

RECENT DEVELOPMENTS IN TOXIC TORTS AND ENVIRONMENTAL LAW

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I. INTRODUCTION

This article is intended to assist practitioners in keeping abreast of significant legislative developments and recent federal and state court decisions that will impact the litigation of toxic tort and environmental cases.

II. CLASS ACTIONS

A. *Evaluation of Expert Testimony at Class Certification Stage*

In June 2011, the Supreme Court reversed the Ninth Circuit's class certification decision in *Wal-Mart Stores, Inc. v. Dukes*,¹ an employment discrimination case in which the lower court certified a class² despite declining to conduct a *Daubert*³ analysis of a challenged expert's testimony. While the Supreme Court's reversal of the Ninth Circuit opinion did not explicitly address whether a *Daubert* analysis is required at the class certification stage, the Court acknowledged that the district court in *Dukes* found that expert testimony did not have to be scrutinized using the *Daubert* standard when it decided plaintiffs' motion for class certification.⁴ Nevertheless, the Court implied its disagreement with the district court's position, noting, "[w]e doubt that is so."⁵ Thus, the federal circuit courts' trend toward requiring district courts to evaluate expert opinions offered at the class certification stage is one the Supreme Court likely would approve.

The Eleventh Circuit continued this trend in *Sher v. Raytheon Co.*⁶ In an unpublished opinion, the court affirmed its agreement with the Seventh Circuit in *American Honda Motor Co. v. Allen*,⁷ holding that a district court must engage in a complete *Daubert* analysis and resolve challenges to the reliability of the expert's information before certifying a class.⁸ In *Sher*, a group of real property owners alleged that their property was contaminated as a result of Raytheon's improper storage and disposal of hazardous waste. The district court granted plaintiffs' motion for class certification.⁹ The Eleventh Circuit reversed, finding that the district court erred when it failed to weigh conflicting expert testimony that was presented by the parties at the class certification stage.¹⁰ Specifically, the court noted that

1. 131 S. Ct. 2541 (2011).

2. *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137 (N.D. Cal. 2004).

3. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 597 (1993).

4. *Wal-Mart Stores*, 131 S. Ct. at 2554.

5. *Id.*

6. No. 09-15798, 419 F. App'x 887, 2011 WL 814379 (11th Cir. Mar. 9, 2011).

7. 600 F.3d 813, 816 (7th Cir. 2010).

8. *Sher*, 2011 WL 814379, at *3 (citing *Am. Honda Motor Co.*, 600 F.3d at 816).

9. *Id.* at *1.

10. *Id.* at *3.

the refusal of the district court to conduct a *Daubert* analysis of the expert's qualifications was erroneous because "a district court must make the necessary factual and legal inquiries and decide all relevant contested issues prior to certification."¹¹

B. *CAFA Jurisdiction*

The Class Action Fairness Act (CAFA)¹² expands federal diversity jurisdiction for class actions when certain criteria are met. Recent circuit court decisions have further clarified the interpretation of CAFA.

1. Jurisdiction Not Dependent on Certification

Several circuit courts have considered whether federal courts retain subject-matter jurisdiction of an action filed under CAFA after denial of class certification. In *Metz v. Unizan Bank*,¹³ the Sixth Circuit agreed with "the other circuits that have addressed this issue" and concluded that the "denial of class certification does not divest federal courts of jurisdiction."¹⁴ This holding confirms that subject-matter jurisdiction is established upon the filing of an action that meets CAFA's requirements and is not dependent on certification of the proposed class.

2. "[A]ny defendant"

In *Westwood Apex v. Contreras*, the Ninth Circuit considered whether a counterclaim defendant qualifies as "any defendant" entitled to remove a case on CAFA grounds.¹⁵ Under CAFA, "[a] class action may be removed to a district court . . . by *any defendant* without the consent of all defendants."¹⁶ *Westwood* began as a case to recover an unpaid \$20,000 student loan. In response, the defendant filed class action counterclaims against plaintiff and added new counterclaim defendants, who removed to the district court.¹⁷ The district court concluded that CAFA did not "permit removal by additional counterclaim defendants" and remanded.¹⁸ The Ninth Circuit affirmed, holding that a counterclaim defendant is *not* "any defendant," and upheld the "longstanding rule that a party who is joined to such an action as a defendant to a counterclaim or as a third-party defendant may not remove the case to federal court."¹⁹

11. *Id.*

12. 28 U.S.C. §§ 1332(d), 1453 & 1711–1715.

13. 649 F.3d 492 (6th Cir. 2011).

14. *Id.* at 500 (citations omitted).

15. 644 F.3d 799, 801 (9th Cir. 2011).

16. 29 U.S.C. § 1453(b) (emphasis added).

17. *Westwood*, 644 F.3d at 802.

18. *Id.* at 803.

19. *Id.* at 807.

III. DUTY TO WARN

Since the Washington Supreme Court issued its *Braaten* and *Simonetta* decisions,²⁰ rejecting a manufacturer's duty to warn of the dangers of a third party's product, the intermediate appellate courts of Washington have consistently rejected efforts to limit the reach of that pair of decisions.²¹ The *Braaten* decision specifically reserved the question of whether a duty to warn about the dangers of a third party's product might arise when the defendant manufacturer *specifies* the use of the third party's product in conjunction with the use of its own product.²²

In *Wangen v. A.W. Chesterton Co.*, the intermediate appellate court considered and rejected the so-called specification exception suggested by *Braaten*.²³ The plaintiff in *Wangen* argued that the defendant, a pump manufacturer, was not entitled to summary judgment because there was a genuine factual dispute about whether the defendant had specified the use of replacement asbestos-containing gaskets and gasket material for its pumps.²⁴ Putting aside the dispute about the state of the record evidence, the court considered whether the fact that a manufacturer had specified that its nonasbestos product be used in conjunction with asbestos products made and sold by a different manufacturer could give rise to a duty to warn about the hazards associated with the use of the other manufacturer's asbestos products.²⁵ The court determined that the underlying principle of *Braaten* and *Simonetta*—that “liability for unsafe products is limited to those who [manufacture] such products or are in their chain of distribution”—allowed no room for a specification exception.²⁶ The court further noted that the plaintiff had provided no “persuasive authority” to support his claim for an exception to the rule of *Braaten* and *Simonetta*.²⁷

20. *Braaten v. Saberhagen Holdings*, 198 P.3d 493 (Wash. 2008); *Simonetta v. Viad Corp.*, 197 P.3d 127 (Wash. 2008).

21. *Braaten* and *Simonetta* both held that a manufacturer has no duty under products liability or negligence principles to warn of dangers presented by products that may be used in conjunction with the manufacturer's product where those products are manufactured, sold, or supplied by a third party.

22. *See Braaten*, 198 P.3d at 504.

23. No. 65258-3-1, 2011 WL 3443962, at *6–7 (Wash. Ct. App. Aug. 8, 2011). This issue previously had been skirted by another Washington appellate court in *Yankee v. APV North America, Inc.*, 262 P.3d 515, 521 (Wash. Ct. App. 2011) (holding that defendant manufacturer was entitled to summary judgment because the plaintiffs had failed to present legally sufficient evidence that the defendant had actually specified the use of the asbestos-containing gaskets and packing to which the plaintiffs allegedly had been exposed).

24. *Wangen*, 2011 WL 3443962, at *6.

25. *Id.* at *6–7.

26. *Id.* at *6.

27. *Id.* at *7; *see also* *Macias v. Mine Safety Appliances Co.*, 244 P.3d 978, 983, 985 (Wash. Ct. App. 2010), *review granted sub nom.*, *Macias v. Saberhagen Holdings, Inc.*, 249 P.3d 1029 (Wash. 2011) (table) (rejecting plaintiff's contention that an exception to *Braaten* and *Simonetta* applied based on the unique function of the defendant's respirators that were designed to protect users from the hazards of asbestos).

Like the Washington courts, appellate courts in California are grappling with the scope of a manufacturer's duty to warn about the hazards of a third party's product. That question arose again in *Woodard v. Crane Co.*,²⁸ in which the court reversed a \$6.9 million verdict for the plaintiff against the defendant manufacturer. The jury determined that the defendant was liable for having failed to warn of the dangers of asbestos-containing products used in its valves, despite the fact that the defendant neither sold nor supplied those asbestos-containing products. Rejecting the jury's verdict, the court closely analyzed and reaffirmed the decision in *Taylor v. Elliott Turbomachinery Co.*,²⁹ which was the first of a line of California appellate decisions addressing the issue.³⁰ *Taylor* held that, under California law, a manufacturer has no duty to warn of the dangers of products that it neither manufactured nor sold, regardless of whether it knew that such products would be used in connection with its own product.³¹ While *Taylor* was not reviewed by the California Supreme Court, three cases presently before that court will directly address the scope of a manufacturer's potential liability in connection with the products of a third party.³²

IV. SCIENTIFIC EVIDENCE

A. *Wisconsin and Alabama Join the Majority of States Applying the Daubert Standard*

Pursuant to legislation signed into law this past year, both Wisconsin and Alabama have joined the majority of states applying some version of the *Daubert*³³ standard for the admission of expert testimony.³⁴ In both states,

28. No. B219366, 2011 WL 3759923 (Cal. Ct. App. Aug. 25, 2011) (review granted Nov. 16, 2011).

29. 171 Cal. App. 4th 564 (2009).

30. *Woodard*, 2011 WL 3759923, at *3-5.

31. *Taylor*, 171 Cal. App. 4th at 575.

32. See *O'Neil v. Crane Co.*, 99 Cal. Rptr. 3d 533 (Ct. App. 2009), *petition for review granted*, 223 P.3d 1 (Cal.) (rejecting *Taylor*); *Merrill v. Leslie Controls, Inc.*, 101 Cal. Rptr. 3d 614 (Ct. App. 2010), *petition for review granted*, 224 P.3d 919 (Cal.) (following *Taylor*); *Walton v. William Powell Co.*, 108 Cal. Rptr. 3d 412 (Ct. App. 2010), *petition for review granted*, 232 P.3d 1201 (Cal.) (following *Taylor*). After the close of the reporting period covered by this publication, the California Supreme Court issued an opinion in the lead case addressing this issue, *O'Neil v. Crane Co.*, No. BC360274, 2012 WL 88533 (Cal. Jan. 12, 2012). It held that a product manufacturer is not liable under strict liability or negligence principles for harm caused by another manufacturer's product *unless* the manufacturer's own product "contributed substantially to the harm, or the [manufacturer] participated substantially in creating the harmful combined use of the products." *Id.* at *1. As of January 16, 2012, decisions in the other two appeals raising this issue have not yet been issued by the California Supreme Court. A thorough discussion of the recent *O'Neil* decision will be included in the 2013 annual survey.

33. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993).

34. Wis. STAT. § 907.02 (2011); 2011 Ala. Laws Act 2011-629 (to be codified at ALA. CODE § 12-21-160).

the legislation was prompted by repeated refusals of their highest courts—as recently as 2010 in Wisconsin—to adopt a more stringent evidentiary standard.³⁵ Prior to the legislation, the two states had divergent approaches to the admission of expert testimony. Wisconsin applied neither the *Frye*³⁶ nor *Daubert* standard, as it did not condition the admissibility of scientific evidence upon its reliability.³⁷ Rather, Wisconsin state courts admitted scientific evidence if it was relevant, the witness was qualified as an expert, and the evidence would help the fact finder in determining an issue of fact.³⁸ In contrast, Alabama courts have applied the *Frye* “general acceptance” standard, except with respect to the admission of DNA evidence, where the *Daubert* standard has been applied.³⁹

B. *Ninth Circuit Upholds Use of Case Management Tool to Weed Out Frivolous Claims*

In a case of first impression, the Ninth Circuit held that a lower court’s use of a *Lone Pine* order⁴⁰ did not violate the federal *Daubert* standard. A *Lone Pine* order is a case management tool used in mass tort and other types of complex litigation where a court requires the plaintiffs to make a prima facie showing of causation and to provide some degree of evidentiary support for their claims.

In *Avila v. Willits Environmental Remediation Trust*,⁴¹ the plaintiffs sought relief for medical problems allegedly caused by exposure to chemicals released from a former machine shop in Willits, California.⁴² In December 2004, five years after the litigation began, the district court ordered a group of plaintiffs who had never lived in Willits, or who lived there only after the machine shop ceased operations, to make a prima facie showing regarding exposure and causation.⁴³ In addition to written statements setting forth all facts supporting these plaintiffs’ claimed exposure, the court required plaintiffs to provide a written statement from an expert opining

35. See *State v. Fisher*, 778 N.W.2d 629, 633 (Wis. 2010); *Courtaulds Fibers, Inc. v. Long*, 779 So. 2d 198, 202 (Ala. 2000).

36. *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

37. *State v. Walstad*, 351 N.W.2d 469, 486 (Wis. 1984) (explaining that the Wisconsin Supreme Court had expressly rejected *Frye*); *State v. Peters*, 534 N.W.2d 867, 872 (Wis. Ct. App. 1995) (“Because Wisconsin rejected the *Frye* test and adopted a test unrelated to that used by the federal courts and many state courts, our standard for the admission of scientific evidence was unaffected by *Daubert*.”).

38. *Peters*, 534 N.W.2d at 872.

39. *S. Energy Homes, Inc. v. Washington*, 774 So. 2d 505, 517 n.5 (Ala. 2000) (explaining that the *Daubert* standard only applied in determining the admissibility of DNA evidence).

40. See *Lore v. Lone Pine Corp.*, No. L 33606-85, 1986 WL 637507 (N.J. Super. Ct. Law Div. Nov. 18, 1986).

41. 633 F.3d 828 (9th Cir.), cert. denied, 132 S. Ct. 120 (2011).

42. *Id.* at 832.

43. *Id.* at 833.

on causation and articulating the scientific and medical basis for the opinion.⁴⁴ Finding that it did not satisfy the *Daubert* standard, the court struck the plaintiffs' causation expert's report and dismissed their claims for failure to show causation.⁴⁵

Plaintiffs appealed, arguing that the district court's *Lone Pine* order improperly bypassed established rules of procedure for discovery and summary judgment.⁴⁶ The Ninth Circuit disagreed, stating that district courts "have broad discretion to manage discovery and to control the course of litigation."⁴⁷ The court added: "Rule 16(c)(2)(L) authorizes a court to adopt 'special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems.'"⁴⁸ Even more, the Ninth Circuit found that a "case management order that focuses on key issues for expert opinion is in aid of the *Daubert* responsibilities the district judge must discharge."⁴⁹ Finding issuance and enforcement of the *Lone Pine* order an appropriate exercise of the district court's discretion, the Ninth Circuit upheld the dismissal.⁵⁰

Before *Avila*, only the Fifth Circuit had ruled directly on the propriety of a *Lone Pine* order, reaching the same result.⁵¹

C. Summary Judgment Affirmed in Sixth Circuit Medical Monitoring Case

The Sixth Circuit in *Hirsch v. CSX Transportation, Inc.* upheld the Northern District of Ohio's grant of summary judgment for CSX Transportation (CSXT) in a putative class action seeking a judicially administered medical monitoring program.⁵² The *Hirsch* plaintiffs sued CSXT following an October 2007 derailment near Painesville, Ohio, alleging that the crash exposed them to cancer-causing agents.⁵³ The district court granted summary judgment because the plaintiffs could not establish a triable issue of fact regarding causation and damages.⁵⁴

In affirming the district court's ruling, the Sixth Circuit first addressed the case's unusual posture. To support their medical monitoring

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.* (quoting FED. R. CIV. P. 16(c)(2)(L)).

49. *Id.* at 834.

50. *Id.*

51. *Acuna v. Brown & Root, Inc.*, 200 F.3d 335 (5th Cir. 2000) (approving *Lone Pine* order in case alleging tortious injury from mining activity).

52. 656 F.3d 359, 364 (6th Cir. 2011).

53. *Id.* at 360.

54. *Id.*

claims, the plaintiffs had offered several experts to show causation and injury.⁵⁵ But rather than move to exclude any of them, or ask the district court for a *Daubert* hearing, CSXT filed a “no-evidence” motion for summary judgment that essentially challenged the sufficiency of the experts’ reports.⁵⁶ The Sixth Circuit found this permissible, rejecting the plaintiffs’ argument that dismissal was improper without a *Daubert* ruling.⁵⁷

Turning to the merits, the Sixth Circuit observed that

the [p]laintiffs . . . have, even by their own admission, as of now not suffered any discernable compensable injury. Rather, their alleged injuries consist solely of the increased risk of . . . certain diseases that, according to Plaintiffs, are more likely to occur as a result of the train crash.⁵⁸

Thus, to prove entitlement to medical monitoring, plaintiffs’ increased risk must be such that a reasonable physician would order medical monitoring.⁵⁹

The Sixth Circuit agreed that the plaintiffs’ evidence was wholly insufficient.⁶⁰ The court found particularly lacking the affidavit of the plaintiffs’ medical expert, which stated that, based on his acceptance of a one-in-a-million increased risk as a threshold for medical monitoring, a reasonable physician would prescribe the putative class members a medical monitoring regime.⁶¹ Not only did the court find the assessment to be tainted by unreliable exposure evidence, but it also concluded that the increased risk “border[ed] on legal insignificance.”⁶²

Accordingly, the Sixth Circuit concluded that the evidence was insufficient to create a genuine issue of material fact regarding whether a reasonable physician would prescribe a medical monitoring program for the plaintiffs.⁶³ While the ruling apparently raised the bar for other medical monitoring plaintiffs in the circuit, the Sixth Circuit left open several questions and even suggested that the plaintiffs could have survived summary judgment by providing conclusive medical evidence that they did indeed face a one-in-a-million increased risk of cancer.⁶⁴

55. *Id.* at 361.

56. *See id.* at 362.

57. *Id.*

58. *Id.* at 363.

59. *See id.*

60. *Id.*

61. *Id.*

62. *Id.* at 364.

63. *Id.*

64. *Id.*

V. MEDICAL MONITORING

A. Fourth Circuit Strictly Construes Medical Monitoring Requirements Under West Virginia Law

The Fourth Circuit recently offered its interpretation of medical monitoring under West Virginia law in *Rhodes v. E.I. du Pont de Nemours & Co.*⁶⁵ *Rhodes* involved allegations that a DuPont manufacturing facility discharged perfluorooctanoic acid (PFOA) into the surrounding area.⁶⁶ Plaintiffs, residents in the town where DuPont's facility is located, filed a class action complaint alleging various common law claims⁶⁷ and sought "injunctive relief to obtain long-term diagnostic testing (medical monitoring) for latent diseases" for those exposed to PFOA beginning in 2005.⁶⁸ Because plaintiffs were unable to show any present physical injuries or property damages, the Fourth Circuit upheld the dismissal of their common law tort claims.⁶⁹

Plaintiffs argued that the "injury" requirement had been "relaxed" by the West Virginia Supreme Court of Appeals in *Bower v. Westinghouse Electric Corp.*⁷⁰ Under *Bower*, plaintiffs posited that "they may recover medical monitoring as a remedy for battery without demonstrating a harmful bodily contact, provided they can show an increased future risk of developing diseases" due to defendant's allegedly tortious conduct.⁷¹ The Fourth Circuit disagreed. The court construed *Bower* as permitting an "independent tort claim for medical monitoring" and allowing a plaintiff to recover the "costs of diagnostic testing for diseases that may develop in the future as a result of a defendant's conduct."⁷² Nevertheless, the Fourth Circuit explained, West Virginia law still requires proof of "injury," but in the form of a "significantly increased risk of contracting a particular disease relative to what would be the case in the absence of exposure."⁷³ Because plaintiffs failed to prove such injury, the court affirmed dismissal of their claim for "medical monitoring relief incident to the traditional common law tort claims."⁷⁴

65. 636 F.3d 88 (4th Cir. 2011).

66. *Id.* at 92.

67. *Id.* at 94.

68. *Id.* at 93.

69. *Id.* at 94–98. Plaintiffs originally asserted independent medical monitoring claims that they later voluntarily dismissed. Plaintiffs still sought medical monitoring relief "incident to the traditional common law tort claims by showing that DuPont's tortious conduct caused them to suffer an increased future risk of developing certain diseases." *Id.* at 98.

70. 522 S.E.2d 424, 431 (W. Va. 1999).

71. *Rhodes*, 636 F.3d at 98.

72. *Id.*

73. *Id.* (quoting *Bowers*, 522 S.E.2d at 431).

74. *Id.* at 98.

B. *Eastern District of New York Predicts New York Would Recognize Independent Claim for Medical Monitoring*

In *Caronia v. Philip Morris USA, Inc.*, the Eastern District of New York predicted that the Court of Appeals of New York would recognize an independent medical monitoring claim.⁷⁵

Plaintiffs sought medical monitoring for a class of New York residents over fifty years old who smoked Marlboro brand cigarettes for at least twenty “pack-years,”⁷⁶ did not currently suffer from lung cancer, and were not currently “under investigation” for lung cancer.⁷⁷ In a case of first impression, the district court conducted a detailed analysis to predict whether New York’s highest court would recognize an independent cause of action for medical monitoring of asymptomatic plaintiffs, answering in the affirmative.⁷⁸ The court based its decision on several factors, including the following: (1) New York’s intermediate appellate courts had permitted recovery for medical monitoring; (2) “the majority of other federal courts [applying] New York law to the question have concluded that the New York Court of Appeals would permit recovery”; (3) “the New York Court of Appeals would not be alone, and would not even be at the vanguard, in permitting recovery of this sort”; and (4) the plaintiffs were not seeking a lump sum, but rather limiting the recovery to the medical monitoring relief.⁷⁹

The court next considered whether plaintiffs’ medical monitoring claim was timely. Defendants argued that because medical monitoring is a remedy for the “increased risk of contracting a serious illness,” the claims were time barred because plaintiffs “knew of their increased risk of developing cancer long ago.”⁸⁰ The court rejected this argument, concluding that a claim for medical monitoring does not accrue until (1) a plaintiff knows or should know “of his increased risk of developing a serious disease” and (2) “when that increase, under the standard of care, triggers the need for available diagnostic testing that has been accepted in the medical community as an effective method of screening or surveil-

75. No. 06-CV-224 (CBA) (SMG), 2011 WL 338425, at *4, 7 (E.D.N.Y. Jan. 13, 2011).

76. A “pack-year” is the equivalent of one year of smoking twenty cigarettes (one pack) per day. See NAT’L CANCER INST., <http://www.cancer.gov/dictionary?cdrid=306510> (last visited Jan. 10, 2012).

77. *Caronia*, 2011 WL 338425, at *1.

78. *Id.* at *4–8.

79. *Id.* at *7 (citation omitted).

80. *Id.* at *8.

81. *Id.* at *9. The court followed the analysis and results reached by the Supreme Judicial Court of Massachusetts in *Donovan v. Philip Morris U.S.A.*, 914 N.E.2d 891, 902–03 (Mass. 2009).

lance.”⁸¹ Nevertheless, the court found that plaintiffs failed to plead that defendants’ “tortious conduct is what caused [plaintiffs] to be exposed to harmful smoke sufficient to require medical monitoring” and dismissed their claims.⁸²

VI. SEVERAL STATE LEGISLATURES CAP PUNITIVE DAMAGES

In a wave of tort reform bills passed by Republican-controlled legislatures, several states enacted provisions that will cap punitive damages in toxic tort cases. As part of the Wisconsin legislation that adopted the *Daubert* standard, Wisconsin capped punitive damages—except in drunk driving cases—at the greater of \$200,000 or two times the amount of compensatory damages.⁸³ The legislation retained the previous standard for the award of punitive damages, which required the plaintiff to show that the defendant acted with malice or intentional disregard for the plaintiff’s rights.⁸⁴

In accordance with legislation signed into law on June 16, 2011, and effective as of October 1, 2011, punitive damages are now capped in Tennessee state courts at the greater of \$500,000 or twice the amount of compensatory damages.⁸⁵ These limits do not apply if the defendant was convicted of a felony for causing the injury or acted under the influence of drugs or alcohol.⁸⁶ Going a step further, the Tennessee legislature also limited noneconomic damages in all civil actions to \$750,000 per plaintiff.⁸⁷ The new statutory section defines noneconomic damages as losses from, among other things, “physical and emotional pain; suffering; inconvenience; physical impairment; . . . loss of . . . companionship; . . . loss of enjoyment of . . . life.”⁸⁸

Finally, effective January 1, 2012, South Carolina has capped punitive damages in the majority of cases at three times compensatory damages or \$500,000, whichever is greater.⁸⁹ Under § 15-32-510, punitive damages must be specifically requested in the complaint, and such a request will result in a bifurcated trial. The cap is raised to the greater of four times the amount of compensatory damages or \$2 million in certain circumstances,

82. *Caronia*, 2011 WL 338425, at *9.

83. WIS. STAT. § 895.043 (2011).

84. *Id.* § 895.043(3).

85. TENN. CODE ANN. § 29-39-104(a)(5) (2011).

86. *Id.* § 29-39-104(a)(7).

87. *Id.* § 29-39-102(a)(2).

88. *Id.* § 29-39-101(2).

89. 2011 S.C. Laws Act 52 (to be codified at S.C. CODE §§ 15-31-510, 530).

such as where the defendant's conduct was motivated by "unreasonable financial gain."⁹⁰

VII. STATUTE OF LIMITATIONS

A. *Arizona Supreme Court Declines to Extend the Class Action Tolling Doctrine to Statutes of Repose*

In a decision highlighting a split in authority on the issue, the Arizona Supreme Court held in *Albano v. Shea Homes Ltd. Partnership*⁹¹ that the class action tolling doctrine, set forth in *American Pipe & Construction Co. v. Utah*,⁹² does not apply to statutes of repose.⁹³ In *American Pipe*, the U.S. Supreme Court held that until the trial court denies class certification, the filing of a class action complaint tolls the statute of limitations for an absent class member who then seeks to intervene.⁹⁴ *American Pipe* was later extended to apply to cases where parties brought their own actions instead of seeking to intervene in a pending class action.⁹⁵ The Arizona Supreme Court in *Albano* certified three questions from the Ninth Circuit, including whether the class action tolling doctrine applies to Arizona's statute of repose.

The *Albano* court began by explaining that in "determining whether to apply class action tolling, '[t]he proper test is . . . whether tolling the limitation in a given context is consonant with the legislative scheme.'"⁹⁶ With that in mind, the court noted that a statute of repose establishes a substantive right; specifically, a time limit beyond which no claim may be pursued.⁹⁷ On the other hand, the court stated, the *American Pipe* rule was a Court-created rule based on Federal Rule of Civil Procedure 23's underlying policy considerations.⁹⁸ As a result, the court concluded that it would be inappropriate to use this Court-created rule to "alter the substantive effect of a statute of repose."⁹⁹ Accordingly, the court answered the certified question in the negative.¹⁰⁰

90. *Id.* § 2.

91. 254 P.3d 360, 367 (Ariz. 2011).

92. 414 U.S. 538 (1974).

93. Compare *Joseph v. Wiles*, 223 F.3d 1155, 1166–67 (10th Cir. 2000) (*American Pipe* tolling applies to statutes of repose), with *Footbridge Ltd. Trust v. Countrywide Fin. Corp.*, 770 F. Supp. 2d 618, 625 (S.D.N.Y. 2011) (*American Pipe* tolling inapplicable to statutes of repose).

94. 414 U.S. at 553.

95. See *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 353–54 (1983) (holding that *American Pipe* applied to class members who "choose to file their own suits or to intervene as plaintiffs in the pending action").

96. *Albano*, 254 P.3d at 366 (quoting *Am. Pipe*, 414 U.S. at 557–58).

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

B. *Statute of Limitations Begins to Run Before Causal Connection Is Established*

In *Gazal v. Boebringher Ingelheim Pharmaceuticals, Inc.*, the Eighth Circuit held that a plaintiff cannot wait to sue until legally sufficient proof of causation exists.¹⁰¹ In June 2009, plaintiff sued several pharmaceutical companies for failure to warn about the link between Mirapex and compulsive gambling.¹⁰² The defendants sought summary judgment on the basis that the claims were time-barred under Texas's two-year statute of limitations.¹⁰³ The plaintiff asserted that the claims did not accrue until June 2008, when the first large-scale scientific study making a causal connection between Mirapex and compulsive behaviors, the Dominion Study, was published.¹⁰⁴ Rejecting this theory, the district court found that the plaintiff was, by his own admission, aware of the potential link between Mirapex and compulsive gambling no later than 2005, and, thus, his claims were time-barred.¹⁰⁵

On appeal, the plaintiff argued that the proper issue was whether a plaintiff's claim accrues at the time he suffers a *legally cognizable* injury.¹⁰⁶ According to the plaintiff, an injury is not legally cognizable until its cause can be ascertained; in other words, when evidence of a causal connection exists.¹⁰⁷ Under the plaintiff's interpretation of *Merrell Dow Pharmaceuticals, Inc. v. Havner*,¹⁰⁸ the controlling Texas precedent regarding causation evidence, to be scientifically reliable, evidence must be grounded in a properly designed epidemiological study that indicates the relative risk of disease for persons exposed is more than 2.0, or twice that of a control population.¹⁰⁹ By extension, the plaintiff argued, his claim would have failed as a matter of law until 2008, when the Dominion Study was published.¹¹⁰ On that basis, he argued that the claims did not accrue until 2008.

The Eighth Circuit disagreed, explaining that the statute of limitations concerned notice rather than objective verification of causation: "*Havner* considered what weight ought to be given to particular epidemiological studies in determining whether the plaintiffs' causation evidence was legally sufficient under the 'more likely than not' burden of proof. It did not

101. 647 F.3d 833, 838 (8th Cir. 2011).

102. *Id.* Plaintiff began taking Mirapex in 2002 and developed a compulsive gambling problem shortly thereafter, resulting in the loss of millions of dollars. *Id.* at 836–37.

103. *Id.* In March 2010, the Judicial Panel on Multidistrict Litigation transferred the case to Minnesota under the umbrella of the Mirapex Products Liability Multidistrict Litigation.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. 953 S.W.2d 706 (Tex. 1997).

109. *Gazal*, 647 F.3d at 838.

110. *Id.*

speak to the minimum notice a plaintiff must have before a particular claim accrues and does not bear on the particular issue before us.”¹¹¹ Because the court concluded that the plaintiff had notice of his injury and its causal connection to Mirapex no later than 2005, the Eighth Circuit upheld the district court’s grant of summary judgment.¹¹²

VIII. PUBLIC NUISANCE

A. *U.S. Supreme Court Holds That Clean Air Act Displaces Federal Public Nuisance Claims*

On June 20, 2011, the U.S. Supreme Court weighed in on emerging global climate change litigation, addressing public nuisance claims brought by eight states, New York City, and three land trusts seeking to restrict the activities of electric power corporations that allegedly contribute to global warming. In *American Electric Power Co. v. Connecticut (AEP)*,¹¹³ the Supreme Court held that the Clean Air Act, 42 U.S.C. §§ 7401 *et seq.* (CAA), and EPA actions authorized by the CAA displace any federal common law right to seek abatement of carbon dioxide emissions from fossil-fuel-fired power plants, but remanded a claim under state nuisance law for further consideration.

Plaintiffs claimed that five major energy companies and the Tennessee Valley Authority contributed to a public nuisance and sought to require each defendant “to cap . . . and then reduce [its carbon dioxide emissions]” by a specified percentage for at least a decade.¹¹⁴ The district court dismissed plaintiffs’ claims as nonjusticiable under the political question doctrine.¹¹⁵ On appeal, the Second Circuit vacated the district court decision.¹¹⁶ As to the energy companies, the Second Circuit found that (1) plaintiffs’ claims did not present nonjusticiable political questions; (2) plaintiffs had Article III standing to pursue their claims; (3) plaintiffs adequately stated claims under the federal common law of nuisance; and (4) plaintiffs’ claims were not displaced by federal statutory law.¹¹⁷

The Supreme Court granted certiorari. As a threshold matter, a divided Court affirmed the Second Circuit’s exercise of jurisdiction, with four justices holding that “at least some plaintiffs have Article III standing under *Massachusetts [v. EPA]*, which permitted a State to challenge EPA’s refusal to regulate greenhouse gas emissions,” and that “no other threshold obstacle bars review.”¹¹⁸

111. *Id.* at 839.

112. *Id.*

113. 131 S. Ct. 2527, 2537 (2011).

114. *Id.* at 2534.

115. *Connecticut v. Am. Elec. Power Co.*, 406 F. Supp. 2d 265, 274 (S.D.N.Y. 2005).

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

117. *Id.* at 315.

118. *AEP*, 131 S. Ct. at 2535 (citing *Massachusetts v. EPA*, 549 U.S. 497, 520–26 (2007)).

The energy companies contended that the CAA displaced plaintiffs' common law nuisance claims by granting exclusive authority to the EPA to regulate greenhouse gas emissions. Plaintiffs countered that the CAA *could not* displace federal common law "until EPA actually . . . sets standards governing [defendants'] emissions."¹¹⁹ The Court rejected this argument, holding that the CAA completely displaces plaintiffs' federal common law nuisance claim.¹²⁰ The Court clarified that "[t]he test for whether congressional legislation excludes the declaration of federal common law is simply whether the statute *speaks directly to the question at issue*."¹²¹ Because "it is primarily the office of Congress, not the federal courts, to prescribe national policy in areas of special federal interest," the Court reasoned, "[w]hen Congress addresses a question previously governed by a decision rested on federal common law the need for such an unusual exercise of law-making by federal courts disappears."¹²² The Court found ample evidence that the CAA, as implemented by the EPA, "'speaks directly' to emissions of carbon dioxide from the defendants' plants."¹²³

The Court also recognized that in light of its "holding that the Clean Air Act displaces federal common law, the availability *vel non* of a state lawsuit depends, *inter alia*, on the preemptive effect of the federal Act."¹²⁴ Because the parties had not briefed preemption, the Supreme Court left open the question of whether state public nuisance law is available for a plaintiff seeking abatement of emissions allegedly contributing to global warming, remanding those claims for further proceedings.¹²⁵

B. *Seventh Circuit Denies Preliminary Injunction to Force the U.S. Army Corps of Engineers to Stop the Migration of Asian Carp into the Great Lakes*

The Seventh Circuit in *Michigan v. U.S. Army Corps of Engineers*¹²⁶ explored the scope of the federal common law public nuisance doctrine and affirmed the denial of a request by five state attorneys general to force the U.S. Army Corps of Engineers to undertake measures to stop the migration of invasive Asian carp into the Great Lakes. The district court denied plaintiffs' motion for a preliminary injunction, finding little likelihood of success on the merits of the nuisance claim. The Seventh Circuit affirmed on different grounds. While the Seventh Circuit found "enough

119. *Id.* at 2538.

120. *Id.* at 2537.

121. *Id.* (internal quotation marks, alterations and citations omitted) (emphasis added).

122. *Id.* at 2537 (internal quotation marks, alterations, and citation omitted).

123. *Id.* at 2537.

124. *Id.* (citation omitted).

125. *Id.*

126. No. 10-3891, 2011 WL 3836457 (7th Cir. Aug. 24, 2011).

evidence . . . to establish a good or perhaps even a substantial likelihood of harm—that is, a nontrivial chance that the carp will invade Lake Michigan in numbers great enough to constitute a public nuisance,” it also found that the government was undertaking efforts to address the problem, and “an interim injunction would only get in the way.”¹²⁷

In reaching its conclusion, the Seventh Circuit took the opportunity to explore the bounds of the federal common law public nuisance doctrine as to claims against the federal government. It first addressed the subject matter encompassed by the common law public nuisance doctrine, which the Corps argued was limited to emission of “traditional pollutants” and did not extend to the introduction of an invasive species of fish into a new ecosystem.¹²⁸ The court rejected this argument, holding that

[i]t would be arbitrary to conclude that this type of action extends to the harm caused by industrial pollution but not to the environmental and economic destruction caused by the introduction of an invasive, non-native organism into a new ecosystem. . . . Public nuisance traditionally has been understood to cover a tremendous range of subjects.¹²⁹

The court next considered whether the limited waiver of sovereign immunity in the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671–2680 (FTCA), trumps the government’s broad waiver of sovereign immunity for actions seeking declaratory or injunctive relief under § 702 of the Administrative Procedure Act.¹³⁰ The Corps argued that because the FTCA says nothing about injunctive relief, it implicitly prohibits injunctive relief in tort suits against the United States. The Seventh Circuit held that “the Corps’ effort to transform silence into implicit prohibition would seriously undermine Congress’ effort in the APA to authorize specific relief against the United States.”¹³¹ Moreover, the FTCA, “[b]y its terms . . . does not apply to *any* federal common-law tort claim, no matter what relief is sought.”¹³² Rather, “state tort law—not federal law—is the source of substantive liability under the FTCA.”¹³³ Because a nuisance claim based entirely on federal common law “would not be cognizable under the FTCA in the first place . . . the [sovereign immunity] waiver contained in § 702 of the APA” governs and allows public nuisance actions seeking injunctive or declaratory relief to proceed against the federal government.¹³⁴

127. *Id.* at *2.

128. *Id.* at *4.

129. *Id.*

130. *Id.* at *7–8.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

The Seventh Circuit also addressed the impact of the Supreme Court's decision in *AEP*, rejecting the argument that here, as in that case, congressional regulation has displaced as a matter of law the federal common law on which the states rely. The court remarked that "[t]he important displacement question is whether Congress has provided a sufficient legislative solution to the particular interstate nuisance here to warrant a conclusion that this legislation has occupied the field to the exclusion of federal common law."¹³⁵ The court concluded that efforts to curb migration of invasive species "have yet to reach the level of detail one sees in the air or water pollution schemes," and thus do not sufficiently displace federal common law nuisance claims.¹³⁶

IX. ASBESTOS

A. *Delaware Supreme Court Considers Viability of Household Exposure Claims for Second Time*

In 2009, the Delaware Supreme Court considered the viability of so-called household exposure asbestos claims in *Riedel v. ICI Americas, Inc.*,¹³⁷ a case involving a claim brought by a woman against her husband's former employer. The woman claimed that she had contracted an asbestos-related disease through her contact with her husband's asbestos-contaminated work clothes. The court analyzed the claim as one for nonfeasance (i.e., a failure to act) because the plaintiff had pled that the defendant employer had *failed* to prevent her husband's asbestos-contaminated clothing from being brought home and had *failed* to warn of the dangers of household exposure to asbestos. As a result, the court held that the plaintiff needed to show a "special relationship" between herself and the defendant employer in order to establish that the defendant owed her any duty. Finding that there was no relationship between the plaintiff and her husband's employer on which to base a duty, the court held that the claim against the defendant employer was not viable.¹³⁸ The *Riedel* court specifically left open the possibility that a household exposure claim might survive challenge if it was pled as a misfeasance claim, i.e., a claim asserting affirmative misconduct.¹³⁹

In the wake of *Riedel*, the Delaware plaintiffs' bar attempted to save their pending household exposure claims by re-pleading them as misfeasance

135. *Id.* at *10.

136. *Id.* at *12-13.

137. 968 A.2d 17 (Del. 2009).

138. *Id.* at 26.

139. *Id.* at 25.

claims. This year, however, in *Price v. E. I. du Pont de Nemours & Co.*,¹⁴⁰ the Delaware Supreme Court considered and rejected those efforts.

The factual scenario at issue in *Price* was virtually identical to the one presented in *Riedel*. The plaintiff in *Price* sued her husband's former employer, alleging that she had developed an asbestos-related disease as a result of her exposure to asbestos that had contaminated her husband's work clothes and, consequently, her home. In an effort to survive a challenge under *Riedel*, the plaintiff sought to amend her complaint to re-plead her household exposure claim as one alleging that the defendant had committed an act of misfeasance by "wrongfully releasing asbestos from its plant and exposing [the plaintiff], a reasonably foreseeable victim[,] to [its] toxic asbestos fibers."¹⁴¹ The plaintiff's proposed amendment alleged that defendant's conduct constituted "affirmative, active misconduct because it was only through the direct orders and desires of [the defendant] that the [asbestos] fibers were released within its plant and not contained within its plant and escaped beyond the plant to pollute" the plaintiff's home.¹⁴² The trial court rejected the proposed amendment as futile, finding that the amended complaint would not state a claim under *Riedel*.¹⁴³

The Delaware Supreme Court affirmed. Noting that the basic facts underlying the claim were identical to those at issue in *Riedel*,¹⁴⁴ the *Price* court rejected the plaintiff's attempt to repackage household exposure claims as misfeasance claims. It held that the basic facts of the plaintiff's household exposure claim, "stripped of all reformatory recharacterization," could only serve to state a claim for "pure nonfeasance," not one for misfeasance.¹⁴⁵

Because, in tandem, *Price* and *Riedel* require that a household exposure claimant establish that she has a "special relationship" with the defendant employer, this pair of decisions effectively closes the door on such claims under Delaware law.¹⁴⁶

140. 26 A.3d 162 (Del. 2011).

141. *Id.* at 164.

142. *Id.* at 166.

143. *Id.*

144. *Id.* at 167.

145. *Id.* at 169 ("No amount of semantics can turn nonfeasance into misfeasance or *vice versa*.").

146. The *Price* court rejected the plaintiff's contention that she had the requisite "special relationship" with the defendant employer based on her husband's thirty-year career with the defendant, on the fact that the defendant had provided the plaintiff health insurance as its employee's spouse, and on other steps that the defendant allegedly had taken to "promot[e] a family friendly workplace." *Id.* at 170.

B. *A Second Illinois Appellate Court Finds Defendant Owes No Duty in Household Exposure Case*

The Illinois Supreme Court is set to consider a challenge to a negligence-based household exposure claim asserted against an employer of the plaintiff's husband in *Simpkins v. CSX Corp.*¹⁴⁷ In the interim, the Fourth District Appellate Court weighed in on the household exposure issue in the context of product liability claims asserted against manufacturers of asbestos-containing automotive brakes and brake linings (commonly referred to as "friction products" in asbestos litigation) in *Estate of Holmes v. Pneumo Abex, L.L.C.*¹⁴⁸ In *Holmes*, the plaintiff asserted claims against the manufacturer defendants for the wrongful death of his mother. He alleged that his mother was exposed to asbestos brought home on her husband's work clothes, which had become contaminated during his work at a manufacturing plant. Following a trial and a verdict for the plaintiff, the manufacturer defendants appealed the denial of their post-trial motions, arguing that they were entitled to judgment notwithstanding the verdict because they owed the plaintiff's mother no duty.¹⁴⁹

The Fourth District followed the same duty analysis applied by the Fifth District in *Simpkins* but reached a different conclusion. The *Holmes* court held that the friction product manufacturers had no duty to warn the plaintiff's mother of household exposure dangers because the evidence at trial showed that the risks of asbestos household exposure were not "known" prior to 1964, when the mother was exposed to the asbestos on her husband's clothing.¹⁵⁰ Because the mother's injury was not "foreseeable," there could be no duty. Notably, in predicating its decision on foreseeability, the Fourth District assumed for purposes of its analysis that there was a legally sufficient relationship between the mother and the manufacturers.¹⁵¹ In so doing, the court avoided confronting the apparent conflict between *Simpkins* and *Nelson* on the need for and existence of a relationship between

147. 942 N.E.2d 462 (Ill. 2010). This appeal will resolve a split between the Fifth District Appellate Court's decision, which held that an employer does owe a duty to its employees' family members, *Simpkins v. CSX Corp.*, 929 N.E.2d 1257 (Ill. App. Ct. 2010), and the Second District Appellate Court's decision in *Nelson v. Aurora Equipment Co.*, 909 N.E.2d 931 (Ill. App. Ct.), *appeal denied*, 919 N.E.2d 355 (Ill. 2009), which held that no duty was owed by an employer absent a "special relationship" between the employer and the employee's family member.

148. 955 N.E.2d 1173 (Ill. App. Ct. 2011) (appeal pending).

149. *Id.* at 1174.

150. *Id.* at 1178-79 (rejecting the plaintiff's reliance on early scientific studies unrelated to asbestos that noted the risks of household exposure to other toxic substances); *see also* Rodarmel v. Pneumo Abex, L.L.C., No. 4-10-0463, 2011 WL 4336923, at *20 (Ill. App. Ct. Sept. 15, 2011) (following *Holmes* in an asbestos conspiracy case and holding no duty existed for 1953-56 exposure because risk was not foreseeable during that time).

151. *Holmes*, 955 N.E.2d at 1178.

plaintiff and defendant on which to predicate a duty. *Holmes* is currently on appeal to the Illinois Supreme Court.

C. *New Jersey Appellate Court Upholds Jury Verdict in Household Exposure Case Against Plaintiff's Former Employer*

While the viability of household exposure cases was affirmed by the New Jersey Supreme Court in 2006,¹⁵² the New Jersey Appellate Division in *Anderson v. A.J. Friedman Supply Co.* recently had an opportunity to rule on the viability of such a claim under a “novel scenario.”¹⁵³ Plaintiff in *Anderson* brought claims against Exxon, alleging that she had been injuriously exposed to asbestos while she was employed by Exxon and also as a result of washing her husband’s asbestos-contaminated work clothes while he too was employed by Exxon. Exxon argued that her claims were barred by the exclusivity provision of the New Jersey Workers’ Compensation Act (WCA). The appellate court disagreed. While it conceded that the claim predicated on the plaintiff’s employment-related exposures was barred under the WCA, the court held that the household exposure claim was not subject to the WCA bar.¹⁵⁴ Relying on what is known as the “dual persona doctrine,”¹⁵⁵ the court reasoned that, because Exxon was not functioning as the plaintiff’s employer when it permitted her husband’s work clothes to become contaminated, the household exposure claim was not occupational in nature.¹⁵⁶ Rather, the household exposure claim was predicated on a separate legal duty Exxon owed to the plaintiff under general negligence principles.¹⁵⁷ Accordingly, the court held that it was proper for the household exposure claim to have been tried.¹⁵⁸

D. *Courts in Two States Consider the Constitutionality of Retroactive Application of Their States' Medical Criteria Statutes*

Resolving a conflict in Florida’s intermediate appellate courts regarding the constitutionality of the retroactive application of the state’s asbestos

152. See *Olivo v. Owens-Illinois, Inc.*, 895 A.2d 1143 (N.J. 2006) (holding that where injury resulting from household exposure to asbestos was foreseeable, premises owner owed duty to spouse of the employee of one of its independent contractors).

153. 3 A.3d 545, 555 (N.J. Super. Ct. App. Div. 2010), *review denied*, 16 A.3d 383 (N.J. 2011).

154. *Id.* at 557.

155. See *id.* at 556 (quoting 6 LARSON’S WORKERS’ COMPENSATION LAW § 113.01[1], at 113-2 (2009)).

156. *Id.* at 557.

157. *Id.*

158. *Id.* at 558 (upholding \$7.5 million jury verdict against Exxon and holding that trial court did not need to allocate liability between the plaintiff’s direct, occupational exposures and her household exposures).

medical criteria statute,¹⁵⁹ the Florida Supreme Court held in *American Optical Corp. v. Spiewak*¹⁶⁰ that provisions of the statute that barred claims by unimpaired plaintiffs could not constitutionally be enforced against claims that had accrued and were pending at the time of the statute's enactment.

At issue in *Spiewak* were the claims of various plaintiffs who had filed actions before 2005, alleging that they had various degrees of "asbestosis," which condition had not yet progressed to the point of producing any actual physical impairment. The Florida Asbestos and Silica Compensation Fairness Act, Florida Statutes §§ 774.201–774.209, which became effective in 2005, however, had added a new and indispensable element to asbestos claims, requiring that a claimant plead and prove an existing malignancy or an "actual physical impairment" as defined under the Act in order to maintain an action.¹⁶¹ Because the plaintiffs' claims did not meet this new requirement, their claims were dismissed. They challenged the dismissal on the grounds that the retroactive application of the Act deprived them of vested property rights in violation of both the Florida and U.S. Constitutions.¹⁶²

The court's analysis focused on determining, in the first instance, whether the plaintiffs' right to pursue an asbestos claim had vested prior to 2005, given the fact that they had suffered no physical impairment. In that regard, the court had to decide what constituted an actionable "manifestation" of asbestos disease—either the type of physical impairment defined in the Act or the mere presence of "actual changes in the lung" falling short of causing physical impairment as defined by the Act.¹⁶³ Relying on Florida tort precedent in which the damage alleged was as slight as "a mental reaction," the court determined that, prior to enactment of the Act, all that was required under the common law to make an asbestos claim actionable was "some actual harm"—a standard that did not require "a precise technical level or particular threshold of injury or impairment symptom that a plaintiff must satisfy to file an action."¹⁶⁴ Thus, the court agreed that the plaintiffs' asbestos claims had accrued and given rise to vested rights prior to 2005.

Next, the court considered whether the Act's requirement of "physical impairment" could constitutionally be applied retroactively to such vested claims. Finding that retroactive application of the "physical impairment" requirement did not "merely impair [the plaintiffs'] vested rights—it destroy[ed] them," the court held that retroactive application of that

159. *Compare* *Williams v. Am. Optical Corp.*, 985 So. 2d 23 (Fla. Dist. Ct. App. 2008), *with* *DaimlerChrysler Corp. v. Hurst*, 949 So. 2d 279 (Fla. Dist. Ct. App. 2007).

160. No. SC08-1616, 2011 WL 2652189 (Fla. July 8, 2011).

161. *Id.* at *1.

162. *Id.* at *2.

163. *Id.* at *5.

164. *Id.* at *5–6.

portion of the Act to the plaintiffs' pending claims violated the Florida Constitution.¹⁶⁵

Notably, in responding to a vigorous dissent filed in the case, the majority pointed out that even claimants who, prior to 2005, had some level of medically recognized impairment “as that term is commonly understood” would be precluded under the Act from proceeding with their filed cases if they could not meet the more particular requirements for “impairment” set forth in the Act.¹⁶⁶ In this regard, the Florida court’s decision is similar to the recent decision of a Texas appellate court in *Union Carbide Corp. v. Synatzske*¹⁶⁷ that held that retroactive application of that state’s medical criteria statute to a claim was unconstitutional. In *Synatzske*, there was substantial evidence that the decedent had died of asbestosis, but the plaintiffs could not comply with the statute’s pulmonary function test requirement because, prior to his death, the decedent “suffered from physical and mental limitations which made it impossible to take a pulmonary function test.”¹⁶⁸ Noting that there was evidence from which the trier of fact could conclude that the decedent suffered “asbestos impairment . . . comparable to the impairment that an exposed person would have had if the exposed person met the criteria” in the Texas statute, the court determined that application of the statute to bar the claim would “change the rules ‘after the game had been played’” and “disturb settled expectations.”¹⁶⁹ The court therefore held that the Texas statute could not be applied retroactively to bar the wrongful death claim.

X. EMERGING TORTS

In the first reported decision to address tort claims arising from hydraulic fracturing¹⁷⁰ in the Marcellus Shale, the Middle District of Pennsylvania denied a motion to dismiss and a motion to strike in *Fiorentino v. Cabot Oil & Gas Corp.*¹⁷¹ Plaintiffs in *Fiorentino* were a group of sixty-three individuals who had leased to Cabot Oil & Gas Corp. the right to extract natural gas from their properties. Plaintiffs alleged that Cabot’s gas-well

165. *Id.* at *10–12.

166. *Id.* at *10.

167. No. 01-09-01141-CV, 2011 WL 2623952 (Tex. App. June 30, 2011).

168. *Id.* at *4.

169. *Id.* at *21–22.

170. Hydraulic fracturing is a process where water and other materials are injected into a well at high pressure to fracture underground geologic formations, releasing natural gas stored in small pockets. See *Hydraulic Fracturing Background Information*, ENVTL. PROT. AGENCY, http://water.epa.gov/type/groundwater/uic/class2/hydraulicfracturing/wells_hydrowhat.cfm (last visited Jan. 10, 2012).

171. 750 F. Supp. 2d 506 (M.D. Pa. 2010).

drilling activities, including hydraulic fracturing, released methane and other toxins, causing property damage, physical illness, and emotional distress. They sought, among other relief, an injunction prohibiting further operations, and compensatory and punitive damages.¹⁷²

Cabot filed a motion to dismiss four of the eight claims, including plaintiffs' claims for strict liability and gross negligence.¹⁷³ The district court denied the motion to dismiss the strict liability claim. In so ruling, the court followed the Restatement (Second) of Torts, which provides that one may be strictly liable for harm arising from an "abnormally dangerous activity."¹⁷⁴ Cabot unsuccessfully argued that, as a matter of law, Pennsylvania courts hold that *no* petroleum or natural gas related activities are "abnormally dangerous." The district court rejected that argument, explaining that Pennsylvania courts have only concluded that storage and transmission of gas and petroleum products are not abnormally dangerous, but have yet to decide whether gas-well drilling or operations are abnormally dangerous.¹⁷⁵

XI. NATIONAL ENVIRONMENTAL POLICY ACT

In *Wilderness Society v. U.S. Forest Service*,¹⁷⁶ the Ninth Circuit, sitting en banc, abandoned its longstanding "federal defendant" rule, which categorically prohibited private parties and state and local governments from intervening of right in the merits or liability phase of litigation against the federal government under the National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq.* (NEPA). The issue arose when three interest groups representing recreation interests moved to intervene in this NEPA case, which was commenced by environmental groups challenging the U.S. Forest Service's adoption of a travel plan allowing the use of motorized vehicles on roads and trails in the Sawtooth National Forest. Under the "federal defendant" rule, courts in the Ninth Circuit historically precluded intervention by private parties, like the recreation interest groups in this case, because NEPA "is a procedural statute that binds only the federal government" and the private parties lacked the "significantly protectable" interest required for an intervention of right under Rule 24(a)(2) of the Federal Rules of Civil Procedure.¹⁷⁷

172. *Id.* at 510.

173. *Id.* Cabot also unsuccessfully moved to strike the request for punitive damages and attorney fees and costs, and to strike allegations of fear of future illness, emotional distress, and negligence per se. *Id.* at 514–16.

174. *Id.* at 512 (quoting RESTATEMENT (SECOND) OF TORTS § 519).

175. *Id.*

176. 630 F.3d 1173, 1178 (9th Cir. 2011).

177. *Id.* at 1177–78.

Revisiting this precedent, the Ninth Circuit decided that the “federal defendant” rule conflicts with Rule 24(a)(2), which requires only that an intervening party have “‘an interest relating to the property or transaction that is the subject of the action.’”¹⁷⁸ Thus, Rule 24(a)(2) focuses the intervention analysis on the “property or transaction that is the subject of the lawsuit.”¹⁷⁹ In contrast, the court stated, the “federal defendant” rule “mistakenly focuses on the underlying legal claim... .”¹⁸⁰

Accordingly, the Ninth Circuit held that application of the Rule 24(a)(2) intervention analysis may enable a private party or state or local government intervenor to demonstrate a “significantly protectable” interest warranting intervention by showing that the “‘interest is protectable under some law’” and “‘there is a relationship between the legally protected interest and the claims at issue.’”¹⁸¹ The Ninth Circuit thus reversed and remanded to the district court to consider the recreation groups’ intervention motion in light of the new rule.¹⁸²

XII. CLEAN WATER ACT

In *National Pork Producers Council v. EPA*,¹⁸³ petitioners from the farming and poultry industries challenged a 2008 EPA Rule, 42 C.F.R. Parts 9, 122 & 412,¹⁸⁴ requiring owners of concentrated animal feeding operations (CAFOs) to apply for a National Pollutant Discharge Elimination System (NPDES) permit if the CAFO “discharges or proposes to discharge pollutants.”¹⁸⁵ The 2008 Rule also required that NPDES permits issued to CAFOs must include the development and implementation of a Nutrient Management Plan.¹⁸⁶ Furthermore, a CAFO would be liable under the 2008 Rule for failing to apply for an NPDES permit and also for any consequent illegal discharges.¹⁸⁷

The petitioners argued that the 2008 Rule exceeded EPA’s authority under the Clean Water Act, 33 U.S.C. §§ 1251 *et seq.* (CWA), because it required CAFOs *proposing* to discharge pollutants to apply for a FNPDES permit.¹⁸⁸

178. *Id.* at 1178 (quoting FED. R. CIV. P. 24(a)(2)).

179. *Id.*; FED. R. CIV. P. 24(a)(2).

180. *Wilderness Soc’y*, 630 F.3d at 1178.

181. *Id.* at 1180 (citation omitted).

182. *Id.* at 1180–81.

183. 635 F.3d 738 (5th Cir. 2011).

184. EPA issued the 2008 Rule in response to the Second Circuit decision *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486, 502–06 (2d Cir. 2005), which held that a 2003 EPA Rule promulgating NPDES regulations for CAFOs violated the CWA. See *Nat’l Pork Producers Council*, 635 F.3d at 744–45 (describing history of 2008 Rule).

185. *Nat’l Pork Producers Council*, 635 F.3d at 745–46 (explaining 2008 Rule).

186. *Id.* at 746.

187. *Id.*

188. *Id.* at 750.

The Fifth Circuit agreed. The Fifth Circuit noted that under the 2008 Rule, a CAFO proposes to discharge if it is “designed, constructed, operated, and maintained in a manner such that the CAFO will discharge.”¹⁸⁹ Thus, a CAFO will “propose” to discharge “regardless of whether the operation wants to discharge or is presently discharging.”¹⁹⁰ The Fifth Circuit concluded that because the CWA authorizes EPA to regulate only *actual* discharges into navigable waters, the 2008 Rule requiring NPDES permits for CAFOs *proposing* to discharge exceeded EPA’s CWA authority.¹⁹¹

Applying *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*’s two-step inquiry for reviewing an agency’s construction of a statute,¹⁹² the Fifth Circuit also considered whether the CWA authorizes EPA to require a *discharging* CAFO to apply for an NPDES permit.¹⁹³ Because the CWA does not expressly create a “duty to apply,” the Fifth Circuit analyzed under *Chevron*’s second step “whether the regulation ‘is based on a permissible construction of the statute.’”¹⁹⁴ Finding that Congress intended EPA to control water pollution by regulating discharges, the court concluded that EPA was reasonable to interpret the CWA to impose a “duty to apply” for an NPDES permit on discharging CAFOs.¹⁹⁵

The court additionally held, however, that EPA could not hold CAFOs liable for failing to apply for an NPDES permit.¹⁹⁶ Because the CWA clearly delineated the circumstances under which EPA may commence enforcement actions and impose penalties, and those circumstances did not include a discharger’s failure to apply for an NPDES permit, the 2008 Rule’s creation of such liability exceeded EPA’s CWA authority.¹⁹⁷

189. *Id.*

190. *Id.*

191. *Id.* at 751.

192. 467 U.S. 837, 842–43 (1984). Under the first step of the inquiry, a court determines “whether Congress has directly spoken to the precise question,” and, if so, the clearly expressed congressional intent is dispositive. *Id.* at 842. If, however, “the statute is silent or ambiguous with respect to the specific issue,” the court will move to the second step of the inquiry and determine “whether the agency’s answer is based on a permissible construction of the statute.” *Id.* at 843.

193. *Nat’l Pork Producers Council*, 635 F.3d at 751.

194. *Id.* (quoting *Chevron*, 467 U.S. at 842–43).

195. *Id.* at 751.

196. *Id.* at 751–52.

197. *Id.* at 752. Environmental groups also petitioned for review of the 2008 Rule, but the Fifth Circuit severed the environmental groups’ petition from the industry petitions. The environmental petition, under the case caption *Natural Resources Defense Council v. EPA*, No. 09-60510 (5th Cir.), resulted in a settlement agreement in which EPA agreed to propose a rule under CWA § 308 that would require CAFOs to report certain information. EPA published that proposed rule on October 21, 2011. National Pollutant Discharge Elimination System (NPDES) Concentrated Animal Feeding Operation (CAFO) Reporting Rule, 76 Fed. Reg. 65,431 (Oct. 21, 2011).

XIII. CLEAN AIR ACT

In a two-to-one decision, the Ninth Circuit held in *National Association of Home Builders v. San Joaquin Valley Unified Air Pollution Control District*¹⁹⁸ that the Air Pollution Control District's Rule 9510 was not preempted by § 209(e) of the Clean Air Act, 42 U.S.C. §§ 7401 *et seq.* (CAA).¹⁹⁹ The Air Pollution Control District adopted Rule 9510 under a CAA provision authorizing states to develop "indirect source review programs."²⁰⁰ Rule 9510 regulates emissions from certain development projects by requiring developers to reduce construction equipment emissions from a baseline measurement.²⁰¹ Plaintiffs, the National Association of Home Builders (NAHB), sued the District arguing that Rule 9510 is preempted by the CAA § 209(e)(1) and (2).

Plaintiffs posited that Rule 9510 imposes emissions control standards on construction equipment, which are nonroad vehicles, and is thus preempted by § 209(e).²⁰² The Ninth Circuit disagreed, concluding that Rule 9510 was not preempted under § 209(e)(1) because that provision preempts standards relating to "new" nonroad vehicles, i.e., vehicles that had never been sold.²⁰³ Because the construction equipment at a development site was not "new" within the meaning of § 209(e)(1), that provision did not preempt Rule 9510.²⁰⁴

The Ninth Circuit further held that Rule 9510 is not preempted by § 209(e)(2) because its standards and requirements do not relate to the control of emissions from construction equipment.²⁰⁵ The court explained that Rule 9510 qualifies as an indirect source review program because it targets development sites rather than specific equipment—the baseline emissions are calculated from the development as a whole and the Rule does not target construction equipment apart from its regulation of the entire development.²⁰⁶ Because the Rule establishes "site-based regulation of emissions," its standards and requirements are not related to the control of emissions

198. 627 F.3d 730, 740 (9th Cir. 2010), *cert. denied*, 132 S. Ct. 369 (2011).

199. Section 209(e)(1) prohibits states and political subdivisions from adopting or attempting to enforce standards or other requirements related to the control of emissions from certain new nonroad engines. 42 U.S.C. § 7543(e)(1). Section 209(e)(2) impliedly preempts any standard or requirement relating to the control of emissions from all other nonroad vehicles unless EPA has approved the standard or requirement. *Id.* § 7543(e)(2).

200. *Id.* § 7410(a)(5)(A)(i). "Indirect sources review programs" include measures to ensure mobile sources of air pollution will not be attracted to new or modified indirect sources, such as facilities, buildings, and other structures. *Id.* § 7410(a)(5)(C), (D).

201. *Natl Ass'n of Home Builders*, 627 F.3d at 732.

202. *Id.* at 734.

203. *Id.* at 735.

204. *Id.*

205. *Id.* at 737–40.

206. *Id.* at 737.

from nonroad vehicles and it is not preempted by § 209(e)(2).²⁰⁷ The court explained that whether the emissions at the development ultimately come from construction equipment is irrelevant: “If an indirect source review program could not attribute the emissions from mobile sources, while they are stationed at an indirect source, to the indirect source as a whole, states could not adopt any indirect source review program.”²⁰⁸

XIV. COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT

A. *Dry Cleaning Equipment Manufacturer Not an “Arranger”*

In *Team Enterprises, LLC v. Western Investment Real Estate Trust*,²⁰⁹ the Ninth Circuit held that the manufacturer of dry cleaning equipment is not liable as an “arranger” under the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601–9675 (CERCLA), for cleanup costs incurred at the site where that equipment was used. The plaintiff, Team Enterprises, incurred costs cleaning PCE that had leaked into the soil at the site of its dry cleaning operations.²¹⁰ Team Enterprises had used equipment manufactured by R&R Street & Co. to filter and recycle the PCE wastewater.²¹¹ Team Enterprises sued R&R Street (and other defendants) for contribution under CERCLA, arguing that R&R Street was liable as an arranger.²¹²

The Ninth Circuit rejected Team Enterprises’ arguments. First, the court held that R&R Street was not an “arranger” because “[a]bsent a showing that Street intended for its sale . . . to result in the disposal of PCE,” plaintiffs could not show the *intent* required by the Supreme Court in *Burlington Northern & Santa Fe Railway Co. v. United States*.²¹³ Second, the Ninth Circuit disagreed that intent could be inferred. Because the purpose of the equipment was to recover and recycle PCE, and not to dispose

207. *Id.* at 739.

208. *Id.* The dissent, however, agreed with the NAHB that Rule 9510 does not qualify as an indirect source review program and is preempted by § 209(e)(2). The dissent explained that Rule 9510 “facially targets direct sources by limiting the emissions of construction equipment separate from its regulation of development sites.” *Id.* at 741–42 (Smith, C.J., concurring in part and dissenting in part). The dissent further stated that because the Rule regulates the construction equipment directly, that is, apart from the indirect source, it creates standards to control the emissions of nonroad vehicles and should be preempted by § 209(e)(2). *Id.*

209. 647 F.3d 901, 909 (9th Cir. 2011).

210. *Id.* at 906.

211. *Id.*

212. *Id.* at 907.

213. *Team Enters.*, 647 F.3d at 908–09 (citing *Burlington N. & Santa Fe Ry. Co. v. United States*, 129 S. Ct. 1870 (2009)).

of it, the equipment design did not show the requisite intent to dispose necessary for arranger liability.²¹⁴ The court declined to infer intent from R&R Street's failure to warn against improper disposal practices.²¹⁵ Finally, the Ninth Circuit determined that R&R Street could not be liable as an arranger based on its alleged control over the disposal of PCE because it neither had legal authority to direct the disposal nor exercised actual control over the disposal of PCE.²¹⁶

B. Parties Incurring Cleanup Costs Pursuant to an Administrative Settlement May Not Seek Cost Recovery Under CERCLA § 107

In *Morrison Enterprises, LLC v. Dravo Corp.*,²¹⁷ the Eighth Circuit held that a potentially responsible party that has incurred cleanup costs pursuant to an administrative order or judicially approved settlement following a lawsuit under CERCLA § 106 or § 107 may seek contribution for those costs under § 113, but may not seek direct cost recovery under § 107. Morrison Enterprises, LLC and the City of Hastings both filed a CERCLA § 107 lawsuit against Dravo Corporation seeking the recovery of cleanup costs incurred in cleaning up a contaminated groundwater site.²¹⁸ Dravo argued that neither Morrison nor the city could assert a claim for cost recovery under § 107, but were instead limited to seeking contribution under § 113.²¹⁹ Neither Morrison nor the city had asserted a § 113 contribution claim.²²⁰

This dispute raised a question left unsettled by the 2007 Supreme Court's decision in *United States v. Atlantic Research Corp.*²²¹ holding that parties who "voluntarily" incur their response costs and have not been subject to a § 106 or § 107 enforcement action may file an action under § 107 to recover the response costs from potentially responsible parties,²²² but that parties who have not incurred cleanup costs and have been subject to a § 106 or § 107 enforcement action may not bring a § 107 action, and are instead limited to seeking contribution under § 113.²²³ The Supreme

214. *Id.* at 909.

215. *Id.*

216. *Id.* at 910–11.

217. 638 F.3d 594 (8th Cir. 2011).

218. *Id.* at 601.

219. *Id.*

220. *Id.* at 602. Under CERCLA, private parties are permitted to recover expenses for cleanup of hazardous sites under both §§ 107(a) and 113(f). Section 107(a) allows a private party to recover "any other necessary costs of response." 42 U.S.C. § 9607(a). In contrast, § 113(f) authorizes a private party to "seek contribution from any other person who is liable or potentially liable" under CERCLA. *Id.* § 9613(f).

221. 551 U.S. 128 (2007).

222. *Id.* at 138–39 n.6.

223. *Id.* at 139.

Court “declined to decide whether a liable party sustaining expenses pursuant to a consent decree following a suit under §§ 106 or 107(a) could recover such compelled costs under § 107(a), § 113(f), or both.”²²⁴

Despite Morrison’s and the city’s assertions that they had “voluntarily” incurred response costs, the Eighth Circuit found that EPA had filed § 106 and § 107 civil actions against both plaintiffs, and that both plaintiffs had entered into administrative settlements to resolve their liability in those lawsuits.²²⁵ Because “[r]esponse costs incurred pursuant to such administrative settlements following a suit under § 106 or § 107(a) are not incurred voluntarily,”²²⁶ the court held that Morrison’s and the city’s only remedy was to seek contribution from Dravo under § 113.²²⁷

XV. FEDERAL TORT CLAIMS ACT

A. *Discretionary Function Exception Does Not Bar Claim*

In *Myers v. United States*,²²⁸ plaintiffs sought damages from the United States on behalf of their daughter for injuries the child allegedly sustained by exposure to the heavy metal thallium in soil dumped into a landfill adjacent to the child’s residence and school as part of a Navy soil remediation project. The plaintiffs brought claims for negligence, nuisance, trespass, strict liability for ultrahazardous activities, and battery.²²⁹ The district court found that the United States acted “reasonably” in its cleanup activities and did not breach any duty in conducting the soil remediation project.²³⁰ The district court also found *sua sponte* that it did not have subject-matter jurisdiction over plaintiffs’ claims because the “discretionary function” exception to the tort liability of the United States under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671–2680 (FTCA), applies.²³¹ In a partially split decision, the Ninth Circuit reversed and remanded the case for further proceedings.

The Ninth Circuit first addressed the district court’s *sua sponte* dismissal of plaintiffs’ claims under the “discretionary function” exception to the FTCA. While the FTCA “waives the government’s sovereign immunity for tort claims arising out of the negligent conduct of government employees acting within the scope of their employment,” the discretionary

224. *Morrison*, 638 F.3d at 603 (citing *Atl. Research*, 551 U.S. at 139 n.6).

225. *Id.* at 604–05.

226. *Id.* at 604.

227. *Id.*

228. 652 F.3d 1021 (9th Cir. 2011).

229. *Id.* at 1027.

230. *Id.*

231. *Id.*

function exception “provides immunity from suit for any claim ‘based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or employee of the Government, whether or not the discretion involved be abused.’”²³²

Plaintiffs claimed, *inter alia*, that the Navy breached its duty to ensure its health and safety plan was properly reviewed and executed. Plaintiffs argued that the “execution of safety standards is not susceptible to a policy analysis,” and thus cannot be a “discretionary function.”²³³ The Navy countered that “the government’s discretionary oversight of a contractor, even of the contractor’s compliance with safety standards,” is a discretionary function and, thus, “is immune from tort suit.”²³⁴ The Ninth Circuit disagreed, explaining that “the decision to adopt safety precautions may be based in policy considerations, but the implementation of those decisions is not.”²³⁵

The Ninth Circuit also disagreed with the district court’s finding that the risk of thallium exposure from the landfill project was unforeseeable.²³⁶ The district court relied on “what it perceived to be a lack of proof of causation as determinative of the foreseeability of [the plaintiffs’] injuries.”²³⁷ The Ninth Circuit, however, held that the “[t]he proper question in the ‘foreseeability’ inquiry . . . was not whether [plaintiff] *was* exposed to thallium . . . but whether it was foreseeable that a person exposed to thallium would suffer the kinds of injury that [plaintiff] suffered.”²³⁸ Moreover, the court found the Navy unreasonably breached two mandatory duties: to review the site health and safety plan and to ensure that air monitoring samples were reviewed. Finding that a “violation of the mandatory duty to ensure adherence to the safety plans is plainly a breach of the duty to exercise reasonable care . . . to follow required safety precautions,” the court reversed and remanded for trial on causation and damages.²³⁹

B. Continuing Tort Doctrine Does Not Extend FTCA Claim Filing Deadline

In a case of first impression, the Fifth Circuit in the case of *In re FEMA Trailer Formaldehyde Products Liability Litigation*²⁴⁰ considered whether the

232. *Id.* at 1028 (quoting 28 U.S.C. § 2680(a)). A two-prong test determines the applicability of the exception: “(1) whether challenged actions involve an element of judgment or choice; and (2) if a specific course of conduct is *not* specified, whether the discretion left to the government is of the kind that the discretionary function exception was designed to shield, namely, actions and decisions based on considerations of public policy.” *Id.* (citation omitted).

233. *Id.* at 1031.

234. *Id.*

235. *Id.* at 1032 (internal quotation marks, alterations, and citation omitted).

236. *Id.* at 1035.

237. *Id.*

238. *Id.* (citation omitted).

239. *Id.* at 1037 (citing RESTATEMENT (SECOND) OF TORTS § 416).

240. 646 F.3d 185 (5th Cir. 2011).

continuing tort doctrine applies to expand the statute of limitations on a toxic exposure claim brought under the FTCA. The court found the doctrine inapplicable in such circumstances.²⁴¹

Following Hurricanes Katrina and Rita, the Federal Emergency Management Agency (FEMA) provided the plaintiff with an emergency housing unit (EHU), where she lived with her children beginning in May 2006. In July 2006, and again in July 2007, FEMA distributed flyers warning of formaldehyde dangers in EHUs and urging residents to “seek medical advice, if necessary.”²⁴² Plaintiff claimed to be unaware of either flyer and asserted that she learned for the first time in December 2007 that formaldehyde emissions from the EHUs could cause respiratory problems.²⁴³ On July 10, 2008, plaintiff, on behalf of her minor son, submitted an administrative claim with FEMA pursuant to the FTCA, claiming off-gassing of formaldehyde from the EHU had harmed her son.²⁴⁴ Seven months later, while her administrative claim was pending, plaintiff filed a complaint against FEMA in the U.S. District Court for the Eastern District of Louisiana, where it was consolidated with thousands of other claims relating to formaldehyde in the FEMA EHUs.²⁴⁵ The district court subsequently dismissed plaintiff’s claims for lack of subject-matter jurisdiction, finding her July 2008 administrative claim untimely under the FTCA’s statute of limitations.²⁴⁶ Plaintiff appealed.

The FTCA requires that tort claims against the federal government be filed with the appropriate agency within two years after the claim accrues.²⁴⁷ The Fifth Circuit noted that while “the FTCA does not define when a claim accrues, it is well-settled that a tort action under the FTCA accrues when the plaintiff knows or has reason to know of the alleged injury that is the basis of the action.”²⁴⁸ Plaintiff argued on appeal that while she filed her claim more than two years after her son’s symptoms began, accrual of her claim was tolled by either (1) the discovery rule, (2) equitable estoppel, or (3) the continuing tort doctrine.²⁴⁹

The court rejected plaintiffs’ arguments that the discovery rule or equitable estoppel applied, and then turned to a question of first impression in the circuit: whether the continuing tort doctrine applies to FTCA claims. The court held it does not. Under the continuing tort doctrine, “the cause

241. *Id.* at 190.

242. *Id.*

243. *Id.*

244. *Id.*

245. *Id.* at 188–89.

246. *Id.* at 189.

247. 28 U.S.C. § 2401(b).

248. *In re FEMA Trailer Formaldehyde Prods. Liab. Litig.*, 646 F.3d at 189 (citation omitted).

249. *Id.* at 189–90.

of action is not complete and does not accrue until the tortious acts have ceased.’”²⁵⁰ Noting that “claim accrual under the FTCA is based on awareness of the injury, not when the alleged wrongful conduct ends,”²⁵¹ the Fifth Circuit pointed out that application of the continuing tort doctrine “would allow a putative plaintiff to circumvent the statute of limitations bar by continuing voluntarily to subject herself to a condition she knows to be harmful.”²⁵² “Given the jurisdictional nature of the FTCA’s statute of limitations and the general policy of construing narrowly statutes that waive sovereign immunity,” the Fifth Circuit declined to apply the continuing tort doctrine to extend the time to file plaintiff’s FTCA claim.²⁵³

250. *Id.* at 191 (quoting *Gen. Universal Sys., Inc. v. HAL, Inc.*, 500 F.3d 444, 451 (5th Cir. 2007)).

251. *Id.*

252. *Id.*

253. *Id.*

