

RECENT DEVELOPMENTS IN TOXIC TORTS
AND ENVIRONMENTAL LAW

*Beth M. Kramer, Gloria Martinez Trattles, Jessica A. Hall,
Brandon G. Waggoner, Brian J. Weber, Alison L. Share,
Adam Cullman, and Scott L. Winkelman*

| | |
|--|-----|
| I. Introduction | 628 |
| II. Federal Preemption..... | 628 |
| A. State Common Law Duties Imposing Requirements Different from or in Addition to Federal Requirements Concerning Medical Devices Are Preempted..... | 629 |
| B. Federal Cigarette Labeling Requirements Do Not Preempt State Deceptive Advertising Laws..... | 630 |
| C. Drug State Law Failure to Warn Claims Not Preempted | 631 |
| III. Duty to Warn and Adequacy of Warning..... | 632 |
| A. Duty to Warn of Suicide Risks Depends on Manufacturer's Knowledge | 632 |
| B. Courts Reject Duty to Warn of Dangers of Third-Party Manufacturer's Product | 633 |
| IV. Scientific Evidence and Emerging Torts | 635 |
| A. The Sixth Circuit Adopts Reliable Differential Diagnosis as a Test for Admission of Causation Evidence Under Daubert..... | 635 |
| B. Nebraska Supreme Court Overturns Exclusion of Expert Based Upon Misapplied Daubert Standard..... | 636 |

Beth M. Kramer and Scott L. Winkelman are partners, Gloria Martinez Trattles is counsel, and Jessica A. Hall, Brandon G. Waggoner, and Brian J. Weber are associates in the Washington, D.C., office of Crowell & Moring LLP. Alison L. Share is currently serving as a law clerk to the Honorable Peter W. Hall of the U.S. Court of Appeals for the Second Circuit. Adam Cullman is a third-year law student at the University of Michigan. Kramer is a Vice Chair of the TIPS Toxic Torts and Environmental Law Committee.

- V. Punitive Damages..... 637
- VI. Class Certification 637
- VII. Asbestos 639
 - A. Judges Must Instruct Jury That Fear of Cancer Must Be “Genuine and Serious” 639
 - B. Household Exposure Claims Considered by Highest Courts in Delaware and Tennessee 640
 - C. Illinois Supreme Court Strikes Down the Lipke Rule 641
- VIII. CERCLA 642
 - A. Burlington Northern & Santa Fe Railway Co. v. United States 642
 - B. Compelled Contribution Cost Recovery—Section 107(a) or Section 113(f) 643
 - C. Statute of Repose and CERCLA Discovery Rule 644
- IX. Clean Air Act 645
 - A. Violation Notice and Enforcement Action Impose No Duty on EPA to Object..... 645
 - B. EPA Air Quality Standards Both Rejected and Approved..... 646
- X. Clean Water Act 647
 - A. Entergy Corp. v. Riverkeeper..... 647
 - B. Coeur Alaska, Inc. v. Southeast Alaska Conservation Council..... 648
 - C. National Cotton Council v. EPA..... 649
 - D. Friends of the Everglades v. South Florida Water Management District..... 649
- XI. Emerging Torts: Climate Change..... 650
 - A. Connecticut v. American Electric Power Co. 650
 - B. Comer v. Murphy Oil USA..... 651
 - C. Native Village of Kivalina v. ExxonMobil Corp. 652

I. INTRODUCTION

During the past year, a number of groundbreaking decisions have issued from federal and state courts that will have significant impact on litigation in the areas of toxic torts and environmental law. In this article, the authors identify the more notable developments and trends gleaned from these decisions to assist practitioners in keeping abreast of the latest jurisprudence.

II. FEDERAL PREEMPTION

The U.S. Supreme Court has decided several cases that have clarified the status and scope of federal preemption.

A. *State Common Law Duties Imposing Requirements Different from or in Addition to Federal Requirements Concerning Medical Devices Are Preempted*

In *Riegel v. Medtronic, Inc.*,¹ the Supreme Court ruled that the preemption clause of the Medical Device Amendments of 1976 (MDA)² barred state common law claims challenging the safety and effectiveness of a medical device given premarket approval by the Food and Drug Administration (FDA). *Riegel* featured a patient who sued Medtronic, the manufacturer of a catheter that allegedly ruptured during plaintiff's heart surgery, for state law claims including negligence, strict liability and breach of warranty. The U.S. District Court for the Northern District of New York granted Medtronic's motion for summary judgment, and the Second Circuit affirmed, finding Medtronic subject to device-specific standards contained in its federally approved premarket approval application.³ The Second Circuit held that Riegel's claims were preempted because they would impose state requirements that differed from, or added to, the federal requirements.⁴

The MDA, the statute at issue, contains a preemption provision which provides that with respect to a device intended for human use, a state shall not establish or continue in effect any requirement "(1) which is different from, or in addition to, any requirement applicable under [federal law] to the device, and (2) which relates to the safety or effectiveness of the device or to any other matter included in a requirement applicable [under relevant federal law]."⁵

The Supreme Court focused first on whether New York state law establishes requirements different from, or in addition to, federal requirements and, second, on whether Riegel's claims were premised on such requirements.⁶

The Court found that the MDA provides extensive federal oversight reserved for Class III devices such as the catheter at issue, including requiring that such devices undergo premarket approval. The Court held that the premarket approval process imposed a federal "requirement" on Medtronic.⁷ The Court found the MDA premarket approval process rigorous, to the point that once a device receives premarket approval, its manufacturer may not alter the device in a manner that would affect safety or effectiveness without first obtaining FDA permission. The Court then held the state

1. 562 U.S. 312 (2008).

2. 21 U.S.C. §§ 360c, *et seq.*

3. *Riegel v. Medtronic, Inc.*, 451 F.3d 104, 118 (2d Cir. 2006).

4. *Id.* at 121.

5. 21 U.S.C. § 360k(a).

6. *Riegel v. Medtronic*, 552 U.S. 312, 321–22 (2008).

7. *Id.* at 322–23.

common law negligence and strict liability claims to impose requirements that conflict with federal statutory requirements.⁸ Accordingly, the Supreme Court held that the MDA's preemption clause bars state common law claims challenging the safety or effectiveness of a medical device marketed in a form preapproved by the FDA, and affirmed the Second Circuit.⁹

B. *Federal Cigarette Labeling Requirements Do Not Preempt State Deceptive Advertising Laws*

In *Altria Group, Inc. v. Good*,¹⁰ smokers of light cigarettes alleged that cigarette manufacturer Altria had violated the Maine Unfair Trade Practices Act (MUTPA) by fraudulently advertising that its cigarettes would deliver less tar and nicotine than regular brands. The U.S. District Court for the District of Maine granted summary judgment for Altria, finding MUTPA preempted under Section 1334(b) of the Federal Cigarette Labeling and Advertising Act.¹¹ The First Circuit reversed, holding that the Labeling Act did not preempt the state law MUTPA claim.¹² In reaching its decision, the appellate court rejected the reasoning of the Fifth Circuit in *Brown v. Brown & Williamson Tobacco Corp.*,¹³ a similar case in which a challenge to the "light" descriptor in the advertising was considered a warning neutralization claim that would be preempted. The Supreme Court granted certiorari to resolve the apparent conflict.

The Supreme Court affirmed the Second Circuit's decision, holding that neither the Labeling Act's preemption provision nor the actions of the Federal Trade Commission (FTC) with respect to tobacco regulation preempt a state law fraud claim.¹⁴ The Court stated that "Congress may indicate preemptive intent through a statute's express language or through its structure and purpose."¹⁵ The Court further noted that where federal law may be said to bar state action in a field of traditional state regulation (such as the regulation of advertising), there is a presumption against preemption unless it is the clear and manifest purpose of Congress. The Court additionally observed that when the text of an express preemption clause is susceptible of more than one plausible reading, courts in general are to "accept the reading that disfavors preemption."¹⁶

8. *Id.* at 323–25.

9. *Id.* at 330.

10. 129 S. Ct. 538 (2008).

11. *Good v. Altria Group, Inc.*, 436 F. Supp. 2d 132 (D. Me. 2006), citing 15 U.S.C. § 1331 *et seq.*

12. *Good v. Altria Group, Inc.*, 501 F.3d 29 (1st Cir. 2007).

13. 479 F.3d 383 (5th Cir. 2007).

14. *Altria Group*, 129 S. Ct. at 551.

15. *Id.* at 543.

16. *Id.* at 543.

The question for the Court was whether preemption was required by the Labeling Act's directive that no requirement or prohibition based on smoking and health be imposed under state law regarding the advertising or promotion of any cigarettes, the packages of which are labeled in conformity with the Labeling Act.¹⁷ The Court found that, as in *Cipollone v. Liggett Group, Inc.*¹⁸ and *Lorillard Tobacco Co. v. Reilly*,¹⁹ the petitioners may be held to account under state law for breaching a duty not to deceive that had nothing to do with smoking and health and thus did not fall within the ambit of the Labeling Act.²⁰ The Court also found that various FTC decisions with respect to tar and nicotine statements did not impliedly preempt state deceptive practices rules like MUTPA.²¹

The Court declined the plaintiffs' calls to reject the express preemption framework of *Cipollone* and *Reilly*. The Court also distinguished *Riegel*, reported above, in which the preempted state common law claims indeed sought to enforce requirements regarding safety and effectiveness.²²

C. Drug State Law Failure to Warn Claims Not Preempted

In *Wyeth v. Levine*,²³ injection of the antinausea drug Phenargin by the IV-push method allegedly resulted in gangrene and the amputation of respondent's arm. Levine brought suit in Vermont state court, alleging that Wyeth failed to provide adequate warning of the risk of administering the drug by this method. Wyeth asserted that a state law failure-to-warn claim was preempted because the drug's labeling had been approved by the FDA. The trial court found for Levine, and the Vermont Supreme Court affirmed.

The U.S. Supreme Court agreed, finding that the federal law was not preemptive of Levine's failure-to-warn state law claim.²⁴ The Court found it was not impossible for Wyeth to comply with both state law and federal labeling duties. While a manufacturer generally may change a drug label only upon FDA approval of a supplemental application, the Court found that Wyeth's interpretation of the statute mistakenly would hold the FDA, not the manufacturer, primarily responsibility for drug labeling.²⁵

The Court further rejected Wyeth's notion that requiring compliance with the state law duty to provide a stronger warning would interfere with

17. *Id.* at 544.

18. 505 U.S. 504 (1992).

19. 533 U.S. 525 (2001).

20. *Altria Group*, 129 S. Ct. at 551.

21. *Id.*

22. *Id.* at 549.

23. 129 S. Ct. 1187 (2009).

24. *Id.* at 1204.

25. *Id.* at 1197.

Congress's intent, in enacting the Federal Food, Drug, and Cosmetic Act (FDCA), to entrust an expert agency (the FDA) to determine drug labeling. The Court found this to be an untenable interpretation of congressional intent and an overbroad view of an agency's preemptive reach.²⁶ Specifically, the Court held that Congress had not intended to preempt state law failure-to-warn claims, noting that while Congress had enacted a preemption provision governing medical devices, it had not done so for prescription drugs.²⁷ Wyeth's reliance on language in the preamble to a 2006 FDA regulation governing the content and format of prescription drug labels was also found misplaced; the Court viewed this language as merely the agency's assertion that state law is an obstacle to its statutory objectives, and marked a dramatic shift in the FDA's long-standing position that state law is a complementary form of drug regulation. Thus, the Court found, the FDA's preamble did not merit deference or support preemption.²⁸

Wyeth was followed two months later by a May 20, 2009, White House memorandum issued to the heads of executive departments and agencies.²⁹ The memorandum stated that department and agency heads should not include preemption language in a regulation's preamble except where preemption provisions are contained in the codified regulation, nor should preemption be written into regulation except where justified under preemption principles. The memorandum called for review of regulations issued within the past ten years for possible amendments consistent with this directive.

III. DUTY TO WARN AND ADEQUACY OF WARNING

A. *Duty to Warn of Suicide Risks Depends on Manufacturer's Knowledge*

Cases addressing the duty of drug manufacturers to warn of suicide risks have resulted in a slew of rulings with divergent outcomes. The Ninth Circuit affirmed a lower court's summary judgment dismissal under California's learned intermediary law in *Latiolais v. Merck & Co., Inc.*³⁰ Plaintiff claimed her husband committed suicide while taking Zocor and that Merck failed to warn that suicide was a risk associated with the drug. The District Court for the Central District of California determined that because the prescrib-

26. *Id.* at 1199.

27. *Id.*

28. *Id.* at 1200.

29. Memorandum for the Heads of Executive Departments and Agencies (May 20, 2009), available at http://www.whitehouse.gov/the_press_office/Presidential-Memorandum-Regarding-Preemption.

30. 302 Fed. Appx. 756 (9th Cir. 2008).

ing doctor did not consider the package inserts when prescribing to plaintiff's husband, plaintiff failed to show inadequate warnings by Merck.³¹ The Ninth Circuit affirmed, finding too many assumptions necessary in order to conclude that a warning would have made a difference.³²

In *Stupak v. Hoffman-La Roche Inc.*,³³ the Eleventh Circuit upheld the decision of the District Court for the Middle District of Florida that plaintiffs did not demonstrate with evidence that Hoffman-La Roche Inc. knew of the risk of suicide in people who took the acne drug Accutane. The Stupaks highlighted an internal company "Psychiatric Disorder Issue Work-Up" revealing seventeen reports of suicide; the panel deemed this insufficient to establish the requisite knowledge.³⁴

In a contrary outcome, in *Forst v. SmithKline Beecham Corp.*,³⁵ the District Court for the Eastern District of Wisconsin denied summary judgment for drug manufacturer GlaxoSmithKline, holding that the company may have owed a duty to change the label on Paxil CR to warn of increased risk of suicide. The court in *Forst* determined that drug manufacturers have a duty to add warnings to drug labels "as soon as there is reasonable evidence of an association of a serious hazard with a drug."³⁶

B. Courts Reject Duty to Warn of Dangers of Third-Party Manufacturer's Product

Reversing earlier headway made by plaintiffs in the Washington Court of Appeals, the Washington Supreme Court held in two cases that a product manufacturer has no duty to warn of dangers presented by products, manufactured by a third party, that may be used in conjunction with the manufacturer's product. In *Simonetta v. Viad Corp.*³⁷ and *Braaten v. Saberhagen Holdings*,³⁸ the Washington Supreme Court addressed the responsibility of a manufacturer to warn of dangers presented by other manufacturers' asbestos-containing products. Issued the same day, the two rulings featured similar fact patterns: in each, a worker on a Navy ship contracted a disease said to be caused by asbestos and sued a device manufacturer, alleging a duty on the manufacturer's part to warn of the dangers of asbestos exposure from insulation, even though such insulation had been manufactured by a separate entity and used to cover the devices after the sale and installation of such devices.³⁹

31. *Id.* at 757.

32. *Id.*

33. 326 Fed. Appx. 553 (11th Cir. 2009).

34. *Id.* at 559 n.8.

35. 602 F. Supp. 2d 960 (E.D. Wis. 2009).

36. *Id.* at 967 (quoting 21 C.F.R. § 201.80(e)).

37. 197 P.3d 127 (Wash. 2008).

38. 198 P.3d 493 (Wash. 2008).

39. *Braaten*, 198 P.3d at 495; *Simonetta*, 197 P.3d at 129.

In *Simonetta*, the court addressed the underlying issue of whether a manufacturer of an evaporator owes a duty to warn “of the dangers of asbestos exposure resulting from another manufacturer’s insulation” under either a negligence or strict liability theory.⁴⁰ The court looked to *Restatement (Second) of Torts* § 388 to determine the extent of the duty to warn under a theory of negligence.⁴¹ Reviewing state precedent, the court focused on the chain of distribution of a product to determine the extent of a manufacturer’s duty.⁴² The court found little support in case law to extend the duty to warn to another manufacturer’s product.⁴³ Decisions from other state and federal courts also supported the court’s holding: because the defendant did not “manufacture, sell, or supply the asbestos insulation,” it had no duty to warn of hazards of insulation.⁴⁴

The *Simonetta* decision also addressed the duty to warn under a strict liability theory, focusing on *Restatement (Second) of Torts* § 402A, which addresses unreasonably dangerous products.⁴⁵ Section 402A addresses the special liability of sellers of “any product in a defective condition unreasonably dangerous to the user or consumer.”⁴⁶ The Washington Supreme Court reaffirmed that liability can extend to all entities in a product’s line of distribution, all of whom are in the “best position to know of the dangerous aspects of the product.”⁴⁷ But the defendant in *Simonetta* did not manufacture, sell, or supply the asbestos insulation, nor did it have control over the type of insulation used by the Navy. The asbestos insulation manufactured by a third-party, not the evaporator manufactured by the defendant was dangerous.⁴⁸ Citing its decision in *Simonetta*, the Washington Supreme Court refused to impose strict liability under these circumstances.⁴⁹

The California Court of Appeal adopted similar reasoning to the same end in *Taylor v. Elliott Turbomachinery Co., Inc.*⁵⁰ Faced with analogous facts, the court determined that manufacturers of equipment used by the Navy in aircraft carrier propulsion systems were not strictly liable or negligent for failing to warn of the dangers of asbestos contained in parts they did not manufacture. The court rejected strict liability for three reasons: (1) California law restricts the duty to warn to those within the chain of

40. *Simonetta*, 197 P.3d at 131.

41. *Id.* at 132.

42. *Id.* at 133.

43. *Id.*

44. *Id.* at 133–34.

45. *Id.* at 134.

46. *Id.* at n.6 (quoting RESTATEMENT (SECOND) OF TORTS § 402A(1)).

47. *Id.* at 134.

48. *Id.* at 136.

49. *Id.* at 138.

50. 90 Cal. Rptr. 3d 414 (Cal. Ct. App. 2009).

distribution; (2) a manufacturer's duty to warn does not extend to products manufactured by third parties; and (3) "manufacturers or suppliers of non-defective component parts bear no liability when they simply build a product to a customer's specifications but do not substantially participate in the integration of their components into the final product."⁵¹ The court added that harm to the plaintiff was not foreseeable, dooming the negligence claim.⁵² The reasoning of *Taylor* is likely to come under review soon by the California Supreme Court: in September 2009, two separate divisions of the Second Appellate District of California issued opinions on point—one following and the other rejecting the logic of *Taylor*.⁵³

IV. SCIENTIFIC EVIDENCE AND EMERGING TORTS

A. *The Sixth Circuit Adopts Reliable Differential Diagnosis as a Test for Admission of Causation Evidence Under Daubert*

On April 16, 2009, in *Best v. Lowe's Home Centers, Inc.*,⁵⁴ the U.S. Court of Appeals for the Sixth Circuit adopted a rule to assist district courts in its circuit in distinguishing between reliable and unreliable differential diagnoses when determining the admissibility of causation evidence under Federal Rule of Evidence 702 and *Daubert v. Merrill Dow Pharmaceuticals, Inc.*⁵⁵ Plaintiff in *Best* alleged anosmia (permanent loss of sense of smell) when the pool chemical Aqua EZ Super Clear Clarifier spilled on his face at a Lowe's store. Plaintiff's expert concluded that because of the temporal relationship between exposure to the chemical and the onset of symptoms, in conjunction with the elimination of other causes, the chemical likely burned Best and caused his anosmia.⁵⁶ The U.S. District Court for the Eastern District of Tennessee excluded the expert's testimony as too speculative and granted summary judgment for Lowe's.⁵⁷

The Sixth Circuit noted that the expert had utilized differential diagnosis in forming his opinion, a methodology in which a physician considers all relevant potential causes of the symptoms and eliminates alternative causes based on physical examination, clinical tests and case history.⁵⁸ The

51. *Id.* at 421.

52. *Id.* at 437.

53. Compare *Merrill v. Leslie Controls, Inc.*, 99 Cal. Rptr. 3d 839, 847-49 (Cal. Ct. App. 2009) (following *Taylor* on strict liability and negligence-based duties to warn); with *O'Neil v. Crane Co.*, 99 Cal. Rptr. 3d 533, 542-43 (Cal. Ct. App. 2009) (disagreeing with *Taylor* and finding duty to warn based on fact that pumps and valves at issue in the case were not fungible or multiuse component parts but products specifically designed to be used with asbestos).

54. 563 F.3d 171 (6th Cir. 2009).

55. 509 U.S. 579 (1993).

56. *Best*, 563 F.3d at 176.

57. *Best v. Lowe's Home Ctrs., Inc.*, 2008 WL 2359986, at *9 (E.D. Tenn. June 5, 2008).

58. *Best*, 563 F.3d at 178.

court found differential diagnosis a standard scientific technique for identifying the cause of medical ailments and that an overwhelming majority of courts of appeal have held it sufficiently valid to satisfy the first prong (reliability) of a Rule 702 inquiry.⁵⁹ The district court was thus in error in failing to accept differential diagnosis as a valid technique.⁶⁰

The court cited the Third Circuit opinion in *Paoli v. Railroad Yard PCB Litigation*⁶¹ as instructive in adopting a test to be applied by its district courts in determining whether a differential diagnosis is reliable and admissible. A medical causation opinion in the form of a doctor's differential diagnosis is reliable and admissible where a doctor (1) objectively ascertains, to the extent possible, the nature of the patient's injury, (2) rules in one or more causes of injury using valid methodology, and (3) engages in standard diagnostic techniques by which doctors normally rule out alternative causes in concluding which cause is most likely.⁶²

B. *Nebraska Supreme Court Overturns Exclusion of Expert Based Upon Misapplied Daubert Standard*

In *King v. Burlington Northern Santa Fe Railway Co.*,⁶³ plaintiff's expert testified that benzene is the only component of diesel exhaust known to cause multiple myeloma. The expert conceded that contrary opinions existed and that he was unaware of studies explicitly finding either benzene or diesel dust to cause the disease, but explained that scientific studies usually do not find definitive cause.⁶⁴ The trial court excluded the causation testimony under *Daubert* because it did not have general acceptance in the field. The Nebraska Court of Appeals affirmed, excluding the expert and granting summary judgment to Burlington Northern.⁶⁵

This presented the Nebraska Supreme Court its first opportunity to address the legal standards governing the reliability of expert opinions based on epidemiological studies. It took the occasion to offer an in-depth discourse on how researchers find associations between a suspected agent and disease and how experts interpret those studies to determine whether the relationship is causal.⁶⁶ The court found that under *Daubert*, determination of the admissibility of an expert's opinion must focus on the validity of the underlying principles and methodology, not the conclusions

59. *Id.* (citing *Hardyman v. Norfolk*, 243 F.3d 255 (2001)).

60. *Id.* at 178.

61. 35 F.3d 717 (1994).

62. *Best*, 563 F.3d at 179.

63. 762 N.W.2d 24 (Neb. 2009).

64. *Id.* at 32.

65. *King v. Burlington N. Santa Fe Ry. Co.*, 746 N.W.2d 383 (Neb. Ct. App. 2008).

66. *King*, 762 N.W.2d at 34.

generated. Reasonable differences in scientific evaluation should not compel the exclusion of a witness.⁶⁷ The court added that under *Daubert* the trial court should not require general acceptance of a stated causal link if the expert otherwise bases his opinion on reliable methodology.⁶⁸

The court held that the trial court needed only to determine if the results of the epidemiological studies relied upon were sufficient to support his opinion and whether the expert reviewed them in a reliable manner.⁶⁹ Thus, according to the court, the trial court erred in applying a conclusive study standard.⁷⁰

V. PUNITIVE DAMAGES

In *In re Exxon Valdez*,⁷¹ the Ninth Circuit determined when interest begins to accrue on a punitive damages award that has been judicially reduced. The applicable federal statute provides for post-judgment interest “to be calculated from the date of the entry of the judgment.”⁷² The question for the court turned on which judgment was at issue—the original judgment for the 1989 Exxon spill entered in 1996 or the reduced judgment entered by the Supreme Court in 2008, some twelve years later, which limited the ratio of punitive to compensatory damages to 1:1. The Ninth Circuit followed *Planned Parenthood of Columbia/Willamette Inc. v. American Coalition of Life Activists*,⁷³ awarding plaintiffs interest from the date of the original award because “plaintiffs’ entitlement to punitives was ‘meaningfully ascertained’” in 1996.⁷⁴

VI. CLASS CERTIFICATION

A growing trend among the federal circuits of requiring district courts to resolve factual issues at the class certification stage, even facts pertaining to both merits and class issues, continued with the Third Circuit’s ruling in *In re Hydrogen Peroxide Antitrust Litigation*.⁷⁵ Although not a toxic torts case, this trend bleeds into tort settings.

The primary issue before the Third Circuit was the district court’s asserted failure to apply the correct standard in concluding that plaintiffs had met their burden of proving the predominance element of Rule 23(b)(3). Through the opinions of an expert economist, plaintiffs sought to establish

67. *Id.* at 43.

68. *Id.* at 44.

69. *Id.*

70. *Id.* at 49.

71. 568 F.3d 1077 (9th Cir. 2009).

72. 28 U.S.C. § 1961.

73. 518 F.3d 1013 (9th Cir. 2008).

74. *In re Exxon Valdez*, 568 F.3d at 1080.

75. 552 F.3d 305 (3d Cir. 2009).

that their alleged economic injury was capable of proof at trial through evidence common to all class members. The expert identified for the court “two ‘potential approaches’ to estimating damages on a classwide basis: (1) benchmark analysis . . . and (2) regression analysis. . . .”⁷⁶ Although he had not actually performed either analysis, the expert insisted that sufficient data existed to permit him to do so. In opposing class certification, defendants introduced the opinions of an expert economist who disputed many of plaintiffs’ expert’s conclusions as well as his proposed methodology. The district court thus faced competing, irreconcilable expert opinions on a disputed factual issue key to the predominance inquiry.

In certifying plaintiffs’ proposed class, the district court did not resolve this expert dispute, reasoning:

So long as plaintiffs demonstrate their intention to prove a significant portion of their case through factual evidence and legal arguments common to all class members, that will now suffice. It will not do here to make judgments about whether plaintiffs have adduced enough evidence or whether their evidence is more or less credible than defendants.⁷⁷

This was error, said the Third Circuit. “Weighing conflicting expert testimony at the certification stage is not only permissible; it may be integral to the rigorous analysis Rule 23 demands.”⁷⁸ Moreover, the court held, resolution of fact issues cannot be avoided simply because expert opinions at issue touch on both class and merits issues: “[a]n overlap between a class certification requirement and the merits of a claim is no reason to decline to resolve relevant disputes when necessary to determine whether a class certification requirement is met.”⁷⁹ The Third Circuit deemed this outcome not inconsistent with the Supreme Court’s declaration in *Eisen v. Carlisle & Jacquelin* that Rule 23 does not give a court “authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action.”⁸⁰ Instead, the Third Circuit explained, “*Eisen* is best understood to preclude only a merits inquiry that is not necessary to determine a Rule 23 requirement.”⁸¹

Hydrogen Peroxide tracks recent rulings of the Second,⁸² Tenth,⁸³ and Eleventh⁸⁴ Circuits, each of which has found that in conducting the rigor-

76. *Id.* at 313.

77. *In re Hydrogen Peroxide Antitrust Litig.*, 240 F.R.D. 163, 170 (E.D. Pa. 2007).

78. *In re Hydrogen Peroxide*, 552 F.3d at 323.

79. *Id.* at 316.

80. 417 U.S. 156, 157–58 (1974).

81. *In re Hydrogen Peroxide*, 552 F.3d at 317.

82. *Miles v. Merrill Lynch & Co., Inc.* (*In re Initial Pub. Offering Secs. Litig.*), 471 F.3d 24 (2d Cir. 2006).

83. *Vallario v. Vandehey*, 554 F.3d 1259 (10th Cir. 2009).

84. *Williams v. Mohawk Indus., Inc.*, 568 F.3d 1350, 1358–59 (11th Cir. 2009).

ous analysis required under Rule 23, a district court must resolve factual disputes relevant to each class action prong, including those disputes intertwined with the merits. The Ninth Circuit recently vacated a panel decision certifying a class despite the district court's failure to weigh conflicting expert testimony.⁸⁵ In contrast, the D.C. Circuit in declining to review a class certification ruling noted that merits issues should not be considered at the class certification stage.⁸⁶

A number of state courts also opined during the past year that rigorous analyses of facts at the class certification stage should include resolution of fact disputes regarding the propriety of certification.⁸⁷

VII. ASBESTOS

A. *Judges Must Instruct Jury That Fear of Cancer Must Be "Genuine and Serious"*

Expanding on its decision in *Norfolk & Western Railway Co. v. Ayers*,⁸⁸ in which it ruled that FELA claimants could seek damages for fear of cancer, the U.S. Supreme Court in *CSX Transportation, Inc. v. Hensley*⁸⁹ held that a Tennessee state trial court's failure to instruct the jury regarding the standard of proof governing fear claims was reversible error. Following a three-week trial in which Hensley alleged that CSX had negligently exposed him to asbestos causing his asbestosis, CSX requested that the trial court instruct the jury that to recover for fear of cancer the plaintiff "must demonstrate . . . that the . . . fear [was] genuine and serious."⁹⁰ The trial court refused.

85. *Dukes v. Wal-Mart, Inc.*, 509 F.3d 1168 (9th Cir. 2007), *vacated and en banc rehearing ordered*, 556 F.3d 919 (9th Cir. 2009).

86. *In re Nifedipine Antitrust Litig.*, 2009 U.S. App. Lexis 3643 (D.C. Cir. Feb. 23, 2009).

87. *See, e.g.*, *Whitaker v. 3M Co.*, 764 N.W.2d 631, 638 (Minn. Ct. App. 2009) (as with persuasive federal case law, Minnesota's preponderance of the evidence standard "requires the district court to resolve factual disputes relevant to rule 23 certification requirements, including relevant expert disputes"); *Jackson v. Unocal Corp.*, 2009 WL 2182603, at *8 (Colo. Ct. App. July 23, 2009) ("[W]e are persuaded that when faced with conflicting expert testimony on a question potentially dispositive of class certification, a trial court must 'compare the relative weight of expert opinions in ruling on a motion for class certification.'"); *Cruz v. Unilock Chicago, Inc.*, 892 N.E.2d 78, 92 (Ill. App. Ct. 2008) (permitting factual analysis to the extent necessary to make certification determinations); *Mattson v. Montana Power Co.*, 352 Mont. 212, 240–41 (2009) (trial courts "should make whatever factual and legal inquiries are necessary" on a motion for class certification but should not address any aspect of the merits unrelated to Rule 23). *But see* *Gen. Motors Corp. v. Bryant*, 374 Ark. 38, 47 (2008) ("stray[ing] into the merits of the action itself . . . shall not occur during the certification process").

88. 538 U.S. 135 (2003).

89. 129 S. Ct. 2139 (2009).

90. *Id.* at 2140.

Following a verdict for Hensley and the Tennessee Court of Appeals' affirmation, CSX petitioned the Supreme Court for certiorari, asserting reversible error in the failure to so charge the jury. The Supreme Court agreed, stating that "the fact that cancer claims could 'evoke raw emotions' is a powerful reason to instruct the jury on the proper legal standard."⁹¹ Given "the volume of pending asbestos claims" and "the nature of those claims . . . , without proper instructions, [the jury] could award emotional-distress damages based on slight evidence of a plaintiff's fear of contracting cancer."⁹² The Court deemed jury instructions important "protections against imposing unbounded liability on asbestos defendants in fear-of-cancer claims."⁹³

B. Household Exposure Claims Considered by Highest Courts in Delaware and Tennessee

Courts nationwide have been determining whether employers owe a duty to warn of or protect their employees' family members from employees' asbestos-containing clothing. In *Riedel v. ICI Americas Inc.*,⁹⁴ the Delaware Supreme Court determined that no such duty was owed. Conversely, Tennessee's highest court in *Satterfield v. Breeding Insulation Co.*⁹⁵ not only confirmed such a duty but also expanded it to anyone coming in regular contact with an employee's clothing.

In *Riedel*, Delaware's highest court determined that the defendant employer had no duty to warn of or protect its employee's wife from the dangers of household exposure to asbestos in the absence of a significant relationship between defendant and the spouse. In so holding, the court considered and rejected plaintiff's argument that a relationship was created by virtue of certain employment benefits to which she, as spouse, was a beneficiary.⁹⁶

Notably, the Delaware court's analysis hinged on its determination that the household expense claim before it was grounded in alleged nonfeasance. The court expressly left open the possibility that a household exposure claim might survive challenge if pleaded as a misfeasance claim charging affirmative misconduct.⁹⁷

The same type of claim fared better in Tennessee, where, in *Satterfield*, the state supreme court held that the defendant employer had a duty to prevent take-home exposure.⁹⁸ The *Satterfield* plaintiff, who had contracted

91. *Id.* at 2141.

92. *Id.*

93. *Id.* at 2142.

94. 968 A.2d 17 (Del. 2009).

95. 266 S.W.3d 347 (Tenn. 2008).

96. *Riedel*, 968 A.2d at 26.

97. *Id.* at 25.

98. *Satterfield*, 266 S.W.3d at 369.

mesothelioma, was the twenty-five-year-old daughter of the defendant's employee. Her father, employed by defendant during the 1970s and 1980s, wore his work clothing home after working with asbestos. Despite the absence of any relationship between the employer and the daughter, the court upheld the claim, stating that a duty should (and now does) extend to those who "regularly and for extended periods of time came into close contact with the asbestos-contaminated work clothes of [the defendant's] employees. . . ."99 Mindful of its ruling's expansive reach, the court stated:

In light of the magnitude of potential harm from exposure to asbestos and the means available to prevent or reduce this harm, we see no reason to prevent carpool members, baby sitters, or the domestic help from pursuing negligence claims against an employer should they develop mesothelioma after being repeatedly and regularly in close contact with an employee's asbestos-contaminated work clothes over an extended period of time.¹⁰⁰

C. *Illinois Supreme Court Limits the Lipke Rule*

Last spring, the Illinois Supreme Court in *Nolan v. Weil-McLain*¹⁰¹ limited the reach of a long-standing rule in Illinois, the *Lipke* rule, which barred defendants from introducing evidence of plaintiff's exposure to the products of nonparties. Such a rule had

left Illinois standing alone in excluding evidence of other asbestos exposures, and conflicted with our well-settled rules of tort law that the plaintiff exclusively bears the burden of proof to establish the element of causation through competent evidence, and that a defendant has the right to rebut such evidence and to also establish that the conduct of another causative factor is the sole proximate cause of the injury.¹⁰²

Defendant in *Nolan* sought to introduce evidence tying plaintiff's exposure to products manufactured by four settled parties. The trial judge barred the evidence and the appellate court affirmed.¹⁰³ The Illinois Supreme Court reversed, determining that defendant should have been permitted to introduce such evidence. The court carefully distinguished precedent on the grounds that in this case, unlike in prior cases, defendant invoked the "sole proximate cause" defense. The court concluded that because defendant was not attempting to illustrate that nonparties concurrently contributed to plaintiff's injury, but rather that other products were the sole proximate cause, other exposure evidence was admissible.¹⁰⁴

99. *Id.* at 352.

100. *Id.* at 374.

101. 910 N.E.2d 549 (Ill. 2009).

102. *Id.* at 564 (citing *Lipke v. Celotex Corp.*, 505 N.E.2d 213 (Ill. App. Ct.)).

103. *Nolan v. Weill-McLain*, 2005 WL 724041 (Ill. Cir. Ct. Mar. 21, 2005), *aff'd*, 851 N.E.2d 281 (2006).

104. *Id.*

VIII. CERCLA

A. *Burlington Northern & Santa Fe Railway Co. v. United States*

In *Burlington Northern & Santa Fe Railway Co. v. United States*,¹⁰⁵ the Supreme Court determined that a company that sold a useful product to a third party is not subject to “arranger” liability under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)¹⁰⁶ when unintended spills occurred in the product’s transfer. The Court also called into question the test for imposing joint and several liability under CERCLA.

The case concerned two adjacent properties in California owned by a now-dissolved company, Brown & Bryant (B&B), and by several railroad companies.¹⁰⁷ B&B operated an agricultural chemical distribution business that purchased pesticides and other chemical products from a number of suppliers, including Shell.¹⁰⁸ Beginning in the mid-1960s, B&B purchased the pesticide D-D from Shell, and Shell arranged for delivery by common carrier.¹⁰⁹ Leaks and spills of D-D were common when a transfer occurred, though Shell took steps in the late 1970s to cause distributors to reduce these spills.¹¹⁰

The California Department of Toxic Substances Controls and the U.S. Environmental Protection Agency (EPA) brought cost-recovery actions against Shell and the railroads as potentially responsible parties (PRPs) for a plume of contaminated groundwater under the facility. The district court found both parties to be PRPs, the railroads because they owned part of the facility (§ 9607(a)(1)-(2)), and Shell because it arranged for disposal of a hazardous chemical (§ 9607(a)(3)).¹¹¹ In addition, after analyzing the amount of land owned, the amount of contamination from each of the relevant chemicals, and the time period of the ownership, it apportioned liability of 9 percent to the railroads and 6 percent to Shell.¹¹² On appeal, the Ninth Circuit held that Shell was liable as an arranger because it “arranged for delivery of the substances,” “was aware of . . . the transfer arrangements,” “knew that some leakage was likely,” and “provided advice and supervision concerning safe transfer and storage.”¹¹³ The Ninth Circuit also

105. 129 S. Ct. 1870 (2009).

106. 42 U.S.C. §§ 9601, *et seq.*

107. *Burlington Northern*, 129 S. Ct. at 1874.

108. *Id.*

109. *Id.* at 1875.

110. *Id.*

111. *Id.* at 1876.

112. *Id.* at 1876–77.

113. *Id.* at 1877.

held that the record did not support apportionment but that the railroads and Shell were jointly and severally liable.¹¹⁴

The Supreme Court reversed on both counts. First, it held that Shell was not liable for any of the government's response costs because it did not qualify as an arranger.¹¹⁵ The Court recognized that CERCLA does not define the word and that such a determination "requires a fact-intensive inquiry that looks beyond the parties' characterization of the transaction."¹¹⁶ The Court found that "an entity may qualify as an arranger under § 9607(a) (3) when it takes intentional steps to dispose of a hazardous substance."¹¹⁷ Knowledge of spills and leaks alone "is insufficient to prove that an entity planned for the disposal," even more so "when the disposal occurs as a peripheral result of the legitimate sale of an unused, useful product."¹¹⁸

Second, the Court reversed the Ninth Circuit's ruling on joint and several liability and reverted to the district court's apportionment of damages. Cautioning that "CERCLA defendants seeking to avoid joint and several liability bear the burden of proving that a reasonable basis for apportionment exists," the Court found that even though the parties here had offered no intended apportionment evidence, the district court's analysis of the railroad's share was sufficient to support apportionment.¹¹⁹ *Burlington Northern* has proven to be an influential decision in the short time since it was issued.¹²⁰

B. *Compelled Contribution Cost Recovery—Section 107(a) or Section 113(f)*

In *United States v. Atlantic Research*,¹²¹ the Supreme Court had left unresolved whether a potentially responsible party's compelled response costs are recoverable under Section 113(f) or Section 107(a), or both after a suit is initiated under Section 106 or Section 107. The Second Circuit answered part of that question in *W.R. Grace & Co.—Conn. v. Zotos International, Inc.*,¹²² finding that a party who undertakes remediation after signing a consent decree may recover those costs under Section 107(a).

114. *Id.*

115. *Id.* at 1880.

116. *Id.* at 1879.

117. *Id.*

118. *Id.* at 1880.

119. *Id.* at 1881.

120. See, e.g., *Frontier Commc'ns Corp. v. Barrett Paving Materials, Inc.*, 631 F. Supp. 2d 110, 113–14 (D. Me. 2009) (rail companies that arranged for disposal of tar, coal and other waste into Maine's Penobscot River may be held liable under CERCLA); *In re MTBE Prods. Liab. Litig.*, 643 F. Supp. 2d 461, 468–69 (S.D.N.Y. 2009) (nonsettling defendant's liability was not joint and several but apportioned based on its market share at the time of injury).

121. 551 U.S. 128, 139 n.6 (2007).

122. 559 F.3d 85 (2d Cir. 2009).

W.R. Grace, owner of a contaminated site in New York, entered into consent orders with the New York State Department of Environmental Conservation (NYDEC) in 1984 and 1988.¹²³ As of April 2004, Grace had spent approximately \$1.7 million on remediation at the site, all of it voluntary.¹²⁴ Grace brought suit against Zotos under CERCLA § 113(f) seeking contribution from Zotos as an arranger.¹²⁵ This case addressed whether Grace was entitled to contribution from Zotos under Section 113(f)(3)(B) or Section 107(a)(4)(B).

The Second Circuit acknowledged the spate of recent case law including *Atlantic Research*,¹²⁶ *Cooper Industries, Inc. v. Aviall Services, Inc.*,¹²⁷ and *Consolidated Edison Co. of New York, Inc. v. UGI Utilities, Inc.*,¹²⁸ addressing contribution claims.¹²⁹ The court first addressed the propriety of Grace's Section 113(f) contribution claim. In *Cooper Industries*, the Supreme Court held that private parties who had not been sued for recovery could not seek contribution under Section 113. Grace contended its consent order with the NYDEC was an administrative settlement and thus Section 113(f) permitted recovery.¹³⁰ The court disagreed, finding Section 113(f) applicable only once all CERCLA liability has been resolved.¹³¹ Since the consent order in question resolved only state law claims, contribution was not available.

The court proceeded, however, to authorize contribution through Section 107(a).¹³² Surveying definitions within CERCLA and the statute's legislative goals, the Second Circuit found no reason to penalize a party that entered into a voluntary consent order with the state and cleaned up a contaminated site.¹³³

C. Statute of Repose and CERCLA Discovery Rule

The Ninth Circuit in *McDonald v. Sun Oil Co.*¹³⁴ determined that state law accrual rules overridden by CERCLA's federal discovery rule include not merely statutes of limitation but also statutes of repose. Appellants

123. *Id.* at 87.

124. *Id.* at 88.

125. *Id.*

126. *Atlantic Research*, 551 U.S. at 128.

127. *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157 (2004).

128. *Consol. Edison Co. of New York, Inc. v. UGI Utils., Inc.*, 423 F.3d 90 (2d Cir. 2005).

129. *W.R. Grace & Co.*, 559 F.3d at 89–90.

130. *Id.* at 90.

131. *Id.* at 91.

132. *Id.* at 93.

133. *Id.* at 94–95.

134. 548 F.3d 774 (9th Cir. 2008).

maintained that Oregon's statute of repose be included within CERCLA's discovery rule, Section 309, which provides exceptions to state time bars so as to allow CERCLA claims to be filed later than state limitations rules would otherwise permit.¹³⁵ While statutes of limitations normally provide an end date for filing claims after discovery of an injury, a statute of repose normally defines a claim's timeliness by when an event occurred.¹³⁶

The court in *McDonald* found the term "statute of limitations" in CERCLA ambiguous and thus proceeded to examine the legislative history.¹³⁷ The court found repose statutes to be commonly misunderstood in precedent and scholarship.¹³⁸ Additionally, even though defendant Sun Oil argued that Congress had demonstrated elsewhere its ability to identify statutes of repose when it so intended, identifying four such instances in the U.S. Code, the court noted that in no such instance are the words "statute of repose" found.¹³⁹ The Ninth Circuit determined that Section 309 of CERCLA applies to both state statutes of limitation and repose, allowing the McDonalds to pursue their claims.

IX. CLEAN AIR ACT

A. *Violation Notice and Enforcement Action*

Impose No Duty on EPA to Object

In *Sierra Club v. EPA*¹⁴⁰ and *Sierra Club v. Johnson*,¹⁴¹ the U.S. Courts of Appeals for the Sixth and Eleventh Circuits determined that neither the issuance of a notice of violation nor the commencement of an enforcement action by EPA was sufficient to trigger an agency's duty to object to the issuance of a Clean Air Act (CAA)¹⁴² Title V operating permit, a conclusion that arguably conflicts with Second Circuit case law.¹⁴³ The *Sierra Club* cases concerned a provision of the CAA¹⁴⁴ that requires EPA to object to a Title V permit if a petitioner can "demonstrate" that the permit is not in compliance with the CAA. Both courts held that the word "demonstrate" was ambiguous, and that EPA's construction of the term was permissible.

135. *Id.* at 779.

136. *Id.*

137. *Id.* at 780.

138. *Id.* at 781.

139. *Id.* at 783–84.

140. 557 F.3d 401 (6th Cir. 2009).

141. 541 F.3d 1257 (11th Cir. 2008).

142. 42 U.S.C. §§ 7401, *et seq.*

143. N.Y. Pub. Interest Research Group, Inc. v. Johnson, 427 F.3d 172 (2d Cir. 2005) (suggesting that a notice of violation and commencement of enforcement action undertaken by a state agency was sufficient to demonstrate noncompliance for purposes of Title V of the CAA).

144. 42 U.S.C. § 7661d(b)(2).

In both cases, EPA had issued a notice of violation and commenced enforcement proceedings against a power company for allegedly violating the CAA's prevention of significant deterioration (PSD) requirements. The question before the courts was whether these actions affirmatively demonstrated that the permit was not in compliance with CAA requirements such that EPA was required to object.¹⁴⁵ EPA claimed the notice and commencement of enforcement action were merely "initial steps in the process of determining whether the source is in violation of any CAA requirements" and thus did not demonstrate that the permits were not in compliance with the CAA. The courts agreed, finding that EPA had the discretion not to object and noting that a contrary interpretation would allow a private party to bind EPA to a particular course prematurely, making EPA hesitant to begin such procedures in the future.¹⁴⁶

B. EPA Air Quality Standards Both Rejected and Approved

In *American Farm Bureau Federation v. EPA*,¹⁴⁷ several petitioners challenged revised National Ambient Air Quality Standards (NAAQS) issued by the EPA for particulate matter (PM) under the Clean Air Act (CAA). The D.C. Circuit held that the standards promulgated for "fine" PM were arbitrary and capricious, remanding those standards for further review, but rejected an industry challenge to standards issued for "coarse" PM.

The environmental petitioners in *American Farm Bureau* objected to EPA's decision not to lower the annual standard for fine PM, as well as to its setting the "secondary" standard (designed to "protect the public welfare") at the same level as the "primary" standard (designed to "protect the public health"). On the other hand, the industry petitioners contended that there was an insufficient basis for regulating nonurban coarse PM and that it was inappropriate to set the same daily standard for urban and nonurban coarse PM.

The court explained that it should "defer to the EPA's scientific judgment while . . . ensur[ing] the agency has considered relevant factors and adequately explained how it reached its conclusions."¹⁴⁸ In setting standards, EPA reviews, inter alia, the recommendations of an independent review committee, the Clean Air Scientific Advisory Committee (CASAC). The CAA requires EPA to explain any decision departing from CASAC's recommendations.¹⁴⁹ Because EPA's regulation of fine PM was contrary to recommendations of CASAC and could not be justified on the grounds

145. *Sierra Club v. EPA*, 557 F.3d at 405; *Sierra Club v. Johnson*, 541 F.3d at 1261.

146. *Sierra Club v. EPA*, 557 F.3d at 411; *Sierra Club v. Johnson*, 541 F.3d at 1267.

147. 559 F.3d 512 (D.C. Cir. 2009).

148. *Id.* at 520.

149. 42 U.S.C. § 7607(d)(3).

EPA advanced, the court required EPA to either set its standards in accordance with CASAC's recommendation or better explain why it chose to depart from the recommended level.¹⁵⁰ However, the court found that even in the absence of extensive data on health risks of coarse PM in nonurban areas, EPA may "err on the side of caution."¹⁵¹ The court therefore upheld EPA's coarse PM standards.¹⁵²

X. CLEAN WATER ACT

A. *Entergy Corp. v. Riverkeeper*

In *Entergy Corp. v. Riverkeeper, Inc.*,¹⁵³ an environmental group challenged EPA's use of cost-benefit analysis (CBA) in determining the appropriate control technology for cooling water intake structures under the Clean Water Act¹⁵⁴ (CWA). The Supreme Court upheld the use of CBA, finding the statutory language sufficiently ambiguous to entitle EPA's interpretation to deference.

The CWA requires that cooling water intake structures utilize the best technology available (BTA) "for minimizing adverse environmental impact."¹⁵⁵ These structures draw huge amounts of water from nearby water bodies and in the process harm a variety of aquatic organisms. EPA promulgated regulations in 2004 mandating 80 to 95 percent reduction in aquatic mortality, but no specific form of remedial technology.¹⁵⁶ In so doing, EPA relied on its view that the BTA standard allows it to weigh the relative costs to industry against the benefits to the environment.

Plaintiffs argued that EPA should have required all facilities to install closed cycle systems, which can reduce mortality by 98 percent¹⁵⁷ but cost significantly more than other remedial technologies. Plaintiffs stressed that the words "best" and "minimizing" implied that Congress intended for the technology that achieved the greatest reductions in aquatic deaths to be utilized and argued that Congress did not intend for CBA to be used.

The Supreme Court held that the BTA standard permits EPA's consideration of costs and benefits, finding that Congress's failure to expressly permit CBA in Section 1326(b) did not mean Congress intended to preclude it. Moreover, the Court reasoned, plaintiffs' interpretation would allow no

150. 559 F.3d at 520, 529.

151. *Id.* at 533.

152. *Id.* at 534.

153. 129 S. Ct. 1498 (2009).

154. 33 U.S.C. §§ 1251 *et seq.*

155. 33 U.S.C. § 1326(b).

156. 40 CFR § 125.94(b)(1).

157. *Entergy Corp.*, 129 S. Ct. at 1504.

consideration of costs whatsoever, yet even plaintiffs conceded that the CWA would not require “spend[ing] billions to save one more fish.”¹⁵⁸

B. *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*

In *Coeur Alaska, Inc. v. South Alaska Conservation Council*,¹⁵⁹ the Supreme Court held that discharges that fall under the CWA’s Section 404 dredge and fill program do not require a Section 402 National Pollution Discharge Elimination System (NPDES) permit. The Court also held that discharges of fill material permitted under Section 404 need not comply with the CWA’s Section 306 new source performance standards set by EPA.

Defendants in *Coeur Alaska* sought a permit to discharge slurry from a froth-flotation gold mine into a lake. The slurry, a rock and water mixture, was classified as fill by the U.S. Army Corps of Engineers and initially permitted under Section 404 because it would have the effect of raising the bottom of the lake.¹⁶⁰ Plaintiffs argued that the discharge should have been permitted under Section 402, but that even if the discharge was properly permitted under Section 404 it was required to comply with new source performance standards for froth-flotation gold mines.

The Court rejected plaintiffs’ argument that EPA had jurisdiction to issue a permit to the defendants under Section 402, noting that EPA’s own regulations forbid the EPA from issuing a permit that is “provided [to the Corps] in § 404.”¹⁶¹ As a result, “if the Corps has authority to issue a permit for a discharge under Section 404, then EPA lacks authority to do so under Section 402.”¹⁶²

The Court also rejected plaintiffs’ argument that discharges of fill must comply with new source performance standards, finding that such a reading “would create numerous difficulties for the regulated industry” and pointing to an EPA memorandum stating that performance standards do not apply to discharges of fill material.¹⁶³ The Court found that while EPA’s memorandum was “not subject to sufficiently formal procedures to merit *Chevron*¹⁶⁴ deference,” it was nonetheless “entitled to a measure of deference because it interprets the agencies’ own regulatory scheme.”¹⁶⁵ The Court’s decision thus creates a clear separation between Sections 404 and 402, two CWA provisions that have been the subject of fierce debate.

158. *Id.* at 1510.

159. 129 S. Ct. 2458 (2009).

160. 33 C.F.R. § 323.2 (adopting an effects-based test).

161. *Coeur Alaska, Inc.*, 129 S. Ct. at 2459 (internal quotations omitted).

162. *Id.* at 2467.

163. *Id.* at 2469.

164. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

165. *Coeur Alaska, Inc.*, 129 S. Ct. at 2461, 2473.

C. *National Cotton Council v. EPA*

In *National Cotton Council v. EPA*,¹⁶⁶ the Sixth Circuit rejected a regulation issued by the EPA exempting certain pesticides from CWA permitting requirements. The rule at issue governed CWA permitting requirements for pesticides coming into contact with waterways.¹⁶⁷ The new rule gave meaning to the CWA's terms "pollutant" and "discharge of any pollutant," and it stated that pesticide applications over or near waters of the United States were exempt from NPDES permitting as long as they were discharged in accordance with the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). Several environmental and industry groups challenged the final rule.

EPA reasoned that chemical pesticides intentionally applied to water or land could not be considered waste within the ordinary meaning of the term, and therefore were not pollutants.¹⁶⁸ EPA further reasoned that biological pesticides could not be pollutants, as it would have been anomalous for one form of pesticide to be covered by the CWA but not the other. Moreover, while pesticide residue that remained in a water body was a pollutant, it did not come from a point source and did not become excess pesticide until *after* its beneficial purpose had been served. Thus, there was no point-source discharge of a pollutant.

The Sixth Circuit agreed that a pesticide serving a beneficial purpose was not a pollutant for CWA purposes, but held that excess pesticide that remained in and affected a water body after its purpose had been served must be regulated under the CWA. The court rejected EPA's finding that such pesticide was not discharged from a point source simply because it was uncertain at the time of discharge what portion was excess. According to the court, this attempt to "inject a temporal requirement to the 'discharge of a pollutant'" was unsupported by the plain language and purpose of the CWA.¹⁶⁹

D. *Friends of the Everglades v. South Florida Water Management District*

The Eleventh Circuit in *Friends of the Everglades v. South Florida Water Management District*¹⁷⁰ upheld EPA's regulation exempting the transfer

166. 553 F.3d 927 (6th Cir. 2009). A petition for rehearing and rehearing en banc was denied by the Sixth Circuit on August 3, 2009, and petitions for a writ of certiorari were filed in the U.S. Supreme Court on November 2, 2009.

167. 71 Fed. Reg. 68,483 (Nov. 27, 2006).

168. *National Cotton Council*, 553 F.3d at 929.

169. *Id.* at 939.

170. 570 F.3d 1210 (11th Cir. 2009).

of pollutant-bearing water from one navigable body to another from the reach of the CWA, finding that by definition the CWA's coverage is limited to the addition of pollutants to navigable waters.

South Florida is crossed by a "complex system of gates, dikes, canals and pump stations" erected to control flooding.¹⁷¹ This arrangement results in the movement of water, often containing a variety of pollutants, from one location to another. Plaintiffs contended that this movement is an addition within the meaning of the CWA, requiring the defendant water district to obtain a NPDES permit. Defendant argued that a recently promulgated EPA regulation had adopted a unitary waters theory,¹⁷² such that a discharge occurs "only when pollutants first enter navigable waters from a point source."¹⁷³ This position had been raised in prior litigation with no success,¹⁷⁴ but *Friends of the Everglades* was the first such case arising since the publication of EPA's new regulation.

The Eleventh Circuit reasoned that "addition . . . to navigable waters" could mean either "addition to a single body" or "an addition to the total navigable waters from outside."¹⁷⁵ Thus, the court concluded, "[b]ecause the EPA's construction is one of the two readings we have found is reasonable, we cannot say that it is 'arbitrary, capricious, or manifestly contrary to the statute.'"¹⁷⁶

XI. EMERGING TORTS: CLIMATE CHANGE

A. *Connecticut v. American Electric Power Co.*

In September 2009, the Second Circuit handed victory to plaintiffs in climate change tort litigation in *Connecticut v. American Electric Power Co.*¹⁷⁷ *AEP* was filed by several states, New York City, and land trust organizations against five major energy companies and the Tennessee Valley Authority for their alleged contribution to global warming. The complaints allege that defendants, which operate fossil-fuel fired power plants in twenty states, are the five largest emitters of carbon dioxide in the nation and are jointly and severally liable for contributing to a public nuisance under the federal common law. Plaintiffs seek an injunction forcing defendants to cap and then reduce their emissions by a specified percentage over time.¹⁷⁸

171. *Id.* at 1214.

172. 73 Fed. Reg. 33,697 (June 13, 2008) (codified at 40 C.F.R. § 122.3(i)).

173. *Friends of the Everglades*, 570 F.3d at 1217.

174. *See id.* at 1217-18 (describing decisions by the First, Second, and Ninth Circuits); *see also* Miccosukee Tribe v. S. Fla. Water Mgmt. Dist., 280 F.3d 1364 (11th Cir. 2002).

175. *Friends of the Everglades*, 570 F.3d at 1223.

176. *Id.* at 1228.

177. 582 F.3d 309 (2d Cir. 2009).

178. *Id.*

The district court dismissed plaintiffs' claims in September 2005, concluding that they raised nonjusticiable political questions.¹⁷⁹ It found that plaintiffs' claims required an initial policy determination involving a balancing of social interests in pollution control against economic concerns and that these policy determinations were committed to the political branches of government.¹⁸⁰ The district court further noted that it was unaware of any public nuisance cases that "touched on so many areas of national and international policy."¹⁸¹

In a 139-page opinion, the Second Circuit reversed and remanded. The appellate court found that plaintiffs' claims did not present nonjusticiable political questions; plaintiffs had Article III standing to pursue their claims; plaintiffs adequately stated claims under the federal common law of nuisance; and the claims were not displaced by federal statutory law.

B. *Comer v. Murphy Oil USA*

On October 16, 2009, in *Comer v. Murphy Oil USA*, the Fifth Circuit overturned the decision of a Mississippi federal trial court dismissing climate change tort claims.¹⁸² The complaint was filed by residents and owners of lands and property along the Mississippi Gulf coast, alleging that defendants' operation of energy, fossil fuels, and chemical industries in the United States caused the emission of greenhouse gases that contributed to global warming, which in turn caused a rise in sea levels and added to the ferocity of Hurricane Katrina in 2005. The end result was destruction of property owned by the plaintiffs and the public. Unlike *AEP*, the complaint in *Comer* asserts state common law claims only and seeks damages. The district court granted defendants' motions to dismiss in 2007, finding that plaintiffs lacked Article III standing and that the case raised nonjusticiable political questions.¹⁸³

Reversing and remanding in part, the Fifth Circuit found as to certain state common law claims (nuisance, trespass, and negligence) that plaintiffs had Article III constitutional standing and that their claims did not present political questions.¹⁸⁴ The court remanded these claims to the trial court for further proceedings. In contrast, the Fifth Circuit dismissed the three remaining claims—unjust enrichment, fraudulent misrepresentation and

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

180. *Id.* at 271–72.

181. *Id.*

182. 585 F.3d 855 (5th Cir. 2009), *reh'g en banc granted* by 598 F.3d 208 (5th Cir 2010).

183. *Comer v. Murphy Oil USA*, CV 05–0436, Judgment on the Motion to Dismiss (Dkt. No. 369) (S.D. Miss. Aug. 30, 2007).

184. *Comer*, 585 F.3d at 866–67.

civil conspiracy—based on prudential standing consideration.¹⁸⁵ In a separate concurrence, Judge Eugene W. Davis indicated that he would have affirmed the trial court's dismissal on the alternative ground that plaintiffs had failed to state a claim by failing adequately to plead proximate cause, but joined the majority because the panel has discretion not to consider alternative grounds and opted not to do so.¹⁸⁶

C. *Native Village of Kivalina v. ExxonMobil Corp.*

The third of the trilogy, *Native Village of Kivalina v. ExxonMobil Corp.*,¹⁸⁷ was issued by the Northern District of California on September 30, 2009. Plaintiffs Native Village of Kivalina and the City of Kivalina alleged that defendants' supposed greenhouse gas emissions contributed to the loss of the sea ice that protects Kivalina from erosion and storm surges, resulting in coastal erosion and requiring the relocation of Kivalina. Parting ways with the Second Circuit, the court dismissed plaintiffs' federal claim for common law nuisance brought against two dozen oil, energy, and utility companies, finding that the claim presented nonjusticiable political questions and that plaintiffs lacked Article III standing.¹⁸⁸ The court declined to exercise supplemental jurisdiction over plaintiffs' state law tort claims.

185. *Id.* at 867–69.

186. *Id.* at 880.

187. 663 F. Supp. 2d 863 (N.D. Cal. 2009).

188. *Id.* at 876–77, 881–82.