent with Supreme Court precedent,

> district courts must satisfy themselves that the Rule 23 requirements have been met before certifying a class, which will sometimes, though not always, require an inquiry into and preliminary resolution of disputed factual issues, even if those same factual issues are also, independently, relevant to the ultimate merits of the case.[170]

But, the court explained, the primary purpose of a court's inquiry at the class certification stage is to focus, for example, on whether common questions of law or fact predominate over individual questions, not on the answers to those questions or the likelihood of success on the merits.[171] Thus, explained the Ninth Circuit, "[i]t is whether courts are using the facts to probe the plaintiffs' claims of compliance with Rule 23, or to hear either parties' [sic] claims directed to stand-alone merits issues, that renders a court's use of the facts proper or improper."[172]

Nevertheless, in a footnote, the Ninth Circuit seemingly indicated its disagreement with other circuits as to whether a district court's rigorous analysis of Rule 23 elements need to include an evaluation of the methodologies used by a party's expert opining on class certification topics. The court noted, "[a]s a general rule, district courts are not required to hold a *Daubert* hearing before ruling on the admissibility of scientific evidence."[173] In *Dukes*, plaintiffs presented the expert testimony of a sociologist (among others) to support the commonality prong of the Rule 23 analysis. Wal-Mart challenged one of the expert's conclusions as not meeting the *Daubert* standards for expert testimony.[174] The district court rejected Wal-Mart's contention without conducting a *Daubert* hearing, an action that the Ninth Circuit found to be proper.[175] Importantly, the court found Wal-Mart not to have challenged the expert's methodology, only the persuasiveness of his conclusions. Accordingly, the Ninth Circuit found a *Daubert* analysis not warranted because

> testing [the expert's] testimony for "Daubert reliability" would not have addressed Wal-Mart's objections. It would have simply revealed what Wal-Mart itself has admitted and courts have long accepted: that properly analyzed social science data, like that offered by [the expert], may support a plaintiff's assertions that a claim is proper for class resolution.[176]

170. *Id*. at 583.
171. *Id*. at 590.
172. *Id*. at 582.
173. *Id*. at 603 n.22 (internal quotations omitted).
174. *Id*. at 601.
175. *Id*. at 602.
176. *Id*.

Thus, the Ninth Circuit found, because plaintiffs "clearly established foundation for [the expert's] testimony and statistics[,] [i]t was not an abuse of discretion for the district court not to exclude them, under *Daubert* or otherwise."[177] In all, the Ninth Circuit concluded that the district court amply followed the standards it clarified, including by rigorously examining and weighing the parties' evidence before certifying a class. The Supreme Court has granted, in part, Wal-Mart's petition for certiorari.[178]

Because the circumstances of Wal-Mart's challenge did not require resolution of a true *Daubert* issue—there appears to have been no dispute concerning the expert's methodologies—it is unclear at this point whether the Ninth Circuit's observations reflect a true conflict with other circuits concerning the propriety of conducting *Daubert* analyses at the class certification stage.

C. *Class Action Fairness Act*

Congress passed the Class Action Fairness Act (CAFA) in 2005 to prevent class action abuse in plaintiff-friendly state courts.[179] By relaxing the requirements for diversity jurisdiction in large class or mass actions, CAFA has rendered more cases removable to federal court. A number of recent appellate decisions have continued to explore the scope of CAFA jurisdiction.

A pair of decisions from the Seventh Circuit held that following removal to federal court under CAFA, neither denial of class certification nor amendment of the operative complaint to eliminate class allegations will divest the district court of CAFA jurisdiction. First, in *Cunningham Charter Corp. v. Learjet, Inc.*,[180] the Seventh Circuit held that federal jurisdiction under CAFA does not depend on class certification, and thus denial of a motion for class certification does not eliminate the court's subject-matter jurisdiction so as to require remand. According to the court, this holding "vindicates the general principle that jurisdiction once properly invoked is not lost by developments after a suit is filed, such as a change in the state of which a party is a citizen that destroys diversity."[181] The Seventh Circuit explained that unless the flaws in plaintiff's class allegations are "so obviously fatal as to make the plaintiff's attempt to maintain the suit as a class action frivolous," federal jurisdiction survives denial of a motion for class

177. *Id.* at 603 n.22.
178. Wal-Mart Stores, Inc. v. Dukes, No. 10-277, 79 U.S.L.W. 3128 (Dec. 6, 2010).
179. *See* 28 U.S.C. § 1332(d).
180. 592 F.3d 805 (7th Cir. 2010).
181. *Id.* at 807.

certification.[182] This decision adds to a growing split among the federal circuits on whether CAFA jurisdiction depends on class certification.[183]

In its next CAFA jurisdiction decision, the Seventh Circuit held in *In re Burlington Northern Santa Fe Railway Company*[184] that "jurisdiction under CAFA is secure even though, after removal, the plaintiffs amend their complaint to eliminate the class allegations."[185] Finding the situation "indistinguishable" from the one it addressed in *Cunningham* only months earlier, the court again based its conclusion on "[t]he well-established general rule. . . that jurisdiction is determined at the time of removal, and nothing filed after removal affects jurisdiction."[186] Moreover, the court noted, "removal cases present concerns about forum manipulation that counsel against allowing a plaintiff's post-removal amendments to affect jurisdiction" and "cases should not be shunted between court systems."[187]

A recent Eleventh Circuit decision threatened to limit federal jurisdiction under CAFA, especially in those cases originally filed in federal court. Although not a toxic tort case, the Eleventh Circuit's decision in *Cappuccitti v. DirecTV Inc.*[188] holds implications for all class actions. Under CAFA, with exceptions not relevant here, a putative class action filed in state court is removable to federal court if minimal diversity exists and the aggregate amount in controversy for the class exceeds $5 million.[189] Most CAFA-jurisdiction class actions reach federal court by this route. In *Cappuccitti*, however, the court addressed the relatively rare class action filed originally in federal court under CAFA's jurisdictional provisions. The Eleventh Circuit considered whether, in an original diversity jurisdiction action, CAFA's jurisdictional requirements supersede or alter the general diversity requirement that the district court has original jurisdiction "of all civil actions where the matter in controversy exceeds the sum or value of $75,000" and is between citizens of different states.[190] Specifically, the court addressed the question of whether an aggregate classwide amount in controversy may supersede the traditional requirement that an individual

182. *Id.*

183. *See* Vega v. T-Mobile USA, Inc., 564 F.3d 1256, 1268 n.12 (11th Cir. 2009) (CAFA jurisdiction does not depend on certification); *In re* TJX Cos. Retail Sec. Breach Litig., 564 F.3d 489, 492–93 (1st Cir. 2009) (CAFA jurisdiction depends on class certification and in the absence of certification, remand is appropriate).

184. 606 F.3d 379 (7th Cir. 2010).

185. *Id.* at 380.

186. *Id.* (citing St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 293 (1938); *In re* Shell Oil Co., 970 F.2d 355, 356 (7th Cir. 1992) (per curiam)).

187. *Id.* at 381.

188. 611 F.3d 1252 (11th Cir. 2010), *vacated and superseded on reh'g*, No. 09-14107, 2010 WL 4027719, at *1 (11th Cir. Oct. 15, 2010).

189. 28 U.S.C. § 1332(d)(2).

190. *Cappuccitti*, 611 F.3d at 1256; 28 U.S.C. § 1332(a).

plaintiff meet the $75,000 threshold. The Eleventh Circuit initially held that it may not, but later reversed itself.

Where a class action is initiated in federal court, rather than removed, the Eleventh Circuit held originally that plaintiff must allege that at least one putative class member has an amount in controversy exceeding $75,000, regardless of the aggregate value of the classwide controversy.[191] The *Cappuccitti* court did not address whether the individual $75,000 requirement would also apply in removed CAFA actions, and at least one federal court had recently declined to reach that very question.[192] Both plaintiff and defendant petitioned the Eleventh Circuit for rehearing, arguing that CAFA does not require any single putative class member to allege an amount in controversy over $75,000. On October 15, 2010, the Eleventh Circuit vacated its original opinion, deeming its interpretation of CAFA's jurisdictional requirements "incorrect."[193] The court issued a new opinion, holding that "[t]here is no requirement in a class action brought originally or on removal under CAFA that any individual plaintiff's claim exceed $75,000."[194]

In another recent decision with implications for class actions of all types, the Eighth Circuit in *Westerfeld v. Independent Processing, LLC*[195] held that any doubt about the "local controversy" exception to CAFA cannot be construed in favor of the party seeking remand to state court. Under the local controversy exception, a district court must decline to exercise jurisdiction over an otherwise removable class action in which (a) more than two-thirds of the class members are citizens of the state in which the action was originally filed; (b) at least one defendant "from whom significant relief is sought by members of the plaintiff class" and "whose alleged conduct forms a significant basis for the claims asserted by the proposed plaintiff class" is a citizen of the state where the class action was originally filed; (c) the principal injuries were incurred in the state where the action was filed; and (d) no other class action alleging similar facts has been filed during the preceding three years.[196] In *Westerfeld*, the Eighth Circuit held that any doubt regarding whether the local controversy exception applies must be resolved against plaintiff and in favor of removal, as the party invoking the exception bears the burden of proving its applicability.[197]

Justice Scalia also addressed the local controversy exception in September 2010. In the context of a single justice opinion staying a lower court's

191. *Cappuccitti*, 611 F.3d at 1256.
192. *See* Kline v. Earl Stewart Holdings LLC, Civ. A. No. 10-80912, 2010 WL 3432824 (S.D. Fla. Aug. 30, 2010).
193. *Cappuccitti*, 2010 WL 4027719, at *1.
194. *Id*. at *2.
195. No. 10-2635, 2010 WL 3619819 (8th Cir. Sept. 20, 2010).
196. 28 U.S.C. § 1332(d)(4).
197. 2010 WL 3619819, at *2.

imposition of more than $250 million in damages against several tobacco companies while the companies prepared a petition for a writ of certiorari, Justice Scalia noted that the local controversy requirement leaves the federal Due Process Clause as the last line of defense for defendants in nonremovable "local controversy" class actions subject to state court abuses and procedural infirmities.[198]

X. CERCLA

On August 2, 2010, the Ninth Circuit held in *City of Colton v. American Promotional Events, Inc.* that any plaintiff asserting a claim under the Comprehensive Environmental Response Compensation and Liability Act (CERCLA) who cannot recover *past* response costs because they are inconsistent with the National Contingency Plan (NCP) also may not obtain a declaratory judgment as to liability for *future* costs.[199] In so ruling, the court addressed an issue of first impression in the Ninth Circuit and added to a growing split among the circuit courts.

City of Colton arose from the discovery of perchlorate in three drinking water supply wells serving Colton. Although the California Department of Health Services determined that the contamination levels were too low to require closure of the wells, Colton nonetheless took the wells out of service and implemented a wellhead treatment program. It then sued twenty entities, alleging that their industrial activities caused the groundwater contamination. Colton asserted a claim under CERCLA § 107(a)[200] to recover the costs of the wellhead treatment. It also sued under the Declaratory Judgment Act[201] seeking a declaration of liability for costs of a future basinwide cleanup estimated to cost between $55 and $75 million.

To establish liability for response costs under CERCLA § 107(a), a plaintiff must show, among other things, that its response costs were consistent with the NCP.[202] Response costs are consistent with the NCP if they are in substantial compliance with EPA-promulgated regulations setting forth procedures for responding to contamination.[203] Colton conceded that its wellhead treatment program was not consistent with the NCP.[204]

The Ninth Circuit affirmed summary judgment against Colton on both claims. As to Colton's cost-recovery claim for past costs, its concession

198. Philip Morris USA, Inc. v. Scott, No. 10A273, 2010 WL 3724564, at *2 (Sept. 24, 2010).
199. 614 F.3d 998, 1008 (9th Cir. 2010).
200. 42 U.S.C. § 9607(a).
201. 28 U.S.C. §§ 2201, 2202.
202. *City of Colton*, 614 F.3d at 1002–03.
203. *Id.*
204. *Id.* at 1004.

that its wellhead treatment program was not consistent with the NCP was sufficient to affirm the judgment against it.[205] The more vexing issue was whether Colton's inability to establish liability for its past costs "necessarily doomed" its request for a declaratory judgment as to liability for future costs. As the Ninth Circuit noted, the First and Tenth Circuits would permit declaratory relief under such circumstances, but the Second, Third, and Eighth Circuits would not.[206]

The Ninth Circuit began by ruling that the general remedy provided under the Declaratory Judgment Act was preempted by CERCLA's own provision for declaratory relief, § 113(g)(2).[207] It then explained that the declaratory relief available under § 113(g)(2) applies to "liability for response costs," a term that "must refer to the response costs sought in the initial cost-recovery action, given that the [provision] later refers to 'any *subsequent* action or actions to recover *further* response costs.'"[208] Hence, the court held, a CERCLA plaintiff must first establish present liability before it can establish future liability. The court concluded by noting that its reading of CERCLA would better serve the purposes of the statute, as it would "encourag[e] a plaintiff to come to court only after demonstrating its commitment to comply with the NCP and undertake a CERCLA-quality cleanup."[209] On August 23, 2010, Colton filed a petition for a writ of certiorari with the Supreme Court, seeking reversal of the Ninth Circuit's decision.The Supreme Court denied that petition on November 29, 2010.

XI. NATIONAL ENVIRONMENTAL POLICY ACT

In *Monsanto Co. v. Geertson Seed Farms*,[210] the Supreme Court clarified the legal standard for obtaining an injunction under the National Environmental Policy Act of 1969 (NEPA).[211] *Monsanto* arose from a decision by the Animal and Plant Health Inspection Service (APHIS) to deregulate a variety of genetically engineered alfalfa seed designed to tolerate a Monsanto herbicide. Growers of conventional alfalfa and several environmental groups challenged that decision under the Administrative Procedure Act, arguing that the agency violated NEPA by issuing its deregulation decision without first completing a detailed environmental impact statement (EIS). The district court agreed and issued an injunction prohibiting the deregulation and most planting of the seed, pending completion of the mandated

205. *Id*.
206. *Id*. at 1007.
207. 42 U.S.C. § 9613(g)(2).
208. *City of Colton*, 614 F.3d at 1007 (quoting 42 U.S.C. § 9613(g)(2)).
209. *Id*. at 1008.
210. 130 S. Ct. 2743 (2010).
211. 42 U.S.C. § 4321 *et seq*.

EIS. In so ruling, the district court rejected a proposed order that would have permitted partial deregulation of the alfalfa seed while maintaining restrictions on its planting pending completion of the EIS. On appeal, Monsanto and the government did not dispute that APHIS had failed to comply with NEPA but sought to challenge the scope of the injunction. A divided panel of the Ninth Circuit affirmed the district court's ruling.[212]

In a seven-to-one ruling,[213] the Supreme Court reversed, concluding that the district court's injunction was overly broad insofar as it enjoined APHIS from even partially deregulating the alfalfa seed pending completion of the EIS. The Court began by explaining that the mere existence of a NEPA violation does not create a presumption that injunctive relief is available or that such relief should always be granted. Writing for the majority, Justice Alito emphasized that "[i]t is not enough for a court considering a request for injunctive relief to ask whether there is a good reason why an injunction should *not* issue; rather, a court must determine that an injunction *should* issue."[214] That determination is made under the traditional four-factor test for issuance of an injunction: (1) irreparable harm, (2) inadequacy of legal remedies, (3) a balance of hardships favoring the moving party, and (4) the absence of injury to the public interest were an injunction to issue.[215]

The Court concluded that none of these factors supported the prohibition against partial deregulation pending completion of the EIS. Most importantly, the Court noted, respondents had failed to demonstrate irreparable injury from the proposed partial deregulation, and the breadth of the injunction intruded on APHIS's authority to make a decision concerning partial deregulation in the first instance.[216] For similar reasons, the district court also was deemed to have erred in entering a nationwide order against any planting of the alfalfa seed until the EIS was completed, regardless of the possibility of a partial deregulation order.[217] In closing, Justice Alito stated that "[i]f a less drastic remedy (such as partial or complete vacatur of APHIS's deregulation decision) was sufficient to redress respondents' injury, no recourse to the additional and extraordinary relief of an injunction was warranted."[218]

212. Geertson Seed Farms v. Johanns, 570 F.3d 1130, 1139 (9th Cir. 2009).
213. *Monsanto*, 130 S. Ct. 2743. Justice Stevens dissented, and Justice Breyer did not participate in the decision.
214. *Id*. at 2757.
215. *Id*. at 2756.
216. *See id*. at 2758–61.
217. *Id*. at 1261.
218. *Id*.

XII. PRICE ANDERSON ACT

The Tenth Circuit vacated a $926 million judgment against Rockwell International Corp. and Dow Chemical Co. in *Cook v. Rockwell International Corp*. based on plaintiffs' failure to show actual damage to property.[219] Property owners near the site of a former weapons plant in Colorado filed a public liability action against the facility's operators under the Price Anderson Act in 1990 on behalf of themselves and a putative class.[220] The class alleged trespass and nuisance claims arising from the release of plutonium particles onto their property.[221] After nearly two decades of litigation, the district court held a four-month jury trial, which concluded in January 2006. The jury found the two contractors liable for $726 million in compensatory damages and prejudgment interest and $200 million in punitive damages.[222]

Defendants appealed, arguing, inter alia, that to establish the threshold "injury to property" constituting a "nuclear incident" under the Price Anderson Act, plaintiffs must prove actual damage to their property, not merely contamination.[223] Plaintiffs, in contrast, argued that the mere presence of radioactive plutonium particles on their property established a "nuclear incident" under the Act and was sufficient to establish "damage to property."

The Tenth Circuit rejected the plaintiffs' position, agreeing with Rockwell and Dow that "[i]n order to prove plutonium-related 'damage to property,' Plaintiffs must necessarily establish that plutonium particles released from [the facility] caused a detectable level of actual damage to class properties."[224] The court analogized its decision to a recent Tenth Circuit case rejecting a medical monitoring claim based on risk of future injury as insufficient to establish "bodily injury" under the Price Anderson Act: "Just as an existing physical injury to one's body is necessary to establish 'bodily injury,' so too is an existing physical injury to property necessary to establish 'damage to property.' Without a demonstrable manifestation of injury, the presence of plutonium can, at best, only establish a risk of future damage to property."[225]

XIII. EMERGING TORTS: CLIMATE CHANGE

On May 28, 2010, plaintiffs in *Comer v. Murphy Oil USA*[226] faced a reversal of fortune when the Fifth Circuit vacated its prior ruling in their favor and

219. 618 F.3d 1127 (10th Cir. 2010).
220. Cook v. Rockwell Int'l Corp., 564 F. Supp. 2d 1189 (D. Colo. 2008).
221. *Cook*, 618 F.3d at 1132.
222. *Cook*, 564 F. Supp. 2d 1189.
223. *Cook*, 618 F.3d at 1139.
224. *Id*. at 1141.
225. *Id*. at 1140.
226. 607 F.3d 1049 (5th Cir. 2010).

dismissed their appeal. The Supreme Court declined to review the Fifth Circuit's vacatur and dismissal on January 10, 2011, bringing the long-running case to a conclusion.

The procedural path leading to this outcome is complicated. Mississippi Gulf Coast property owners filed a putative class action under state law against an array of energy, fossil fuel, and chemical companies, alleging that their greenhouse gas emissions contributed to global warming, which intensified Hurricane Katrina in 2005, which in turn resulted in damage to their properties. On August 30, 2007, the district court granted defendants' motions to dismiss, holding that plaintiffs lacked Article III standing and that the case raised nonjusticiable political questions.[227]

On October 16, 2009, a three-judge panel of the Fifth Circuit reversed and remanded in part, holding that that neither Article III standing nor the political question doctrine barred plaintiffs' state common law claims for nuisance, trespass, and negligence.[228] In a separate concurrence, Judge Davis stated that he would have affirmed the dismissal for failure to adequately plead proximate cause, but nonetheless joined the majority because the panel was not required to consider alternative grounds for dismissal.[229]

Defendants petitioned the Fifth Circuit for a rehearing en banc. On February 26, 2010, after seven judges were recused, the remaining nine judges granted a rehearing by a six-to-three vote.[230] Prior to the rehearing, however, new circumstances arose that prompted the disqualification and recusal of another judge, leaving only eight judges left, and a loss of a quorum necessary to proceed with the en banc rehearing. After receiving letter briefs from the parties, a majority of the remaining judges first held that, under Fifth Circuit rules, the original panel's decision in favor of plaintiffs had been automatically vacated upon the granting of a rehearing en banc.[231] The majority then concluded that once the ninth remaining judge recused herself, the court had no authority to take action on the matter—including reinstating the original panel's decision in favor of plaintiffs.[232] Thus, the Fifth Circuit found itself left no option but to dismiss the appeal.

227. Judgment on the Motion to Dismiss, Comer v. Murphy Oil USA, No. 1:05-cv-00436 (S.D. Miss. Aug. 30, 2007) (Dkt. No. 369).

228. Comer v. Murphy Oil USA, 585 F.3d 855 (5th Cir. 2009), *reh'g en banc granted*, 598 F.3d 208 (2010), *vacated by* 607 F.3d 1049 (2010). The Fifth Circuit upheld under the prudential standing doctrine the district court's dismissal of plaintiffs' unjust enrichment, misrepresentation, and conspiracy claims, which were based on alleged injuries caused by defendants' public relations efforts and pricing of petrochemicals. *Id*. at 867–69.

229. *Id*. at 880.

230. *Comer*, 598 F.3d at 210; *see also Comer*, 607 F.3d at 1055 (Davis, J., dissenting) (explaining number of votes on petition for en banc rehearing).

231. *Comer*, 607 F.3d at 1053.

232. *Id*. at 1054.

In reaching its ruling, the majority also considered and rejected a number of proposals for curing the loss of a quorum such as requesting the appointment of a judge from another circuit for the rehearing; declaring a quorum of nonrecused judges; invoking the "Rule of Necessity" to permit a recused judge to sit; "dis-enbancing" the case in order to reinstate the original opinion; and staying disposition of the appeal until a new circuit judge was appointed to fill a then existing vacant seat on the Fifth Circuit. According to the majority, none of these solutions was viable because, among other reasons, they required the court to "conduct judicial business" without a necessary quorum in the first instance.[233] Judges from the original panel dissented, arguing that the case should have been reheard on the merits and disagreeing that there was no way to cure the loss of a quorum.[234]

On August 26, 2010, plaintiffs filed a petition for a writ of mandamus asking the Supreme Court to direct the Fifth Circuit to return the case to the three-judge panel that previously decided in their favor. With the denial of that petition on January 10, 2011,[235] and the Fifth Circuit's vacatur of its prior decision in favor of plaintiffs and dismissal of their appeal, the district court's ruling dismissing plaintiffs' climate change tort claims remains good law.

233. *Id*. at 1054–55.
234. *Id*. at 1055–66.
235. *In re* Comer, No. 10-294, 79 U.S.L.W. 3128 (Jan. 10, 2011).