

Environmental Litigation and Toxic Torts Committee Newsletter

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MESSAGE FROM THE CHAIRS

Peter Condron and Shelly Geppert

As the temperatures rise, our committee newsletter brings you articles on two of the hottest developments in environmental and toxic tort law in recent years: TSCA reform and the Flint water crisis. Louis Abrams provides an overview of the much-anticipated, finally enacted revisions to the Toxic Substances Control Act that represent the first significant changes to TSCA in the four decades since it was first enacted. Ameri Klafeta examines the use of the class action device under Federal Rule of Civil Procedure 23 to address environmental injuries, and identifies the significant hurdles that often prevent classes being certified in environmental matters. If you were unable to join us for our related August 10 webinar, Litigating Environmental Class Actions, the program will be available for download from the ABA's online library August 24, 2016.

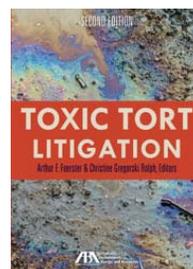
As always, our regular contributing authors highlight significant environmental and toxic tort decisions from around the nation, including a class action decision from the Eighth Circuit, a significant ruling from the California Supreme Court on the scope of the "sophisticated intermediary" defense, a Sixth Circuit decision on the standard of proof under the Energy Employees Occupational Illness Compensation Program Act of 2000, an important ruling from the Massachusetts Supreme Judicial Court on the scope of the Massachusetts Oil and Hazardous

Materials Release Prevention and Response Act, and preemption decisions from Colorado and West Virginia. We're sure you'll find the summaries informative and useful in your practice.

Finally, here's hoping that you and your families have a happy, safe, and enjoyable summer. Stay cool, and we hope to see you all at the SEER Fall Conference in Denver, Colorado, in October.

Peter Condron is a partner in the Washington, D.C., office of Sedgwick LLP. His practice focuses on environmental, toxic tort, product liability, and energy litigation. He may be reached at peter.condron@sedgwicklaw.com.

Shelly Geppert is an attorney at Eimer Stahl LLP in Chicago. Shelly concentrates her practice in civil litigation with a focus on environmental, products liability, and toxic tort matters. She may be reached at sgeppert@eimerstahl.com.



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Toxic Torts Committee Newsletter
Vol. 17, No. 4, August 2016
Stephen Riccardulli and Lisa Gerson, Editors

In this issue:

Message from the Chairs

Peter Condron and Shelly Geppert..... 1

**Case Law Highlights: Mountain/West Coast
Colorado Supreme Court Determines Cities'
Fracking Bans Preempted by State Law**

Whitney Jones Roy and Alison N. Kleaver..... 3

**Oregon District Court Finds State's Temporary
Ban on Instream Motorized Mining Equipment to
Be a Valid State Environmental Regulation and
Not Preempted by Federal Law**

Whitney Jones Roy and Alison N. Kleaver..... 4

**California Supreme Court Adopts Sophisticated
Intermediary Doctrine for Products Liability
Claims**

Whitney Jones Roy and Alison N. Kleaver..... 6

**Case Law Highlights: Midwest
Sixth Circuit Rejects Sierra Club's Appeal
Challenging U.S. Forest Service's Decision to
Renew Oil Pipeline Permit Without Environmental
Analysis**

Sonia H. Lee 8

**Sixth Circuit Affirms Denial of Compensation to
Survivor for Deceased Father's Alleged Injuries
Caused by Occupational Exposure to Beryllium**

Sonia H. Lee 9

**Case Law Highlights: Mid-Continent
Eighth Circuit Reverses Grant of Class
Certification in Lawsuit Alleging Environmental
Contamination from TCE Where Individual Issues
of Causation and Damages Would Predominate**

Lisa Cipriano 11

**Choice of Law Provisions Under Outer
Continental Shelf Land Act Cannot Be Waived by
Failure to Raise the Issue at District Court Level**

Lisa Cipriano 12

**Case Law Highlights: Southeast
D.C. District Court Dismisses Power Plant Lawsuit
Against International Finance Corporation**

Matthew Thurlow..... 14

**West Virginia Court Finds Local Regulation
Preempted by State and Federal Law**

Matthew Thurlow..... 15

**Case Law Highlights: Northeast
Massachusetts Supreme Judicial Court Ok's
Exclusion of Lead from Oil Exemption**

Scott E. Kauff and Nathan Short..... 17

**New Jersey Supreme Court Expands Take-Home
Toxic-Tort Premises Liability Beyond Spouses**

Scott E. Kauff and Nathan Short..... 17

**New Jersey Town, New Jersey Town Employee,
and New Jersey Department of Environmental
Protection Not Liable for Claims in Day Care
Mercury Exposure Suits**

Scott E. Kauff and Nathan Short..... 18

The June 2016 Overhaul to TSCA

Louis Abrams..... 20

**Class Certification Issues in the Flint Water
Litigation**

Ameri R. Klafeta..... 22

About the editors

Stephen Riccardulli is a partner in the New York office of Norton Rose Fulbright. His practice focuses on product liability, environmental, and toxic tort litigation. He may be reached at stephen.riccardulli@nortonrosefulbright.com.

Lisa Gerson is a partner in the New York office of McDermott Will & Emery LLP. Her practice focuses on product liability, environmental, toxic tort, and commercial litigation. She may be reached at lgerson@mwe.com.

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CASE LAW HIGHLIGHTS: MOUNTAIN/ WEST COAST

COLORADO SUPREME COURT DETERMINES CITIES' FRACKING BANS PREEMPTED BY STATE LAW

Whitney Jones Roy and Alison N. Kleaver

City of Longmont v. Colo. Oil and Gas Ass'n, 369 P.3d 573 (Colo. 2016), 2016 Colo. LEXIS 442; *City of Fort Collins v. Colo. Oil and Gas Ass'n*, 369 P.3d 586 (Colo. 2016), 2016 Colo. LEXIS 443. In two concurrent opinions, the Colorado Supreme Court invalidated two cities' bans on fracking and the storage of fracking wastes within the cities' limits. The city of Longmont (Longmont) completely banned the fracking process within the city's limits; whereas, the city of Fort Collins (Fort Collins) enacted a five-year moratorium on the fracking process. The Colorado Supreme Court held that both bans conflicted with state law in their operational effect and, thus, were preempted by state law.

In 2012, the citizens of Longmont voted to amend Longmont's charter to prohibit fracking and the storage or disposal of fracking wastes within city limits. One year later, the citizens of Fort Collins voted in favor of a citizen-proposed ordinance that placed a five-year moratorium on the fracking process. Both Longmont and Fort Collins are home-rule cities, meaning that the Colorado Constitution guarantees them the right to draft and amend their own charters and to regulate purely local matters without interference from the state legislature. The Colorado Oil and Gas Association (Association) sued both cities in separate actions. The Association sought declaratory judgment that Colorado's Oil and Gas Conservation Act preempts both cities' ordinances and a permanent injunction. The trial courts granted summary judgment in the Association's favor. The cities separately appealed, and the court of appeals requested that the cases be transferred to the Colorado Supreme Court for decision. The Colorado Supreme Court accepted both cases.

In *City of Longmont*, the Colorado Supreme Court began its analysis by acknowledging that Colorado has consistently found that, in matters of local concern, a home-rule ordinance supersedes a conflicting state law. However, where a home-rule ordinance conflicts with state law in a matter of either statewide or mixed state and local concern, state law supersedes the local ordinance. 2016 Colo. LEXIS 442 at *16–18. Thus, in order to resolve the preemption issue, the court had to first determine whether the local ordinance involved a matter of statewide, local, or mixed state and local concern. Because prior law had created some confusion about the proper analysis to determine whether state law preempts local regulation, the court clarified that “the question of whether a matter is one of statewide, local, or mixed state and local concern is separate and distinct from the question of whether a conflict between state and local law exists.” Id. at *15. The court further made clear that “in virtually all cases, this analysis will involve a facial evaluation of the respective regulatory schemes, not a factual inquiry as to the effect of those schemes ‘on the ground.’” Id.

To determine whether a regulatory matter is one of statewide, local, or mixed state and local concern, the court examined four factors: (1) the need for statewide uniformity of regulation; (2) the extraterritorial impact of the local regulation; (3) whether the state or local governments have traditionally regulated the matter; and (4) whether the Colorado Constitution specifically commits the matter to either state or local regulation. Id. at *20. Assessing Longmont's ban, the court found that the first factor weighed in favor of preemption because the fracking ban could impede the state's interest in fair and efficient development of gas and oil resources by potentially exaggerating production in other areas while depressing production within the city and could result in the uneven and potentially wasteful production of oil and gas from pools that extend beyond the city's limits. Id. at *23–26. The court found that the second factor also weighed in favor of preemption because the ban could create a ripple effect of citywide bans across the state,

resulting in a de facto statewide ban on fracking. Id. at *27–28. The court found the third and fourth factors to be inconclusive because fracking touches on both the state’s oil and gas regulation and Longmont’s regulation of land use. Further, the Colorado Constitution does not suggest that the issue lies squarely within the purview of either state or local regulation. Id. at 29–30. For these reasons, the court determined that Longmont’s fracking ban was a mixed state and local concern. Id. at *31.

The court then turned to whether the Longmont ordinance conflicts with state law. The court observed that there are three forms of preemption: express, implied, and operational conflict. Id. at *33. Finding that neither express nor implied preemption applied, the court focused its analysis on whether the operational effect of the ordinance conflicts with the application of state law. Id. at *44–48. In analyzing this form of preemption, the court looked at whether the effectuation of the local interest would materially impede the state’s interest. Id. at *42. The court noted that the state has evinced an interest in both fracking and the disposal and storage of fracking waste through the promulgation of extensive regulations on both issues. Id. at *50–53. The Longmont ordinance, however, does not simply regulate, but wholly prohibits the fracking process, even if it complies with the state laws and regulations. Therefore, the court found that the Longmont ordinance conflicts with state law in its operational effect. Id. at *54.

In *City of Fort Collins*, the Colorado Supreme Court addressed a slightly different fracking ordinance, which did not altogether ban the fracking process, but instead placed a five-year moratorium on it within the city’s limits. Citing its decision in *Longmont*, the court determined that the moratorium involved a matter of mixed state and local concern. 2016 Colo. LEXIS 443, at *16. The court then looked at whether the moratorium conflicted with state law. Just as it did in *Longmont*, the court focused on operational effect preemption. Id. at *26. The court determined that Fort Collins’s moratorium, like the Longmont

ban, rendered the state’s statutory and regulatory scheme “superfluous, at least for a lengthy period of time.” Id. at *30. Thus, the court found that the moratorium “materially impedes the effectuation of the state’s interest in the efficient and responsible development of oil and gas resources.” Id. The court further found that, while the Fort Collins ordinance only temporarily banned fracking, this fact did not fundamentally change the outcome because it nevertheless completely banned fracking, at least during that time. Id. at *31–34. The court referenced prior case law invalidating even a one-year prohibition for the same reason. Therefore, the Colorado Supreme Court affirmed the trial court’s ruling that granted summary judgment and invalidated the Fort Collins moratorium.

OREGON DISTRICT COURT FINDS STATE’S TEMPORARY BAN ON INSTREAM MOTORIZED MINING EQUIPMENT TO BE A VALID STATE ENVIRONMENTAL REGULATION AND NOT PREEMPTED BY FEDERAL LAW

Whitney Jones Roy and Alison N. Kleaver

Joshua Caleb Bohmker, et al. v. State of Oregon, et al., 2016 U.S. Dist. LEXIS 39163 (D. Or. March 25, 2016). The United States District Court for the District of Oregon upheld a state law placing a temporary ban on the use of motorized equipment for mining in Oregon riverbeds and banks. The state of Oregon passed Senate Bill 838 (SB 838) in August 2013 in response to the “significant risks” motorized mining poses to Oregon’s natural resources and the cumulative environmental impacts of motorized mining. The moratorium applies only to the use of motorized mining equipment, and does not ban mining altogether. The court found that SB 838 is a valid regulation and not preempted by federal law.

The plaintiffs—miners, mining associations, and businesses related to the mining industry—filed suit against the state of Oregon claiming that SB 838 is preempted by federal law. The plaintiffs

relied on the federal Mining Act of 1872, which provides that “all valuable mineral deposits in lands belonging to the United States . . . shall be free and open to exploration and purchase.” Id. at *4 (citing 30 U.S.C. § 22). The central question in the case was whether a state environmental regulation temporarily banning motorized mining is preempted by federal regulations that make mineral deposits free and open to extraction. Id. at *5.

The court outlined the three types of preemption—express preemption, field preemption, and conflict preemption—and concluded that federal law does not preempt SB 838 in any of these ways. Id. at *15–18. Citing *California Coastal Comm’n v. Granite Rock Co.*, 480 U.S. 572 (1987), the court noted that the federal Mining Act of 1872 does not express any legislative intent regarding how the law should interact with state environmental regulations. Id. at *16. The court further noted that “federal mining laws and environmental regulations do not preempt reasonable state environmental laws that restrict mining activities on federal land.” Id. at *17. The court found additional support for its conclusion in other applicable federal regulations, such as the Clean Water Act, which “expressly recognizes and preserves state authority to regulate water pollution.” Id. at *16–17.

Next, the district court found SB 838 is a reasonable environmental regulation, rather than a land use law. Id. at *18. Citing *Granite Rock*, the plaintiffs contended that federal law preempts a state land use law that extends onto federal land and prohibits otherwise lawful mining activities thereon. Id. The district court rejected this argument, noting that while land use planning and environmental regulation could theoretically overlap, they are nevertheless distinct activities capable of differentiation. Specifically, the court noted that land use regulations choose particular uses for land; whereas, environmental regulations merely require that, if the land is used for a particular purpose, that it be used in a way that limits the environmental effects of the use. Id. at *18–19. Based on this reasoning, the court

held that SB 838 is not a preempted land use plan because it does not prohibit mining altogether or mandate particular uses of the land. Rather, it regulates the environmental impacts of motorized mining by limiting one particular form of mining in specific areas. Id. at *20. As a result, the district court concluded that SB 838 is a reasonable environmental regulation that is not preempted by federal land use laws.

The court also found that SB 838 is not a ban on mining. Id. at *20–21. The plaintiffs argued that SB 838 constitutes a “complete ban” on mining, and thus, is preempted by federal law. Id. The court rejected this argument, citing the holding of another court within the district that had already addressed the very issue and determined that “a ban on one particular method of mining was not equivalent to a complete ban on mining.” Id. at *21–22 (citing *Pringle v. Oregon*, No. 2:13-CV-00309-SU, 2014 WL 795328 (D. Or. Feb. 25, 2014)).

Finally, the court declined to apply a “commercial impracticability” standard as part of its preemption analysis. Id. at *23–25. Citing *People v. Rinehart*, 230 Cal. App. 4th 419 (2014), a recent California court of appeal case in which the court held that a California moratorium on suction-dredge permits was potentially preempted by federal law if it rendered development of a mining claim “commercially impractical,” the plaintiffs argued that SB 838 rendered mining commercially impractical in Oregon and, thus, was preempted by federal law. In rejecting this argument, the court noted that the *Rinehart* opinion had been de-published pending review by the California Supreme Court. Id. at *24. The court also was persuaded by an amicus brief submitted to the California Supreme Court, which argued that federal preemption of a state environmental regulation should not turn on the cost to an individual miner. Id. The court concluded that nothing in the Mining Act or its applicable federal regulations “makes the cost or practicability of mineral extraction a factor in whether or not a state environmental law is preempted.” Id. at *25.

For these reasons, the district court concluded that Oregon’s temporary ban on motorized mining is not preempted by federal law. *Id.* at *26.

CALIFORNIA SUPREME COURT ADOPTS SOPHISTICATED INTERMEDIARY DOCTRINE FOR PRODUCTS LIABILITY CLAIMS

Whitney Jones Roy and Alison N. Kleaver

Webb v. Special Electric Co., Inc., 2016 Cal. LEXIS 3591 (May 23, 2016). The California Supreme Court formally adopted the sophisticated intermediary doctrine in regard to product liability claims. The court overturned the trial court’s improper judgment notwithstanding the verdict (JNOV) on a products liability claim wherein the plaintiff alleged defendant Special Electric breached its duty to warn. The case called into question the scope of a supplier’s duty to warn downstream users when the supplier distributes materials that are eventually used in finished products. The court held that a supplier can discharge its duty to warn only if it (1) provides adequate warnings or sells to a sophisticated buyer and (2) reasonably relies on the buyer to warn end users of the harm. *Id.* at *3.

During the 1970s, Special Electric brokered the sale of crocidolite asbestos, a highly toxic form of asbestos, to Johns-Manville Corporation. Johns-Manville manufactured pipes that contained trace amounts of asbestos, and sold the pipe to various distributors, where it was eventually handled by warehouse workers. Plaintiff William Webb handled the pipes when he was a warehouse worker, between 1969 and 1979, and was diagnosed with mesothelioma in 2011. Webb filed lawsuits against multiple defendants and ultimately went to trial against Special Electric and two other defendants.

Prior to jury deliberation, Special Electric moved for nonsuit on the duty to warn claim and a directed verdict on the strict liability claim, contending that it had no duty to warn a sophisticated

purchaser about the health risks of asbestos. The judge deferred ruling on the motions and the jury returned a verdict finding Special Electric liable for failure to warn and negligence. Special Electric then requested a ruling on its nonsuit and directed verdict motions. The trial court treated the motions as seeking JNOV, granted them, and entered judgment in favor of Special Electric. The state court of appeal reversed for both procedural and substantive error and, as to the latter, held that there was substantial evidence in support of the jury’s original verdict. The California Supreme Court granted review and affirmed the appellate court’s ruling. Prior to this case, the California Supreme Court had not addressed how the sophisticated intermediary doctrine applies in California.

The California Supreme Court first noted that a manufacturer of hazardous materials has a duty to warn about the known and knowable risks associated with the product. *Id.* at *21. However, the court also acknowledged that it is often difficult or impossible for a supplier of raw materials to directly warn consumers at the end of the stream of commerce when finished products contain hazardous materials. Thus, “the [sophisticated intermediary] doctrine originated in the Restatement Second of Torts” to relieve suppliers of the duty to warn if the supplier “has exercised reasonable care to ensure ‘that the information will reach those whose safety depends on their having it.’” *Id.* at *22 (citing RESTATEMENT SECOND OF TORTS § 388, cmt. n). While the court had previously acknowledged the existence of this defense, it had not had opportunity to apply it.

The court formally adopted the sophisticated intermediary doctrine as described in the Restatement. *Id.* at *24–25. Under this rule, a supplier may discharge its duty to warn end users when it (1) provides adequate warnings to the product’s immediate purchaser and (2) reasonably relies on the purchaser to convey appropriate warnings to downstream users who will encounter the product. *Id.* at *25. Because the doctrine is an affirmative defense, the court noted that the supplier will bear the burden of proof. *Id.*

With regard to the first prong of the doctrine, the court noted that the supplier must give adequate warnings to an intermediary about particular hazards but, in narrow exceptions, the intermediary's sophistication may take the place of actual warnings. *Id.* at *26. Specifically, the supplier must demonstrate that "the buyer was so knowledgeable about the material supplied that it knew or should have known about the particular danger." *Id.* Special Electric argued that it could rely on Johns-Manville's sophistication and expertise with asbestos products to discharge Special Electric of its duty to warn ultimate users. The court rejected this assertion, holding that the sophistication of the purchaser alone is not sufficient to avert the duty to warn. *Id.* at *28. Rather, it held that the supplier must have sufficient reason for believing the intermediary's sophistication will operate to protect the user. *Id.* at *28–29.

As to the second prong of the doctrine, the court determined that the supplier must also show that it "actually and reasonably relied on the intermediary to convey warnings to end users." This determination is a question of fact to be decided by a jury. *Id.* at *30. Courts examine three factors in evaluating this requirement: (1) gravity of the risk, (2) likelihood the intermediary will convey the warning, and (3) the feasibility and effectiveness of the supplier to convey the warning directly to the user. *Id.* at *31. The "gravity" factor encompasses the character of the harm and the likelihood that it will occur. The court stated that "[t]he overarching question is the reasonableness of the supplier's conduct given the potential severity of the harm." *Id.* at *32. The likelihood that an intermediary will provide the warning focuses on the reliability of the intermediary and is evaluated by an objective standard based on what a reasonable supplier would have known under the circumstances. *Id.* at *32. The third "feasibility" factor looks at what the supplier can realistically accomplish. *Id.* at *34. For example, raw materials suppliers face different challenges in providing warnings than manufacturers of finished products. Thus, the feasibility (or infeasibility) of providing direct warnings should be considered in the analysis. *Id.* at *35.

Applying these standards to the case at issue, the court found that Special Electric had arguably forfeited the sophisticated intermediary defense by not presenting it to the jury. *Id.* at *36. However, even if the defense had been preserved, the court found that the record did not establish that Special Electric had discharged its duty to warn through the sophisticated intermediary doctrine. The court found disputed evidence as to whether Special Electric provided consistent warnings to Johns-Manville about the asbestos and whether Johns-Manville was aware of the particularly dangerous risks of crocidolite asbestos, rather than the risks of asbestos in general. *Id.* Furthermore, the court found the record devoid of evidence to establish that Special Electric actually and reasonably relied on Johns-Manville to warn end users about crocidolite asbestos. *Id.* at *38. For these reasons, the California Supreme Court affirmed the court of appeal's ruling overturning the JNOV. *Id.*

Whitney Jones Roy is the office managing partner and **Alison N. Kleaver** is a senior associate in the Los Angeles office of Sheppard Mullin Richter & Hampton LLP. They both specialize in complex business litigation and environmental litigation. They may be reached at wroy@sheppardmullin.com and akleaver@sheppardmullin.com.



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CASE LAW HIGHLIGHTS: MIDWEST

SIXTH CIRCUIT REJECTS SIERRA CLUB'S APPEAL CHALLENGING U.S. FOREST SERVICE'S DECISION TO RENEW OIL PIPELINE PERMIT WITHOUT ENVIRONMENTAL ANALYSIS

Sonia H. Lee

Sierra Club v. United States Forest Serv., No. 15-2457, 2016 U.S. App. LEXIS 12046 (6th Cir. June 30, 2016). In a unanimous decision, the Sixth Circuit affirmed the U.S. District Court for the Eastern District of Michigan's order granting summary judgment to the U.S. Forest Service (the Forest Service), holding that the Forest Service did not violate the National Environmental Policy Act, 42 U.S.C. § 4321 et seq. (NEPA), when it reissued a special-use permit to Enbridge Energy Limited Partnership (Enbridge) to operate and maintain an oil pipeline on federal land within the Lower Michigan National Forest without conducting an environmental impact statement (EIS) or an environmental assessment (EA). *Sierra Club v. United States Forest Serv.*, No. 15-2457, 2016 U.S. App. LEXIS 12046 (6th Cir. June 30, 2016). In so ruling, the unanimous panel concluded: "This is not a case in which the agency failed entirely to consider the potential environmental consequences of its decision at the time the decision was made and instead used a [categorical exception] as a post-hoc rationalization for the agency's actions. . . . Rather, the record demonstrates that the [Forest Service] followed the appropriate decision-making process and reached a non-arbitrary conclusion." Id. at *21–22 (internal citations and quotations omitted).

Pursuant to the Mineral Leasing Act, 30 U.S.C. § 181 et seq., the federal government may grant a right-of-way through federal land "for pipeline purposes for the transportation of oil." Id. at *2 (citing 30 U.S.C. § 185(a)). In 1953, the Forest Service issued a special-use permit to Enbridge—which at the time had operated under a different corporate name—permitting Enbridge to use an 8.10-mile strip of federal land within the Lower Michigan National Forest for the purpose of constructing, operating, and maintaining a pipeline

to transfer crude oil. Id. at *2. In 2012, Enbridge sought renewal of its special-use permit. Id. at *3. In 2014, the Forest Service concluded that the categorical exclusion under 36 C.F.R. § 220.6(e) (15) (CE-15) to the documentation required by an EIS or EA applied, and in 2015, renewed Enbridge's special-use permit without conducting an environmental analysis. Id. at *6.

Sierra Club filed suit against the Forest Service in the U.S. District for the Eastern District of Michigan, alleging that the Forest Service violated NEPA by not preparing an EIS or EA prior to renewing Enbridge's special-use permit. Id. at *7. Following the district court's grant of summary judgment to the Forest Service, Sierra Club appealed, arguing, inter alia, that (1) Enbridge's special-use permit falls outside the scope of CE-15, which, pursuant to 36 C.F.R. § 220.6(e)(15), applies to the reissuance of a permit "when the only changes are administrative" and "there are not changes to the authorized facilities or increases in the scope or intensity of authorized activities"; and (2) "extraordinary circumstances" applied such that an EIS or EA was required prior to renewal of Enbridge's special-use permit. Id. at *12.

The unanimous Sixth Circuit panel rejected Sierra Club's argument that the Forest Service should have been precluded from invoking CE-15 because Enbridge "increased the volume of oil flow within the pipes," which Sierra Club contended constituted an increase in "the scope and intensity" of the use of the authorized activity. Id. at *13–14 (quoting 36 C.F.R. § 220.6(e)(15)). Instead, the Sixth Circuit agreed with the Forest Service's contention that it "does not and never has regulated the flow of oil inside the pipeline" and ruled that "Enbridge has not varied the 'scope or intensity of authorized activities,' [within the meaning of] 36 C.F.R. § 220.6(e)(15), between the earlier permit and the 2015 permit because the permit only authorizes use of a right-of-way and the scope of the right-of-way has not changed." Id. at *14.

Sierra Club also argued that the 2015 special-use permit was not a continuation of the previously issued special-use permit because the latter

had expired. The court rejected this contention, finding it is “irrelevant” that the prior special-use permit had expired, as the plain language of CE-15 specifically provides that the exclusion applies to expired permits. *Id.* (noting CE-15 refers to the “[i]ssuance of a new special use authorization . . . to replace an existing or expired special use authorization” (emphasis in original)).

The court also rejected Sierra Club’s argument that the Forest Service erred in its determination that no “extraordinary circumstances” existed to preclude application of CE-15. *Id.* at *17. Although Sierra Club argued that the Forest Service cannot rely on CE-15 because Enbridge’s special-use permit may impact an endangered species, the Kirtland’s warbler, the court opined that the “mere presence” of an endangered species does not preclude the use of a categorical exception. *Id.* at *17–18. Rather, the Forest Service had properly considered whether there was a “cause-effect relationship between a proposed action” and the species by including in its decision memo a biologist’s report that “unambiguously conclude[d]” that the special-use permit would have no effect on the Kirtland’s warbler. *Id.* at *18.

Finally, Sierra Club argued that the Forest Service was required to assess the “cumulative impacts” of its actions prior to applying CE-15. The court again rejected Sierra Club’s argument, finding that a categorical exclusion, by definition, includes “a category of actions which do not individually or cumulatively have a significant effect on the human environment,” and accordingly, no EIA or EIS was required. *Id.* (emphasis in original).

SIXTH CIRCUIT AFFIRMS DENIAL OF COMPENSATION TO SURVIVOR FOR DECEASED FATHER’S ALLEGED INJURIES CAUSED BY OCCUPATIONAL EXPOSURE TO BERYLLIUM

Sonia H. Lee

Freeman v. United States Dep’t of Labor, No. 15-6189, 2016 U.S. App. LEXIS 11635 (6th Cir. June 22, 2016). Applying an arbitrary and capricious

standard of review, the Sixth Circuit upheld the U.S. District Court for the Western District of Kentucky’s affirmance of a U.S. Department of Labor (DOL) decision denying Lynda L. Freeman’s (Freeman) claim for compensation under the Energy Employees Occupational Illness Compensation Program Act of 2000, 42 U.S.C. § 7384 et seq. (the Act) based upon her father Ezra Freeman’s (Ezra) alleged exposure to beryllium while working at the Paducah Gaseous Diffusion Plant. *Freeman v. United States Dep’t of Labor*, No. 15-6189, 2016 U.S. App. LEXIS 11635 (6th Cir. June 22, 2016).

The Act was established to provide benefits to individuals who developed certain illnesses related to exposure to radiation or beryllium during the course of their employment with the Department of Energy (DOE). *Id.* at *2. Pursuant to Part B of the Act, covered employees or their eligible survivors are entitled to a lump-sum payment of \$150,000 and coverage of medical expenses for certain specified illnesses, one of which includes chronic beryllium disease (CBD). *Id.* (citing 42 U.S.C. § 7384l).

A claimant seeking compensation under Part B of the Act based upon CBD must satisfy a two-part test. First, the claimant must provide DOL with proof of an employee’s qualification as a “covered beryllium employee.” *Id.* If the claimant submits documentation establishing employment at a DOE facility during a specified period of time when beryllium may have been present, then the employee’s exposure to beryllium is presumed. *Id.* at *2–3 (citing 42 U.S.C. § 7384n). Second, once the claimant establishes occupational exposure to beryllium, for employees allegedly diagnosed with CBD prior to January 1, 1993, the claimant must prove, through medical evidence, that the employee suffers from at least three of the following five conditions to be eligible for recovery under the Act: (1) characteristic chest radiographic abnormalities; (2) restrictive or obstructive lung physiology testing or diffusing lung capacity defect; (3) lung pathology consistent with CBD; (4) clinical course consistent with a chronic respiratory disorder; or (5) immunologic tests showing

beryllium sensitivity. *Id.* at *3–4 (citing 42 U.S.C. § 7384l(13); 20 C.F.R. § 30.100(c)(2)).

In 2003, Freeman filed a claim for compensation under parts B and E of the act. Specifically, Freeman alleged that her father, Ezra, who had died in 1991, developed lung cancer and emphysema as a result of alleged exposure to beryllium. *Id.* at *4. DOL denied her claim. *Id.* That same year, Freeman filed a second claim for compensation under part B only, and submitted medical evidence to support her contention that her father suffered from CBD. *Id.* at *5. However, in 2007, DOL denied Freeman’s subsequently filed claim because a district medical consultant found that Ezra’s medical evidence did not support a diagnosis of CBD, and while Freeman was able to show that Ezra suffered from two of the three conditions, Freeman nevertheless failed to establish the requisite three of five criteria. *Id.* Following Freeman’s submission of additional medical evidence, DOL vacated its 2007 denial and assigned a second district medical consultant to review the claim. *Id.* However, because the district medical consultant concluded that Ezra’s medical records did not show “characteristic abnormalities of CBD,” DOL again denied Freeman’s claim and, further, rejected Freeman’s subsequent requests for reconsideration and to reopen her case. *Id.* at *6.

Thereafter, Freeman sought judicial review of, *inter alia*, DOL’s denial of her claim by filing a complaint in the U.S. District Court for the Western District of Kentucky. *Id.* The district court affirmed DOL’s determination, and Freeman appealed. In her appeal, Freeman argued that DOL conceded that Ezra’s “medical records showed findings consistent with” CBD, yet it arbitrarily denied Freeman’s claim for survivor benefits. *Id.* at *10. The Sixth Circuit found this argument unavailing, stating that while DOL did note that some findings in Ezra’s medical records were consistent with CBD, DOL also found that two doctors on two separate occasions opined that the medical evidence “was insufficient to support a diagnosis of CBD.” *Id.* (emphasis in original). Freeman also asserted that Ezra’s medical records

showed he was diagnosed with “interstitial lung disease” and “basilar fibrosis,” and argued that “interstitial fibrosis” is a diagnosis that establishes CBD. *Id.* The court found this argument equally unpersuasive and observed: “Freeman essentially asks this court to re-interpret the medical evidence despite the medical consultant’s opinion and the DOL’s reliance on that opinion—something this court cannot do.” *Id.* at *11.

The court ultimately concluded that that “there is no indication that the agency relied on improper factors” or that DOL’s determination was implausible. *Id.* In short, Freeman was properly foreclosed from asserting a claim for compensation under the Act because she was unable to provide evidence establishing three out of the five criteria required to prove a CBD diagnosis. *Id.* at *11.

Sonia H. Lee is an associate in the New York office of Norton Rose Fulbright US LLP. Her practice focuses on product liability, environmental, toxic tort, and complex civil litigation. She may be reached at sonia.lee@nortonrosefulbright.com.



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CASE LAW HIGHLIGHTS: MID-CONTINENT

EIGHTH CIRCUIT REVERSES GRANT OF CLASS CERTIFICATION IN LAWSUIT ALLEGING ENVIRONMENTAL CONTAMINATION FROM TCE WHERE INDIVIDUAL ISSUES OF CAUSATION AND DAMAGES WOULD PREDOMINATE

Lisa Cipriano

Ebert v. General Mills, Inc., No. 15-1735, 2016 WL 2943193 (8th Cir. May 20, 2016). In *Ebert*, a proposed class of property owners in Minneapolis sued the defendant owner and operator of a former industrial facility. *Ebert v. General Mills, Inc., No. 15-1735, 2016 WL 2943193 (8th Cir. May 20, 2016)*. Plaintiffs alleged that the defendant caused the chemical trichloroethylene (TCE) to be released into the ground, leading to the migration of TCE vapors into the surrounding residential area and a resulting reduction in property values. *Id.* at *1–2. They brought claims for violations of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and the Resource Conservation and Recovery Act (RCRA), as well as for negligence, nuisance, and willful and wanton misconduct. *Id.* at *2. Plaintiffs purported to represent a class of residential property owners and sought only property damages and injunctive relief. *Id.* The district court granted class certification under Federal Rule of Civil Procedure 23(b)(2) and 23(b)(3). *Id.* The district court also ordered that the action be bifurcated into two phases—liability followed by damages. *Id.*

The defendant challenged the district court’s order, arguing that there were “vast differences between the class plaintiffs on the issues of injury, causation, and damages.” *Id.* at *3. The defendant took issue only with regard to whether the proposed class could meet the requisite “commonality” and “predominance” inquiries under Rule 23. In response, the plaintiffs contended that they “all suffered the same injury (i.e., that General Mills contaminated this geographic area) such that there is commonality and the injurious conduct is the

same.” *Id.* The court of appeals first noted that “[t]he district court has broad discretion to decide whether certification is appropriate,” but that the appellate court would “nonetheless reverse a certification where there has been an abuse of discretion or an error of law.” *Id.* (internal quotations and citations omitted). The court reversed the district court’s certification order, finding that the lower court abused its discretion in certifying the class because “individual issues predominate the analysis of causation and damages,” making the case “unsuitable for class certification under Rule 23(b)(3)[.]” *Id.* at *5, *7 (district court abused its discretion under Rule 23(b)(2) and 23(b)(3)).

In reaching its decision, the court of appeals stated: “the district court recognized that the issues of General Mills’ standardized conduct of alleged contamination and the remedies sought by the class are common to all plaintiffs for purposes of Rule 23(a)(2) and we do not necessarily disagree.” *Id.* at *4. The court pointed out, however, that “the issue of predominance under Rule 23(b)(3) is qualitative rather than quantitative. Thus, that there is a common question does not end the inquiry. [T]he predominance criterion is far more demanding,” and “[t]he requirement of predominance under Rule 23(b)(3) is not satisfied if individual questions . . . overwhelm the questions common to the class.” *Id.* (internal quotations and citations omitted, brackets in original). Quoting the Supreme Court’s recent decision in *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016), the court of appeals stated that “[a]n individual question is one where members of a proposed class will need to present evidence that varies from member to member, while a common question is one where the same evidence will suffice for each member to make a prima facie showing [or] the issue is susceptible to generalized, class-wide proof.” *Id.* at *4 (internal quotations omitted).

Despite the district court’s attempt to narrow and separate the issues in the case, the court of appeals found that individual issues would predominate. *Id.* For example,

To resolve liability there must be a determination as to whether vapor contamination, if any, threatens or exists on each individual property as a result of General Mills' actions, and, if so, whether that contamination is wholly, or actually, attributable to General Mills in each instance. Accordingly, accompanying a determination regarding General Mills' actions, there likely will be a property-by-property assessment of additional upgradient (or other) sources of contamination, whether unique conditions and features of the property create the potential . . . for vapor intrusion, whether (and to what extent) the groundwater beneath a property is contaminated, whether mitigation has occurred at the property, or whether each individual plaintiff acquired the property prior to or after the alleged diminution in value. This action is directed at TCE in breathable air, where both its presence and effect differ by property. These matters, to name a few, will still need to be resolved household by household even if a determination can be made class-wide on the fact and extent of General Mills' role in the contamination, which determination is problematic. Thus, any limitations in the initial action are, at bottom, artificial or merely preliminary to matters that necessarily must be adjudicated to resolve the heart of the matter.

Id. at *5. The court found that the proposed Rule 23(b)(2) class failed for similar reasons. Id. The court stated that "Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class." Id. at *6 (internal quotations and citations omitted). "It does not authorize class certification when each individual class member would be entitled to a different injunction or declaratory judgment against the defendant." Id. Here, the class could not meet these requirements because, for example, "[t]he remediation sought is not even universal . . . Remediation efforts on each of the affected properties, should they be awarded, will be unique." Id.

CHOICE OF LAW PROVISIONS UNDER OUTER CONTINENTAL SHELF LAND ACT CANNOT BE WAIVED BY FAILURE TO RAISE THE ISSUE AT DISTRICT COURT LEVEL

Lisa Cipriano

Petrobras Am., Inc. v. Vicinay Cadenas, S.A., 815 F.3d 211 (5th Cir. 2016). Plaintiffs, an oil company and the underwriters of its insurance policy, brought claims for negligence, products liability, and failure to warn against defendant, the manufacturer of an underwater tether chain that broke shortly after it had been installed "to secure a piping system for oil production from the Outer Continental Shelf of the Gulf of Mexico." *Petrobras Am., Inc. v. Vicinay Cadenas, S.A.*, 815 F.3d 211, 213–214 (5th Cir. 2016). The plaintiffs alleged subject matter jurisdiction based on admiralty or, alternatively, under the Outer Continental Shelf Land Act (OCSLA). Id. at 214. The defendant "moved for summary judgment, arguing that it was entitled to prevail under the maritime law's economic loss doctrine." Id. "The district court, assuming that maritime law applied, granted summary judgment to [defendant]," but granted leave to add an additional claim. Several months later, the underwriters filed a motion for leave to amend, asserting for the first time that, under the OCSLA, Louisiana law applied to the dispute rather than maritime law, but the district court denied the motion. Id. The court of appeals reversed the district court's decision.

The defendant argued that the underwriters had waived the choice of law argument by not raising it below until after summary judgment had been granted on the merits. The court of appeals first noted that "[t]here is no dispute that . . . OCSLA provides a basis for subject matter jurisdiction in this case. The incident occurred on the Outer Continental Shelf, and the statutory grant of subject matter jurisdiction over cases and controversies arising out of or in connection with operations involving resource exploitation on the Shelf is straightforward and broad." Id. at 215 (internal quotations and

citations omitted). Nevertheless, “[a]lthough federal courts may have jurisdiction pursuant to OCSLA . . . they must then turn to the OCSLA choice of law provision to ascertain whether state, federal, or maritime law applies to a particular case.” Id. “OCSLA’s choice of law provision asserts federal jurisdiction over the subsoil and seabed of the Outer Continental Shelf, over all ‘artificial islands,’ and over installations and devices used in the exploitation of offshore resources, ‘other than a ship or vessel.’” Id. (citing 43 U.S.C. § 1333(a)(1)). In addition, “OCSLA adopts as surrogate federal law the civil and criminal laws of each adjacent State to govern the aforementioned areas (generally speaking) [t]o the extent that [State laws] are applicable and not inconsistent . . . with other Federal laws and regulations. . . .” Id. (citing 43 U.S.C. § 1333(a)(2)(A)) (internal quotations omitted). The court stated that “[b]ecause OCSLA’s choice of law scheme is prescribed by Congress, parties may not voluntarily contract around Congress’s mandate.” Id. Therefore, the court concluded that “[i]f parties cannot choose to avoid Congress’s choice of law provision under OCSLA, then a fortiori the provision cannot be waived by failure to raise the issue below.” Id.

The court went on to consider whether federal maritime law or the law of the “adjacent state”—Louisiana—would apply, and ultimately landed on the latter. Id. at 215–18. The Fifth Circuit “has interpreted the statute to compel borrowing adjacent state law if three conditions are met: (1) The controversy must arise on a situs covered by OCSLA (i.e., the subsoil, seabed, or artificial structures permanently or temporarily attached thereto). (2) Federal maritime law must not apply of its own force. (3) The state law must not be inconsistent with Federal law.” Id. at 216 (internal quotations and citations omitted). Only the second condition was in dispute—i.e., whether federal maritime law applied of its own force. Id. at 218. In order to answer this question, the court relied upon “the twin tests of location and connection with maritime activity.” Id. at 216. “The location prong asks whether the incident occurred on navigable waters or, if injury occurred on land, whether it was caused by a

vessel on navigable waters,” and “[t]he court must consider where the wrong took effect. . . .” Id. (internal quotations and citations omitted). Under the connection test, “the court must consider whether the general character of the activity giving rise to the plaintiff’s injury is substantially related to traditional maritime activity.” Id. The court found that the breaking of the tether chain arguably took effect in navigable waters and could meet the location test, but that it could not meet the connection test because it did not “have the potential to disrupt maritime commercial or navigational activities on or in the Gulf of Mexico.” Id. at 217. While the event disrupted the oil company’s business activities, “development on the Outer Continental Shelf is not a traditional maritime activity.” Id. at 218.

Lisa Cipriano is a commercial litigation attorney at the Chicago office of Eimer Stahl LLP. Lisa’s experience includes environmental and products liability matters, class action securities fraud cases, accountants’ liability cases, and contract disputes. She may be reached at lcipriano@eimerstahl.com.



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CASE LAW HIGHLIGHTS: SOUTHEAST

D.C. DISTRICT COURT DISMISSES POWER PLANT LAWSUIT AGAINST INTERNATIONAL FINANCE CORPORATION

Matthew Thurlow

Jam v. International Finance Corporation, No. 15-612 (JDB), 2016 U.S. Dist. LEXIS 38299 (D.D.C. March 24, 2016). On March 24, 2016, the District Court for the District of Columbia dismissed a complaint brought by local farmers, fishermen, and residents of Gujarat, India, and Earthrights International against International Finance Corporation (IFC) based on IFC's \$450 million loan for the construction of the coal-fired Tata Mundra Power Plant. *Jam v. International Finance Corporation*, No. 15-612 (JDB), 2016 U.S. Dist. LEXIS 38299 (D.D.C. Mar. 24, 2016). Plaintiffs brought claims for negligence, negligent supervision, nuisance, trespass, and breach of contract against IFC based on allegations that the Tata Mundra Power Plant caused a number of negative environmental and social impacts to the local marine ecosystem, air quality, human health, and residents' "way of life." *Id.* at *1. IFC moved to dismiss the lawsuit on the basis that IFC was immune from suit under the International Organizations Immunities Act (IOIA). *Id.* at *2. The court agreed with IFC and dismissed the lawsuit in its entirety.

IFC is a member of the World Bank Group and provides financing for private development projects in developing countries. *Id.* at *2. Before providing project funding, IFC requires loan recipients to meet Performance Standards on Environmental and Social Sustainability to ensure that projects address, avoid, minimize, and mitigate negative environmental and social impacts. *Id.* at *3. IFC monitors and supervises its clients' efforts and can withdraw financing if a project fails to meet its environmental and social commitments. *Id.* at *4.

IFC loaned Coastal Gujarat Power Limited (CGPL), a subsidiary of Tata Power, approximately

\$450 million of the estimated \$4.14 billion it cost to build the Tata Mundra Power Plant. *Id.* at *2. Although IFC recognized the potential for significant environmental and social risks with the project, it worked with CGPL to develop an Environmental and Social Action Plan (Plan) to address those risks. *Id.* at *4. Local residents in Gujarat claimed that IFC and CGPL failed to honor the commitments made in the Plan and, as a result, the plant caused a number of negative environmental and social impacts, including: (1) hot water from the plant's cooling system altered the marine environment near the plant and reduced fish catch; (2) the water intake channel leaked saltwater into groundwater and made it unusable for drinking and farming; (3) emissions from the plant negatively impacted local air quality; and (4) local fishermen and farmers were displaced from the area near the plant. *Id.* at *5. Plaintiffs filed a complaint with the IFC's Compliance Advisor Ombudsman (CAO). The CAO largely backed Plaintiffs' claims in a final investigation report that concluded, "IFC had failed to adequately consider the environmental and social risks to which plaintiffs would be exposed as a result of the Plant's development," and then "compounded that error by failing to perform an environmental and social impact assessment commensurate with project risk, and . . . fail[ed] to address subsequent compliance issues during project supervision." *Id.* at *7. But because the CAO has no enforcement mechanism and could provide plaintiffs no relief, plaintiffs subsequently brought suit in federal court against the IFC. *Id.* at *8.

The court determined that under the IOIA, IFC is entitled to the "same immunity from suit and every form of judicial process as is enjoyed by foreign governments." 22 U.S.C. § 288a(b); *id.* at *10. Although immunity can be waived under the IOIA, and IFC's Articles of Agreement include a waiver of immunity provision, the D.C. Circuit has interpreted such waivers narrowly: "Waivers should be more broadly construed only when the waiver would arguably enable the organization to pursue more effectively its institutional goals." *Id.* at *12. Plaintiffs argued that their

suit fit within the precedent in which waivers of liability have been upheld because IFC's waiver ultimately benefits the international organization (for example, by encouraging third parties to enter into contracts with the organization). *Id.* at *13–14. The court disagreed and distinguished plaintiffs' case from cases in which waivers had been granted, in part because plaintiffs "are a would-be class of fisherman and farmers," did not "have a commercial relationship with IFC," and their claims were based largely on tort rather than principles of contract law. *Id.* at *14.

Further, upon weighing the costs versus the benefits of allowing a waiver of immunity, the court agreed with IFC that waiver in this case would "produce a considerable chilling effect on IFC's capacity and willingness to lend money in developing countries, by opening a floodgate of lawsuits by allegedly aggrieved complainants from all over the world." *Id.* at *15–16. Finally, the court rejected plaintiffs' additional arguments regarding the benefits that such lawsuits might bring in creating incentives for IFC to adhere more closely to its social and environmental policies: "To support a finding of waiver, [plaintiffs] must point to a benefit that would justify opening the courthouse doors to a new type of plaintiff, bringing a new and very broad type of suit, more costly than those that have previously been allowed and aimed squarely at IFC's discretion to select and administer its own projects." *Id.* at *19. The court found no such benefit that justified allowing a waiver of immunity. Accordingly, the court held that IFC had not waived its immunity and dismissed the complaint in its entirety. *Id.* at *20–21.

WEST VIRGINIA COURT FINDS LOCAL REGULATION PREEMPTED BY STATE AND FEDERAL LAW

Matthew Thurlow

EQT Production Company v. Wender, No. 16-00290, 2016 U.S. Dist. LEXIS 75685 (S.D. W. Va. June 10, 2016). On June 10, 2016, the District Court for the Southern District of West Virginia

granted summary judgment to an oil and gas production company and struck down a local ordinance banning the disposal of wastewater in underground injection control (UIC) wells and storage of wastewater at conventional vertical drilling sites. *EQT Production Company v. Wender*, No. 16-00290, 2016 U.S. Dist. LEXIS 75685 (S.D. W. Va. June 10, 2016). The court held that the ordinance provisions were preempted by state and federal law. *Id.* at *44.

EQT Production Company (EQT) filed suit after the County Commission of Fayette, West Virginia, passed an ordinance prohibiting the storage of wastewater in UIC wells, or the temporary storage, handling, treatment, or processing of wastewater unless at a site permitted for vertically drilled wells under West Virginia Code section 22-6-6. *Id.* at *4. Violation of Fayette County's ordinance was a misdemeanor and punishable by imprisonment in a local jail for up to one year and/or a fine of \$1000 per violation per day. *Id.* at *4–5. The ordinance also permitted civil enforcement by the county or county citizens. *Id.* at *5.

Although the new ordinance had not yet been enforced against EQT, the court held that EQT had standing to challenge most aspects of the ordinance because EQT's concerns about persecution were not speculative: "A plaintiff challenging a constitutionally-dubious statute should generally be afforded recourse to the courts as soon as sanctions have been threatened, at least so long as the supposed threat is more than the speculative worrying of an anxious mind." *Id.* at *14. The court permitted all of EQT's challenges to the ordinance with the exception of its challenge to the ordinance's ban on storage of wastewater produced at horizontally drilled wells because EQT had "not presented any evidence" that the ban on temporary storage of wastewater from those wells would affect EQT's operations in Fayette County. *Id.* at *17.

On the merits, EQT argued that the ordinance was preempted by West Virginia's Oil and Gas Act and West Virginia's UIC program, promulgated under the Safe Drinking Water Act. *Id.* at *20.

The Fayette County Commission countered that both laws allowed local regulation of underground wastewater injection. *Id.* at *20–21. The court ultimately disagreed with the County Commission’s argument that it had plenary power to address hazards to public health and abate nuisances: “Contrary to the Commission’s findings, its powers—far from plenary—are either expressly granted, necessarily implied, or else non-existent.” *Id.* at *24. The court held that any activity “sanctioned by the state” cannot be prohibited or impeded by “a local government entity.” *Id.* at *26–28 (“For just as federal law will displace state law when the two meet, so too, is state law superior to local law.”).

The court held that the Commission could not regulate wastewater storage activities at oil and natural gas facilities because “[a]ll authority to oversee gas and oil exploitation in West Virginia resides with the [West Virginia] DEP.” *Id.* at *31. No power to regulate such matters had been granted to county commissions, and the West Virginia Oil and Gas Statute includes no savings clause that carves out authority for counties to regulate oil and gas matters. *Id.* at *31–32. Accordingly, the court held that the sections of the ordinance that regulated on-site storage of wastewater were preempted by West Virginia law. *Id.* at *32–33.

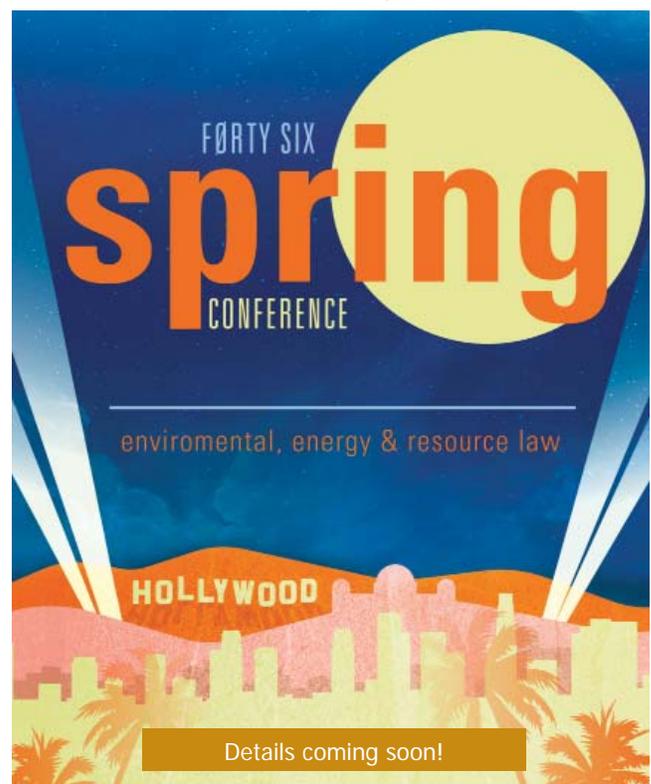
Likewise, the court held that the ordinance’s prohibition on permanent underground wastewater disposal was preempted by West Virginia’s UIC program and the Safe Drinking Water Act. The Safe Drinking Water Act provides that a state UIC program cannot prohibit “the underground injection of wastewater or other fluids which are brought to the surface in connection with oil or natural gas production.” *Id.* at *38. The County Commission’s ordinance, therefore, directly conflicted with the Safe Drinking Water Act. *Id.* Finally, the court rejected the County Commission’s argument that a savings clause in the Safe Drinking Water Act allowed local authorities to regulate wastewater injection to abate nuisances: “In the present context, the state of West Virginia

has concluded that oil and gas extraction is a highly valuable economic activity subject to centralized environmental regulation by the DEP.” *Id.* at *43. Because the state had not expressly granted authority to local authorities to regulate wastewater injection, the court held that “the Commission cannot interfere with, impede, or oppose the state’s goals.” *Id.*

The court therefore granted summary judgment to EQT and voided the County Commission’s ban on disposal of wastewater in UIC wells and the regulation of wastewater storage at conventional vertical drilling sites.

Matthew Thurlow is a senior associate at Latham & Watkins LLP. Matt worked as a trial attorney in the Environmental Enforcement Section at the U.S. Department of Justice from 2008 to 2011. He may be reached at Matthew.Thurlow@lw.com.

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CASE LAW HIGHLIGHTS: NORTHEAST

MASSACHUSETTS SUPREME JUDICIAL COURT OK'S EXCLUSION OF LEAD FROM OIL EXEMPTION

Scott E. Kauff and Nathan Short

Peterborough Oil Company, LLC v. Department of Environmental Protection, 474 Mass. 443, 50 N.E.3d 827 (Mass. 2016). The Massachusetts Supreme Judicial Court, the Commonwealth's highest judicial court, granted summary judgment for the Department of Environmental Protection (DEP) in an action filed by Peterborough Oil Company, LLC (Peterborough Oil) seeking declaratory and injunctive relief. At issue was DEP's exclusion of gasoline additives, such as lead, from the Massachusetts Oil and Hazardous Materials Release Prevention and Response Act's (the Act) "oil exemption" for the purposes of remediation. *Peterborough Oil Company, LLC v. Department of Environmental Protection*, 474 Mass. 443, 50 N.E.3d 827 (Mass. 2016).

The Act, Mass. Gen. Laws ch. 21E, grants DEP broad authority for the cleanup of sites contaminated with oil and hazardous materials. *Id.* at 445. The Act specifically excludes "oil" from the definition of "hazardous materials." Moreover, the definition of "oil" specifically excludes waste oil and "substances which are included in 42 U.S.C. [§] 9601(14)." *Id.* at 446.

Considering the statutory language of the Act, the court reasoned that "[w]hile [the Act] distinguishes between 'oil' and 'hazardous substances,' the [A]ct does not explain how a hazardous substance intermixed with an oil should be treated." *Id.* at 449. The court then compared the "petroleum exclusion" of the federal Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601–9675 (2012) (CERCLA), to the Act's "oil exclusion" but found, *inter alia*, three substantive differences: (1) unlike CERCLA, the Act does not use the term "petroleum;" (2) the Act's definition of "oil" "does not explicitly incorporate CERCLA's exceptions to its enumeration of 'hazardous materials;'" and (3) the Act's definition

of "oil" does not use the term "hazardous materials." *Id.* at 450. As to the Act, the court declined to read "leaded gasoline" into the definition of "oil" "where the definition also provides that lead is not an "oil." *Id.*

Finding the Act's language ambiguous, the court looked to legislative intent. *Id.* Recognizing DEP's requirement to "eliminate any substantial hazard to health, safety, public welfare or the environment . . ." the court found that "interpreting leaded gasoline entirely as an 'oil' would stretch the meaning of the 'oil exemption' to the point that it would become virtually a nullity[;] . . . [s]uch an interpretation would eviscerate the legislative purpose." *Id.* at 451 (citations and quotations omitted).

Based on studies concerning characteristics of petroleum hydrocarbon, the DEP concluded "that petroleum hydrocarbons pose a low safety risk to a public water supply when spilled within a specified radius of a potential water supply." *Id.* at 451. Therefore, the court reasoned that "[e]xpanding the definition [of the oil exemption] to include contaminants either known to be hazardous, or whose properties are less understood, would contravene the legislative mandate." *Id.* at 452.

In sum, the court held that "DEP's interpretation that the oil exemption does not exempt hazardous fuel additives from cleanup requirements reasonably furthers the legislative purpose, and ensures that DEP will exempt from cleanup requirements only those substances that do not pose the very risks the MCP [Massachusetts Contingency Plan] is designed to mitigate." *Id.* at 454.

NEW JERSEY SUPREME COURT EXPANDS TAKE-HOME TOXIC-TORT PREMISES LIABILITY BEYOND SPOUSES

Scott E. Kauff and Nathan Short

Schwartz v. Accuratus Corp., et al., ___ A.3d ___, 2016 WL 3606026 (N.J. 2016). The New Jersey Supreme Court, accepting a Third Circuit certified

question, expanded beyond spouses the scope of the take-home toxic-tort theory of premises liability—a category of claims concerning the transportation of toxins from the workplace to the home. *Schwartz v. Accuratus Corp., et al.*, __ A.3d __, 2016 WL 3606026 (N.J. 2016).

Upon being diagnosed with chronic beryllium disease plaintiff Brenda Ann Schwartz and Paul Schwartz filed suit in Pennsylvania state court against Accuratus Ceramic Corporation (Accuratus), a ceramics facility at which beryllium allegedly was used. *Id.* at *1–*2 & *2 n3. Prior to Brenda’s marriage to Paul, she frequently stayed at Paul’s residence that was also inhabited by Paul’s roommate, Gregory Altemose. *Id.* at *1. During the relevant time period, both Paul and Altemose were employees of Accuratus. *Id.* Brenda “laundered her and Paul’s clothing and towels, as well as the towels used by Altemose [and s]he cleaned her and Paul’s parts of the apartment and common areas.” *Id.*

In a previous opinion concerning take-home toxic-tort liability, *Olivo v. Owens–Illinois, Inc.*, 186 N.J. 394, 895 A.2d 1143 (2006), the court held that an employer had a duty to the spouse of an independent contractor who performed pipe welding services that involved frequent contact with asbestos-containing materials. *Id.* at *3. In *Olivo*, the court explained that the duty of care was the result of the foreseeable risk of harm to certain individual(s). *Id.* In reaching this outcome the court “evaluate[d] factors that affect whether recognition of a duty accords with fairness, justness and predictability,” including (1) the relationship of the parties, (2) the danger of the toxin, (3) the means of mitigating risk, and (4) the public interest in the matter. *Id.* (finding duty to injured spouse).

In *Schwartz*, citing the case-by-case development of tort law, the court declined to provide a bright line test for the boundaries of take-home toxic-tort liability. *Id.* at *5. However, the court clarified that *Olivo* does not stand for the proposition that “a duty for take-home toxic-tort liability cannot extend beyond a spouse. Nor does it base liability on some definition of ‘household’ member, or even

on the basis of biological or familial relationships.” *Id.* at *6. It further provided factors of import to be considered: (1) the relationship of the parties, (2) the opportunity and nature of exposure and (3) the “employer’s knowledge of the dangerousness of exposure, assessed at the time when the exposure to the individual occurred and not later.” *Id.* at *7. The court further explained that in “a non-strict-liability negligence action, the dangerousness of the toxin, how it causes injury, and the reasonable precautions to protect against a particular toxin are relevant in identifying a foreseeable duty by a landowner for off-premises exposure of dangerous toxins.” *Id.*

**NEW JERSEY TOWN, NEW JERSEY TOWN
EMPLOYEE, AND NEW JERSEY DEPARTMENT
OF ENVIRONMENTAL PROTECTION NOT
LIABLE FOR CLAIMS IN DAY CARE MERCURY
EXPOSURE SUITS**

Scott E. Kauff and Nathan Short

Mignano v. Jim Sullivan, Inc., Civ. Nos. L-1309-06, L-1730-06, and L-1823-06, 2016 WL 3004855 (N.J. Super. Ct. App. Div. May 26, 2016). In a consolidated ruling, the New Jersey Appellate Division reversed a trial court’s judgment finding the township of Franklin (the Township), Township employee Robert Errera (Errera), and the Department of Environmental Protection (DEP) liable for claims concerning mercury pollution at the Kiddie Kollege Daycare & Preschool, Inc. (Kiddie Kollege), facility located at a site previously occupied by a thermometer factory operated by Accutherm, Inc. (Accutherm). *Mignano v. Jim Sullivan, Inc.*, Civ. Nos. L-1309-06, L-1730-06, and L-1823-06, 2016 WL 3004855 (N.J. Super. Ct. App. Div. May 26, 2016).

Plaintiffs, children that attended Kiddie Kollege and adults that worked or visited the center, alleged exposure to toxic mercury on the site and brought suit asserting several causes of action, including claims against public entities under the Tort Claims Act (TCA), N.J.S.A. 59:1-1 to 12-3, and 42 U.S.C.A. § 1983 (section 1983). *Id.* at *1–2. After

a trial, the trial court found the Township, Errera, and DEP liable and entered judgment. *Id.* at *8.

The trial court found the Township liable under the TCA relying on evidence of the Township's employees' knowledge of contamination at the Accutherm site and the subsequent failure to avert the development of the site as a day care by withholding necessary construction, occupancy, and zoning permits. *Id.* at *10. The appellate court, however, found that the Township's "actions were immune from liability under N.J.S.A. 59:2-5, which provides that '[a] public entity is not liable for an injury caused by the [duly authorized] issuance . . . of . . . any permit, [or] license. . . .'" *Id.* (alterations in original but for second set of brackets). Citing New Jersey Supreme Court case law, the court found that "the immunity granted to a public entity's permitting activity 'is pervasive and applies to all phases of the licensing function. . . .'" *Id.* at *11 (citation omitted). Moreover, the court reasoned that "[a] public entity cannot be held liable for the exercise of discretion in carrying out government functions." *Id.* The court also denied plaintiffs' assertion that the Township had a duty to warn the public of the danger of the contamination, finding that the site did not present an immediate threat and that the Township therefore "did not have a non-discretionary duty to warn the public of the contamination." *Id.* at *12.

The court then reversed the trial court's finding that the Township was liable for creating a public nuisance. *Id.* at *12–13. The court reasoned that while public nuisance claims against public entities are subject to the TCA, the Township did not own the private property at issue, nor did it create the dangerous condition there—i.e., the issuance of permits did not create the dangerous condition. *Id.* at *13. Further, as recounted above, permitting by the Township is immune under the TCA. *Id.*

The court then reviewed the trial court's application of *Gormley v. Wood-El*, 208 N.J. 72 (2014) (setting forth a four-factor test concerning foreseeability, relative culpability, the nature of the plaintiff/state relationship and a but for test) that

resulted in a finding of Errera's and the Township's liability under section 1983. *Id.* at *13. Section 1983 provides "a means of vindicating rights guaranteed in the United States Constitution . . . " but "does not, by its own terms, create substantive rights." *Id.* (citations and quotations omitted). While the court agreed that Errera was negligent in issuing the zoning permit for the former Accutherm property, it found that his actions were not "so egregious as to shock the conscious" because Errera had no environmental education or experience, was responsible for issuing zoning permits pursuant to the Township's zoning ordinance, and the permit merely indicated allowable use, not that the property was environmentally safe. *Id.* at *14.

As to the Township's liability under Section 1983, the court reviewed and found wanting three theories of liability: (1) state-created danger, (2) failure to train employees, and (3) unlawful policy or custom. *Id.* at *14–17. As to the state-created danger theory, the court found that the Township's issuance of tax sale certificates for the former Accutherm property "was not a direct and foreseeable cause of any harm to plaintiffs, and these actions do not shock the conscious" because the "Township could not anticipate that a daycare center would operate on the site." *Id.* at *4, *14–15. As to the Township's issuance of construction permits, these too were issued prior to any "plan to operate a daycare center on the property." *Id.* at *15. Further, the issuance of zoning and occupancy permits, as in the Errera analysis above, may have been negligent but did not shock the conscience. *Id.*

Concerning the failure-to-train-employees theory, the court disagreed with the trial judge's findings, reasoning that there is no evidence that the Township exhibited "deliberate indifference to the possibility that a tax sale certificate could be issued for a contaminated site and create an unconstitutional state-created danger" because the Township notified potential purchasers of industrial sites for which environmental cleanup responsibility may exist and "there was no evidence that any prior sale of a tax sale certificate in the Township resulted in the use or occupancy of a contaminated site." *Id.* at *16.

With respect to the last theory—unlawful policy or custom—the court found that plaintiffs did not meet their burden of showing that the “Township’s issuance of the tax sale certificates with regard to the Accutherm site were unconstitutional acts.” *Id.* at *17. “These acts did not constitute a state-created danger, and they were not the result of an actionable failure-to-train.” *Id.*

Finally, the court held that while the DEP may be held liable for the actions of its employees, even if negligence and proximate cause were assumed, “DEP is immune from liability for actions that constitute nonfeasance, . . . failure to enforce the law, . . . failure to inspect or negligent inspection, . . . and for discretionary activities.” *Id.* at *18. Further, the court rejected the trial court’s finding that DEP voluntarily assumed remediation responsibilities and thus had a “duty of care as to how the department handled the property pending remediation.” *Id.* The court reasoned that the state Spill Compensation and Control Act placed the duty to clean up the site with responsible parties. *Id.* And, last, the court rejected the plaintiff’s argument that “DEP can be held liable for maintaining or creating a dangerous condition” at the site because DEP never owned or controlled the site, nor is there any evidence that DEP created the danger inherent in the contamination at the site. *Id.*

Scott E. Kauff and **Nathan Short** are Of Counsel with the Law Offices of John K. Dema, P.C. They both concentrate in complex environmental and toxic torts litigation, including representation of natural resource trustees. They may be reached at skauff@demalaw.com and nshort@demalaw.com.

THE JUNE 2016 OVERHAUL TO TSCA

Louis Abrams

On June 22, 2016, President Obama signed the Frank R. Lautenberg Chemical Safety for the 21st Century Act (Lautenberg Act), Pub L. No. 114-182, the first significant revision to the nation’s chemical safety law, the Toxic Substances Control Act (TSCA), in the 40 years since its passing. The Lautenberg Act passed not only the House and Senate with broad bipartisan support but also with endorsement from key players in the environmental and business communities.

This reform effort was the culmination of years of criticism that the original TSCA bill severely hamstrung the ability of the U.S. Environmental Protection Agency (EPA) to regulate harmful chemicals. On this point, critics note that of the estimated 80,000 chemicals currently in use, EPA has ordered testing of only several hundred and restricted only a few.

In response, the Lautenberg Act provides for (1) expanded authority for EPA to regulate new and existing chemicals on the market; (2) preemption of local and state regulations; and (3) new authority for addressing confidential business information. Below is an overview of these changes.

Evaluation of Existing Chemicals

Under the original TSCA law, EPA was required to show that any proposed restriction of an existing chemical in commerce was the “least burdensome” regulation that could address the identified risks. This “least burdensome” analysis required a consideration of the monetary costs that would be incurred by industry in complying with the regulation.

EPA contended that this “least burdensome” requirement was an excessively onerous burden, causing proposed regulations (including a proposed asbestos ban) to be struck down by courts. The Lautenberg Act removes this “least burdensome” language and directs EPA to evaluate existing

chemicals under a two-step analysis: (1) determine if an unreasonable risk to human health and the environment exists without consideration of the costs of any proposed regulation, and (2) if the chemical is deemed to pose an “unreasonable risk,” then consider various regulatory options using cost-benefit information. Pub. L. No. 114-182 § 4. Now, EPA can impose a reasonable regulation but need not necessarily impose the “least burdensome” requirement.

The Lautenberg Act also establishes a process and criteria for EPA to use in reviewing those existing chemicals. For the review process, EPA must categorize chemicals as either “high priority” or “low priority,” and companies must submit information regarding their existing chemicals to EPA. Pub. L. No. 114-182 § 6. EPA must ban, phase out, or impose restrictions on any high-priority chemical presenting an “unreasonable risk.” *Id.* All steps in the review and regulatory process contain judicially enforceable deadlines.

Approval of New Chemicals

TSCA did not originally require affirmative action by EPA before a new chemical was introduced into the marketplace. Rather, if EPA failed to block or limit production of a new chemical (or a new use) for an existing chemical within the 90-180-day review period, then the chemical could be introduced into the marketplace. By contrast, under the Lautenberg Act, EPA will be required to review all new chemicals and significant new uses and affirmatively approve the chemical or use before introduction into the marketplace. EPA’s analysis will hinge on whether the chemical is “not likely to present an unreasonable risk of injury to health or the environment . . . under the conditions of use.” Pub. L. No. 114-182 § 5.

Preemption

Many in the business community have argued that state and local regulations of chemicals created an inconsistent and uneven regulatory environment. The Lautenberg Act attempted to address this concern by providing that final decisions by EPA will preempt all future state laws that restrict

chemicals or are in conflict with EPA actions. That said, any state prohibition or restriction of a chemical enacted before April 22, 2016, and any other state law affecting chemical use enacted before August 31, 2003, will not be preempted. The law also protects two state statutes from being preempted—California’s Proposition 65 and Massachusetts’s Toxic Use Reduction Act. Finally, the Lautenberg Act provides that states can seek a waiver from preemption in deciding to prohibit a certain chemical. Pub. L. No. 114-182 § 13.

Confidential Information

The Lautenberg Act also provides authority to EPA to require anyone claiming confidential information (CI) protection (before or after enactment) to substantiate those claims. EPA must then make a determination whether or not the information should merit protection (or should continue to be protected) from disclosure. Substantiated information would then be protected for 10 years, after which time it would need to repeat the process. If CI protection is denied, EPA will provide a written statement of the reasons and allow for an appeals process. Importantly, CI protection will no longer apply to information on chemicals that are banned or phased out. Pub. L. No. 114-182 § 14. The Lautenberg Act also identifies categories of information that generally may not be protected from disclosure, such as general aggregated production volume information and general descriptions of manufacturing processes. *Id.*

Conclusion

Companies should review their operations to determine what chemicals are currently in use, and what chemicals are planned for future use, in beginning to prepare for implementation of this bill.

Louis Abrams is a commercial litigation attorney at the Philadelphia office of Blank Rome LLP. Louis’s experience includes environmental and product liability matters and contract disputes. He may be reached at Abrams-l@blankrome.com.

CLASS CERTIFICATION ISSUES IN THE FLINT WATER LITIGATION

Ameri R. Klafeta

The Flint, Michigan water crisis has captured the nation's attention and resulted in civil, criminal, and administrative proceedings, including multiple class actions. The Flint residents' stories are compelling, particularly in light of the questions raised regarding whether the situation would have occurred in a community with a different economic and racial makeup. The class action mechanism could be a powerful tool to obtain relief for the people of Flint. As the civil class actions arising from the events in Flint proceed, however, plaintiffs may find that they face an uphill battle to obtain class certification. Although some exceptions do exist, courts frequently find that the individual questions involved in determining injury and causation preclude class treatment in environmental litigation.

The Flint Plaintiffs' Allegations

Plaintiffs in the civil actions have brought claims under various theories against the city of Flint, the state of Michigan, and government employees at all levels, including the governor. Plaintiffs allege personal injuries and property damage resulting from the government's decision to switch the source of Flint's water from Lake Huron to the Flint River, a more corrosive water source. They further allege that this decision, and the defendants' subsequent conduct, resulted in exposure to high levels of lead, with children in particular exhibiting high blood lead levels, as well as an outbreak of Legionnaires' disease.

The litigation that has followed includes class actions brought in federal court by Flint residents and property owners. For example, in *Mays v. Snyder*, 5:15-cv-1402 (E.D. Mich.), plaintiffs seek certification of classes for damages and injunctive relief. Both classes are defined as "all individuals and entities who from April 25, 2014 to present were exposed to toxic Flint water or who owned

property within the City of Flint and experienced injuries and damages to their person or property." The Mays plaintiffs bring claims for constitutional and civil rights violations. The plaintiffs in *Gilcreast v. Lockwood, Andres & Newman, P.C.*, 2:16-cv-11173 (E.D. Mich.), seek to represent a class of "[a]ll persons and entities that have resided in, or owned or rented property in, the City of Flint, Michigan since April 25, 2014." These plaintiffs bring various common law claims, such as negligence, trespass, and nuisance, as well as a procedural due process claim, violations of the Safe Drinking Water Act, and declaratory judgment.

Environmental Class Actions Under Rule 23

To persuade the courts that a class action is the appropriate vehicle for their claims, the Flint plaintiffs will have to establish that the class satisfies Federal Rule of Civil Procedure 23(a)'s numerosity, commonality, typicality, and adequacy requirements. In *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011), the Supreme Court reiterated that commonality requires a common question whose "truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." The damages classes will also require a showing that common questions of law or fact predominate and that the class action is superior to other methods of fairly and efficiently adjudicating the controversy. Fed. R. Civ. P. 23(b)(3). In addition, for their injunctive or declaratory relief classes to proceed, plaintiffs will have to show that defendants "acted or refused to act on grounds that apply generally to the class so that final injunctive relief . . . is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). *Dukes* also cautions that Rule 23(b)(2) does not apply when each class member would be entitled to a "different injunction or declaratory judgment" or individualized award of money damages. *Dukes*, 564 U.S. at 360.

Environmental cases present a host of individual questions that must be resolved in order to provide relief to any plaintiff or putative class member: Was each class member exposed to the

contaminant at issue? If so, to what extent? Did that level of exposure change over time? Did each class member experience personal injuries as a result of that exposure? If so, what were they? Are there other circumstances that could have caused or contributed to each class member's injuries? For diminution in property value claims, did each class member's property value decrease? Was the diminution attributable to any factors other than the contamination? Did the class member buy her property after the contamination had already become known? Whether or not the presence of all of these individual issues—which pertain to injury and causation, not just damages—precludes a class from satisfying Rule 23's requirements depends on the nature of the event giving rise to the dispute.

The Sixth Circuit, whose law will govern the Flint plaintiffs' claims, has explained that a class action may not be appropriate “[i]n complex, mass, toxic tort accidents, where no one set of operative facts establishes liability, [and] no single proximate cause equally applies to each potential class member and each defendant.” *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188, 1197 (6th Cir. 1988). In contrast, it may be a better vehicle where “the cause of the disaster is a single course of conduct which is identical for each of the plaintiffs.” *Id.* Two Sixth Circuit environmental actions illustrate this analysis. In *Sterling v. Velsicol Chemical Corp.*, 855 F.2d 1188 (6th Cir. 1988), the Sixth Circuit affirmed in part certification of a class of plaintiffs who lived near a landfill that contained chemical waste. It held that almost identical evidence would be required to establish the level and duration of contamination, the causal connection between the contamination and the types of injuries suffered, and defendant's liability. *Id.* at 1197. Accordingly, the court found no abuse of discretion in certifying the class. The Sixth Circuit found the major issue distinguishing class members was each plaintiff's damages, which were not subject to generalized proof. *Id.* at 1197, 1200. The court found that the district court erred in attributing all of the representative plaintiffs' alleged injuries to drinking or otherwise using contaminated water, and went

on to review damages individually for each named plaintiff. *Id.* at 1201.

Several years later in *Ball v. Union Carbide Corp.*, 385 F.3d 713 (6th Cir. 2004), the Sixth Circuit affirmed the denial of class certification for residents who lived near a nuclear weapon manufacturing and research facility. A subset of plaintiffs resided in a community that was originally a segregated community for African-American workers and that remained a predominantly African-American community. *Id.* at 717–18. Like some of the Flint plaintiffs, the Ball plaintiffs asserted claims for violations of civil rights statutes, equal protection, and due process. The Sixth Circuit wrote that, even though liability issues may be common to the putative class, by seeking medical monitoring and environmental cleanup of property, the plaintiffs raised individualized issues. *Id.* at 727–28 (“Each individual's claim was . . . necessarily proportional to his or her exposure to toxic emissions or waste.”). The fact that the case involved allegations of racial discrimination did not change the analysis. The court held that the case was “simply not a case about racial discrimination in the abstract, but a case alleging that racial discrimination caused environmental injuries.” *Id.* at 727. The Sixth Circuit distinguished Ball from its earlier decision in *Sterling* because Ball involved multiple defendants with different levels of liability, and thus there was no single course of conduct as in *Sterling*. *Id.* at 728.

As was the case in Ball, courts considering environmental actions more frequently find that common questions regarding defendants' conduct and issues of general causation (i.e., whether a substance can cause the personal injuries at issue) do not overcome all of the individual questions pertaining to injury and causation. In fact, in recent years, three different federal courts of appeal have found certification to be inappropriate because of such individual inquiries. See *Ebert v. General Mills*, No. 15-1735, slip op. at 9 (8th Cir. May 20, 2016) (whether vapor contamination,

if any, impacts each individual property and is attributable to defendant requires “property-by-property assessment”); *Parko v. Shell Oil Co.*, 739 F.3d 1083, 1085–86 (7th Cir. 2014) (reversing certification where class members could have experienced different levels of contamination by different polluters, and diminution in property value of his property not the same for each); *Gates v. Rohm and Haas Co.*, 655 F.3d 255, 270–72 (3d Cir. 2011) (medical monitoring class requires individual inquiries into exposure, individuals’ risk of developing a serious disease, and whether such a regime is reasonably medically necessary; property damages class rejected “[g]iven the potential difference in contamination on the properties”). Differences between class members defeat not just Rule 23(b)(3)’s predominance requirement, but can also render the class insufficiently cohesive for injunctive or declaratory relief pursuant to Rule 23(b)(2). See, e.g., Ebert, slip op. at 12; *Gates*, 655 F.3d at 269.

The Flint plaintiffs will presumably focus on the common issues pertaining to the government’s decision to switch the source of their water to the Flint River and defendants’ subsequent conduct in failing to warn Flint residents or take mitigating action sooner. They will also likely point to general causation—the effects of exposure to lead or the connection between water from the Flint River and Legionnaires’ disease—as a common issue. Ultimately, however, injury and causation, let alone the need for individualized damages awards, may present too many individual issues to certify a class. The nature of the exposure to lead will not be identical for each plaintiff, and even defining a class may be difficult. The corrosive nature of the water means that lead could leach as the water moves through the distribution system. As the water is delivered to individual plaintiffs’ houses, however, the service lines and plumbing inside will differ, resulting in different distributions of and exposure to lead. People may have lived in Flint only briefly during the relevant time period, may have lived in a residence where a water filter was already in place, or may not have consumed tap water at all. There are also numerous defendants implicated in

the various cases with different theories of liability applicable to each. Accordingly, the Flint plaintiffs’ claims will appear more like the complex issues in *Ball*, and less like the more simplified theories of contamination presented in *Sterling*.

D.C. Water Litigation

Perhaps the most instructive predictor of how the Flint class certification issues will fare is the District of Columbia Superior Court’s decision denying class certification in *Parkhurst v. District of Columbia Water and Sewer Authority*, No. 2009 CA 000971 B, 2013 WL 1438094 (D.C. Super. Ct. Apr. 8, 2013). In that case, parents of minor children in the District of Columbia brought an action against their water provider, the District of Columbia Water and Sewer Authority (“D.C. Water”), based on elevated levels of lead in tap water. D.C. Water supplied water provided by the U.S. Army Corps of Engineers, who changed the disinfectant in the water in 2000. This change caused an increase in the leaching of lead in some homes serviced by service lines with lead or interior pipes or fixtures with lead. Plaintiffs’ claims against D.C. Water were largely based on failure to warn.

The court denied certification on several grounds. It took issue with plaintiffs’ class definition, which as defined, could include a “great many” members who did not suffer injury because, for example, they only resided in D.C. for a short period of time, they consumed little tap water, their blood lead levels (BLLs) were elevated for only a short time or only to a limited extent, or they thrived by behavioral and cognitive measures. Notably, the court did not find persuasive plaintiffs’ contention that there is no “safe” level of lead exposure, and it pointed to plaintiffs’ own authorities that stated that a BLL of 10 or higher is a “level of concern, not a predictor of a significant likelihood of harm.” In discussing predominance, the court wrote that “[d]ifferent class members were exposed to different amounts of lead from potentially different sources for different periods of time, and the cognitive and behavioral problems that lead can cause also

result from factors other than lead.” It also found damages issues individualized because each class member would have to prove what damages resulted from the injury proximately caused by ingestion of lead in the supplied water.

Other Class Certification Issues That May Arise

Use of Statistical Evidence: The potential use of statistical evidence to prove injury and causation may arise in the Flint litigation. This is an area that the Supreme Court has addressed twice in recent years. In *Dukes*, the Court rejected the “novel project” of using a sample of class members in a sex discrimination case to determine liability and back pay and then applying the percentages derived to the entire class. *Dukes*, 564 U.S. at 367. More recently, however, in *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036 (2016), the Supreme Court permitted the use of statistical evidence of average “donning and doffing” time for protective gear in an action brought by processing plant employees for overtime pay under the Fair Labor Standards Act of 1938. The *Tyson* decision was careful to warn that “[t]he fairness and utility of statistical methods in contexts other than those presented here will depend on facts and circumstances particular to those cases.” *Id.* at 1049. The Supreme Court also relied heavily on the fact that the defendant in *Tyson Foods* failed to keep records that it was statutorily required to keep, potentially further limiting the decision’s application in future actions. *Id.* at 1050.

The extent to which the district court applies a Daubert analysis of any statistical methodology at the class certification stage may also impact the certification decision. In the past, courts have disagreed about the need to conduct such an analysis when deciding class certification. In *Dukes*, however, the Supreme Court strongly suggested that Daubert plays a role in that decision. *Dukes*, 564 U.S. at 354 (“The district court concluded that Daubert did not apply to expert testimony at the certification stage of class-action proceedings. We doubt that is so. . . .”); see

also *Tyson Foods*, 136 S. Ct. at 1049 (defendant “did not raise a challenge to [plaintiffs’] experts’ methodology under Daubert; and, as a result, there is no basis in the record to conclude it was legal error to admit that evidence”).

Issue Certification: The Flint plaintiffs may also try to seek certification of common issues regarding defendants’ conduct and lead’s effects under Federal Rule of Civil Procedure 23(c)(4). That rule states: “When appropriate, an action may be brought or maintained as a class action with respect to particular issues.” Fed. R. Civ. P. 23(c)(4). The use of issue certification in environmental cases is often rejected, however, where liability determinations are complex and cannot be separated from individual issues, and substantial questions would be unresolved after trial of the common issue. See, e.g., *Gates*, 655 F.3d at 274; *Parkhurst*, 2013 WL 1438094.

Conclusion

Although environmental class actions are frequently found to be inappropriate for class treatment, courts will certify classes in certain circumstances. The complex issues in the Flint litigation and the individual inquiries involved in determining injury, causation, and damages may, however, pose significant obstacles to class certification, leaving plaintiffs to proceed individually.

Ameri R. Klafeta is an attorney with Eimer Stahl LLP in Chicago. She has broad experience in complex and class action litigation, including environmental and mass tort matters. She may be reached at aklafeta@eimerstahl.com.

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