CHAPTER 8

Emerging Areas of Litigation and Significant Legal Issues

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This chapter provides an overview of emerging areas of toxic tort litigation and significant legal issues related to such litigation. Evolving areas of toxic tort litigation include climate change–based nuisance actions, groundwater and subsurface contamination, hydraulic fracturing, and workplace exposure. This chapter also will address recent case law on issues relevant to the toxic tort litigator, including new developments and emerging patterns on issues such as class actions, damages, experts, medical monitoring, and the use of risk assessments to prove causation in toxic tort cases. One common theme is prevalent in all of these issues—toxic tort litigation remains a highly dynamic area of law requiring even the most skilled practitioner to stay abreast of the latest developments.

Emerging or Evolving Areas of Toxic Tort Litigation

Hydraulic Fracturing

As part of a renaissance of increased domestic oil and gas production, U.S. oil and gas producers are using improved techniques to access oil and gas reserves that were previously unavailable, as well as rejuvenating formerly diminished wells. One method for increasing production is through the use of hydraulic fracturing, also known as "fracking." During the fracturing process, engineered fluids containing chemical and natural additives are pumped under high pressure into a natural gas or oil well to create and hold open fractures in the oil or natural gas formation. These fractures, in turn, allow oil and gas to flow to the well by increasing the exposed surface area of the rock in the formation.[1]

1. *See* Mary Tiemann & Adam Vann, *Hydraulic Fracturing and Safe Drinking Water Act Issues,* Congressional Research Service 7-5700 (Apr. 10, 2012), *available at* http://www.crs.gov (citing American Petroleum Institute, *Hydraulic Fracturing*, http://www.api.org/policy/exploration/hydraulicfracturing).

As the use of hydraulic fracturing has increased, so too have concerns about perceived potential negative environmental and human health impacts. Many concerns about hydraulic fracturing center on potential risks to public health and the environment, including contamination of drinking water resources, increased groundwater withdrawal, creation of wastewater and contaminated waste, destruction of habitat, and even seismic activity.

The most significant recent developments in hydraulic fracking involve the unprecedented amount of state legislative and regulatory activity. In the absence of clear federal statutory or regulatory governance of fracking, various states have begun modifying existing or promulgating new statutory and regulatory guidance. Thus, the practitioner must closely examine the respective state regulatory structure for possible new regulatory schemes that make historic governance or case law potentially obsolete.

In addition to spawning increases in regulatory activity, increased hydraulic fracking has resulted in more traditional private tort lawsuits claiming personal injury, making medical monitoring claims, and asserting traditional property damage claims for contamination to surface or groundwater. In addition, fracking has prompted numerous claims for various forms of injunctive relief to prohibit fracking, including requests to impose moratoriums on fracking.

It appears from a survey of cases on file that plaintiffs have generally asserted claims involving traditional negligence, nuisance, trespass, and violation of state regulatory provisions. Several recent traditional tort cases bear mentioning. A representative case is *Fiorentino v. Cabot Oil & Gas Corp*.[2] In *Fiorentino,* the plaintiffs brought a claim alleging that the defendants negligently conducted hydraulic fracturing and other natural gas production activities, allegedly releasing methane, natural gas, and other toxins onto the plaintiffs' land and into their groundwater. Their causes of action included: (1) a claim pursuant to the Pennsylvania Hazardous Sites Cleanup Act (HSCA); (2) negligence; (3) private nuisance; (4) strict liability; and (5) medical monitoring.

Interestingly, the defendants had previously entered into a consent order and agreement (COA) with the Pennsylvania Department of Environmental Protection (PDEP) agreeing to implement corrective action to address some of the same environmental violations that form the basis of the plaintiffs' claims, including allegations that faulty gas well casings caused the alleged contamination of the plaintiffs' private water supplies. In response to the defendants motion to strike and motion to dismiss, the court ruled that the plaintiffs could proceed with the litigation.[3]

This ruling leaves unanswered whether operators will be required to defend both private causes of action and enforcement actions by a regulatory agency simultaneously for the same alleged activities or violations. A second unanswered issue was whether fracking

2. 750 F. Supp. 2d 506 (M.D. Pa. 2010).
3. *Id.* at 516.

was deemed to be an abnormally dangerous or ultrahazardous activity as a matter of law, subjecting the defendants to strict liability (without proof of fault) for harm caused by their activities.

When used in conjunction with a fracking case, strict liability encompasses several theories, but the operative one in natural gas litigation is probably the abnormally dangerous theory. Since liability is, however, limited to the type of harm that makes the activity abnormally dangerous, several factors influence whether an activity is considered abnormally dangerous: the existence of a high degree of risk of great harm; the inability to eliminate the risk through reasonable care; whether the activity is unusual; whether the activity is inappropriate for the area; and the extent to which the activity's dangerousness outweighs its value to the community.[4]

A good representative case regarding the assertion of strict liability claims against an oil and gas producer is *Berish v. Southwestern Energy Production Co*.[5] In *Berish*, the plaintiffs claimed that gas drilling is, by definition, abnormally dangerous. The court declined to dismiss the strict liability claim prior to discovery, suggesting that theoretically natural gas by definition may be an abnormally dangerous activity. The court noted, however, that the claim may be difficult to prove. A second representative case is *Tucker v. Southwestern Energy Co*.[6] In *Tucker*, the court addressed whether hydraulic fracking was an ultrahazardous activity for strict liability purposes and whether air contamination may be considered a trespass. In a consolidated case, one group of plaintiffs asserted that the defendants' fracking had contaminated their water well, while another group of plaintiffs asserted that the fracking had contaminated the air on their property. They alleged claims of nuisance, trespass, negligence, and strict liability, as well as injunctive relief in the form of monitoring.

The court denied the motion to dismiss prior to summary judgment, arguing that determination of whether hydraulic fracking was an ultrahazardous activity was a question of law, and such a fact-intensive determination would be decided on a full record at the summary judgment stage. The court stated that fracking would be considered an ultrahazardous activity if the companies' production activities (1) necessarily present a risk of serious harm that cannot be eliminated by the exercise of the utmost care, and (2) are not a matter of common usage.[7]

In *Evenson v. Antero Resources*, a Colorado district court ruled that declaratory relief claims to halt drilling operations, brought in anticipation of fracking that had not yet occurred, could not be supported.[8] The class action lawsuit sought to force the defendants

4. *Id*.
5. 763 F. Supp. 2d 702 (M.D. Pa. Feb 3, 2011).
6. 2012 U.S. Dist. LEXIS 20697 (E.D. Ark. Feb. 17, 2012).
7. *Id*. at 3.
8. Case No. 2011 CV 5118 (Dist. Ct., Denver Cnty.) (Aug. 12, 2012).

to establish a medical monitoring fund to cover research and treatment of any illnesses that can be linked to drilling activities, as well as use state-of-the-art safety measures to safeguard the health of those living near the drilling rigs. The initial complaint also sought compensation to homeowners for lost property values related to the presence of drilling nearby. In response to a motion to dismiss, the plaintiffs amended their complaint to a single claim of declaratory relief in the form of a permanent injunction prohibiting the plaintiffs from conducting oil or gas drilling activities near the retirement community of Battlement Mesa in Colorado. While not explicitly alleged as an anticipatory nuisance case, the plaintiffs in *Evenson* alleged acute health effects (burning eyes and throats) and regulatory violations largely based on potential future injuries and conditions such as water contamination, chemical exposures, and personal injuries as the basis for the suit.

The court ruled that it lacked jurisdiction to grant declaratory relief because Colorado's Oil and Gas Conservation Act and Administrative Procedures Act provided a statutory mechanism to seek judicial review of a drilling permit. Second, the claim was not ripe as no drilling had occurred and the plaintiffs could not support their tort claims until injuries began to occur.

An emerging area of litigation involving hydraulic fracturing involves the extent to which a municipality may regulate or govern hydraulic fracturing within its corporate boarders. *Anschutz Exploration Corp. v. Town of Dryden*,[9] a case of first impression in New York, could be a sentry case for many other cases that might arise throughout the United States as opponents of hydraulic fracturing attempt to stop the practice. In *Anschutz*, the New York state trial court was asked to determine whether a local municipality may use its power to regulate land use to prohibit exploration for, and production of, oil and natural gas by use of high-volume hydraulic fracturing. The court held that the town of Dryden's ban on gas drilling fell within the authority of local governments to regulate local land use, affirming the authority of towns to ban drilling—including fracturing—within their borders.[10] In reaching its decision, the court noted that Pennsylvania and Colorado courts have considered the issue of the use of the local zoning power to regulate the location of natural gas and reached the same conclusion.

Groundwater and Subsurface Contamination

While groundwater and subsurface contamination have long been issues of consequence to the toxic tort practitioner, state tort law claims and their interrelationship with state environmental laws are gaining prominence as the causes of action of choice for many claimants. The use of state tort law to address groundwater and subsurface contamination raises a myriad of ancillary issues, such as statutes of limitation and the interrelationship

9. 940 N.Y.S.2d 458 (Sup. Ct. 2012).
10. *Id.* at 457–69.

of these statutes on various common law doctrines, including the continuing tort doctrine. Other issues arising in litigation asserting state law claims for groundwater and subsurface contamination include recoverable costs under state environmental laws and preclusion of state tort law claims by state environmental laws.

In *Abnet v. Coca-Cola Co.*, neighboring property owners brought an action in Michigan federal court alleging that Coca-Cola's spraying of wastewater on its property contaminated groundwater in violation of Michigan law.[11] More specifically, the plaintiffs alleged that the spraying depleted oxygen in the affected soil, creating conditions that caused naturally occurring heavy metals such as manganese, iron, lead, and arsenic to leach into groundwater. The plaintiffs claimed a variety of harms resulting from the allegedly contaminated groundwater, including property damage, loss in property value, and physical ailments such as gastrointestinal problems, developmental disabilities, kidney dysfunction, and nausea. The plaintiffs asserted seven different causes of action, including negligence and/or gross negligence, negligence per se, nuisance, trespass, strict liability based on abnormally dangerous activity, Part 201 of Michigan's Natural Resources and Environmental Protection Act (NREPA), and the Michigan Environmental Protection Act (MEPA).[12]

Coca-Cola moved to dismiss four of the seven claims—namely, negligence per se, trespass, the plaintiffs' claims under 201 of NREPA, and the plaintiffs' claims brought pursuant to MEPA. With respect to negligence per se, Coca-Cola asserted that such a claim was not an independent cause of action under Michigan law. The federal district court agreed, holding that while negligence per se is a burden-shifting mechanism under a claim of negligence, the plaintiffs cannot maintain a separate claim of negligence per se.[13]

With respect to trespass, the district court stated that to recover in Michigan, a plaintiff must show "an unauthorized direct or immediate intrusion of a physical, tangible object onto land over which the plaintiff has a right of exclusive possession."[14] The court found persuasive dicta from prior Michigan cases that stated "one does not have ownership or exclusive possession over water beneath one's property."[15] Accordingly, the court held that Michigan law does not recognize claims of trespass where groundwater contamination is the only alleged injury.

11. 786 F. Supp. 2d 1341 (W.D. Mich. 2011).
12. *Id.* at 1343.
13. *Id.* at 1345 (citing Zeni v. Anderson, 243 N.W.2d 270 (Mich. 1976) ("While some Michigan cases seem to speak of negligence per se as a kind of strict liability . . . the negligence per se approach just does not work."); Klanseck v. Anderson Sales & Serv., Inc., 393 N.W.2d 356 (Mich. 1986) ("The fact that a person has violated a safety statute may be admitted as evidence bearing on the question of negligence . . . evidence of violation of a penal statute creates a rebuttable presumption of negligence.")).
14. *Id.* (citing Adams v. Cleveland Cliffs Iron Co., 602 N.W.2d 215 (Mich. Ct. App. 1999)).
15. *Id.* at 1346 (citing Postma v. Cnty. of Ottawa, 2004 Mich. App. LEXIS 2307, at *9 (Mich. Ct. App. Sept. 2, 2004)).

The federal district court also dismissed the plaintiffs' claims under Part 201 of NREPA. As noted by the court, NREPA defines "'costs of response activity'" to mean "'all costs incurred in taking or conducting a response activity, including enforcement costs.'"[16]

> A "response activity" is, in turn, "evaluation, interim response activity, remedial action, demolition, or the taking of other actions necessary to protect the public health, safety, or welfare, or the environment or the natural resources. Response activity also includes health assessments or health effect studies carried out under the supervision, or with the approval of, the department of public health and enforcement actions related to any response activity."[17]

The plaintiffs sought to recover the cost of bottled water for drinking and cooking, and for the replacement or repair of plumbing fixtures and other personal property. The district court held that these costs were not recoverable under NREPA because "Part 201 allows recovery of costs for response activities, which are activities taken to identify and remedy environmental or health hazards" and "not reimbursement of private property damage."[18]

Finally, the district court considered Coca-Cola's motion to dismiss the plaintiffs' claims for injunctive and declarative relief under MEPA. Coca-Cola asserted that courts do not have subject matter jurisdiction to review an ongoing environmental response directed by Michigan Department of Natural Resources & Environment (MDNRE). The federal court noted that while decisions by MDNRE are ultimately subject to judicial review, Part 201 of NREPA states that a court "does not have jurisdiction to review challenges to a response activity selected or approved by the [MDNRE]" until "after the completion of the response activity."[19] The plaintiffs, however, stated that they were not challenging MDNRE decisions, but were merely seeking additional response activities under MEPA, which, they alleged, provided citizens with the right to seek declaratory and equitable relief "for the protection of the air, water, and other natural resources and the public trust in these resources from pollution, impairment, or destruction." The plaintiffs alleged that because they are not seeking to enjoin or directly interfere with the response activities mandated by MDNRE, the preenforcement bar to judicial review did not apply.

The federal court rejected this argument stating, "seeking injunctive relief requiring Defendants to perform additional response activities not required by MDNRE is tantamount to challenging the adequacy of MDNRE's decisions with respect to remedial action."[20] The court acknowledged that while MEPA provides an outlet for such a claim,

16. *Id.* (quoting Mich. Comp. Laws § 324.20101(ff)).
17. *Id.* (quoting Mich. Comp. Laws § 324.20101(ee)).
18. *Id.*
19. *Id.* at 1347 (citing Mich. Comp. Laws § 324.20137(4)(d)).
20. *Id.*

the Michigan courts have held that MEPA is subject to the preenforcement rule. Accordingly, the court held that it lacked subject matter jurisdiction to review MDNRE decisions until the remedial activities deemed necessary by MDNRE have been completed and that this extended to petitions for injunctive relief, which would require additional remedial actions.

This case substantially limits the extent to which property owners in Michigan may rely upon state environmental laws to recover damages for contaminated groundwater. Similarly, property owners in New Jersey encountered difficulty with state law to recover damages related to alleged hazardous waste leachate. This time, however, the property owners did not rely on state environmental laws, but rather relied upon state common law. Importantly, the following case also discusses the interrelationship of common law claims to state doctrine regarding the applicable statute of limitations for such claims.

Haddonbrook Associates v. General Electric Co. arose out of hazardous waste discharges in Voorhees Township, New Jersey.[21] In the 1970s, hazardous waste was discarded into a landfill located on two different parcels of land, causing pollution to the surrounding environment. General Electric Company (GE) owned one such lot and Voorhees Township owned the other. The plaintiff owned land that was adjacent to the Voorhees Township lot.

In 1991, GE filed an action against the operator of the landfill and several other parties for costs that it incurred in remediating the environmental contamination at the landfill site. Three years later, Plantation Homes, Inc. (Plantation), the plaintiff's predecessor in title, moved to intervene in GE's action. In its proposed complaint, Plantation claimed that GE and Voorhees Township, along with the defendants, had illegally disposed of hazardous waste and contaminated the surrounding environment, thereby causing irreparable harm to Plantation. Joseph Samost, Plantation's president and a managing partner of the plaintiff, provided a supporting certification for the motion. Plantation asserted negligence and strict liability claims. In 1995, Plantation's motion to intervene was denied.[22]

In 2007, almost thirteen years after the denial of Plantation's motion to intervene, the plaintiff filed an action against GE in New Jersey state court, which GE removed to federal court. In the 2007 complaint, the plaintiff asserted that due to the disposal of hazardous waste on GE's property, its property had become contaminated and that it was undevelopable for any commercial or residential use. The plaintiff included negligence, strict liability, and nuisance claims in its complaint.

The federal district court granted summary judgment to GE on statute of limitations grounds. The district court reasoned that because Samost attested to his knowledge of the facts in Plantation's proposed 1994 complaint, and because his knowledge was imputed to the plaintiff, the plaintiff knew of its claims against GE at least thirteen years prior to its filing suit against GE. The district court rejected the plaintiff's continuing torts theory

21. 427 Fed. App'x 99 (3d Cir. 2011).
22. *Id.* at 100–01.

because the plaintiff "failed to allege any 'new injury' within the limitations period necessary to apply the continuing tort doctrine" and held the complaint was barred by New Jersey's six-year statute of limitations.[23]

The Third Circuit affirmed. The Third Circuit first reviewed the continuing tort doctrine, citing case law from the New Jersey Supreme Court that governed the doctrine's application.[24] The Third Circuit noted that the doctrine is more often implicated in nuisance claims. The Third Circuit cited the New Jersey Supreme Court's explanation in *Russo Farms, Inc. v. Vineland Board of Education*:

> When a court finds that a continuing nuisance has been committed, it implicitly holds that the defendant is committing a new tort, including a new breach of duty, each day, triggering a new statute of limitations. That new tort is an "alleged present failure" to remove the nuisance, and "[s]ince this failure occurs each day that [defendant] does not act, the [defendant's] alleged tortious inaction constitutes a continuous nuisance for which a cause of action accrues anew each day." . . . Essentially, courts in those cases impose a duty on the defendant to remove the nuisance . . . . Because the defendant has a duty to remove the nuisance, and because the defendant's failure to remove the nuisance is a breach of that duty, each injury is a new tort. The plaintiff is therefore able to collect damages for each injury suffered within the limitations period.[25]

The Third Circuit noted that a continuing tort must contain every element of a new tort, including a new breach of duty, and that the new injury must result from a new breach of duty. The district court had found that the plaintiff failed to allege any "new injury" within the limitations period, which was necessary to trigger the continuing tort doctrine, and the Third Circuit agreed with the district court's reasoning and conclusion that the plaintiff failed to allege a continuing nuisance.[26] The Third Circuit also agreed with the district court that the plaintiff could not establish its negligence and strict liability claims, and failed to allege any conduct within the limitations period to justify the application of the continuing tort doctrine. The Third Circuit concluded that because the plaintiff's "nuisance, negligence, and strict liability claims do not constitute continuing torts under *Russo Farms*, they are barred by the statute of limitations."[27]

These cases evidence the particular challenges property owners potentially face when relying on state laws to recover damages stemming from environmental contamination.

23. *Id.* at 102 (citing N.J.S.A. § 2A:14-1).
24. *Id.* at 101 (citing Russo Farms, Inc. v. Vineland Bd. of Educ., 675 A.2d 1077 (N.J. 1996)).
25. *Id.* (quoting *Russo Farms*, 675 A.2d at 1084).
26. *Id.* at 102.
27. *Id.* at 102–03.

Climate Change–Based Nuisance Actions

For those seeking to "fill the gap" in the absence of comprehensive federal legislation addressing climate change, common law nuisance was the cause of action of choice. The cases discussed in this section highlight the role that nuisance law has played in the climate change–based litigation area, and also addresses whether there exists insurance coverage to address the impacts of climate change.

The first significant climate change case was *Native Village of Kivalina v. ExxonMobil Corp.*[28] In that case, an Eskimo village brought an action against multiple oil, energy, and utility companies for federal common law nuisance, based on the emission of greenhouse gases that the village alleged contributed to global warming and caused erosion of Arctic sea ice. The defendants filed motions to dismiss for lack of subject matter jurisdiction. The United States District Court for the Eastern District of California held that the village's federal nuisance claim was barred by the political question doctrine and also was barred due to lack of standing under Article III of the U.S. Constitution.

In determining nuisance was barred by the political question doctrine, the district court examined the six independent factors set forth by the U.S. Supreme Court in *Baker v. Carr* that govern whether a nonjusticiable political question exists. The six independent *Baker* factors analyzed by the court are: "[1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; [2] a lack of judicially discoverable and manageable standards for resolving it; [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question."[29]

First, the district court examined "whether there is 'a textually demonstrable constitutional commitment of the issue to a coordinate political department.'"[30] The defendants argued that the village failed this first inquiry because allowing the village to proceed with its global warming claim would run afoul of the first *Baker* factor as "it would intrude upon the political branches'" constitutionally committed authority over foreign policy. However, the district court held that merely because global warming had an indisputable international dimension, this fact did not automatically render it a nonjusticiable controversy. As such, the court held that the first *Baker* factor was not implicated.

Second, the district court examined "whether there was 'a lack of judicially discoverable and manageable standards' and whether a decision is impossible 'without an initial

28. Native Vill. of Kivalina v. Exxon Mobil Corp., 663 F. Supp. 2d 863 (E.D. Cal. 2009).
29. Baker v. Carr, 369 U.S. 186 (1962).
30. *Native Vill. of Kivalina*, 663 F. Supp. 2d 871–72 (citing *Baker*, 369 U.S. at 217).

policy determination of a kind clearly for nonjudicial discretion.'"[31] The village asserted that "[t]he judicially discoverable and manageable standards here are the same as they are in all nuisance cases."[32] Rejecting this assertion, the district court held that the village's argument was flawed because it overlooked the fact that in evaluating a nuisance claim, the focus is not entirely on the unreasonableness of the harm, but also that courts must balance the utility and benefit of the alleged nuisance against the harm caused. The district court found that the village failed to articulate any particular judicially discoverable and manageable standards that would guide a fact-finder in rendering a decision that is principled, rational, and based upon reasoned distinctions.[33] The court concluded that the second *Baker* factor precluded judicial consideration of the nuisance claim.

Finally, the district court found the third *Baker* factor equally problematic. Specifically, whether the village's case would require the court to make an initial policy determination "of a kind clearly for nonjudicial discretion." The court noted, "[a] political question under this factor 'exists when, to resolve a dispute, the court must make a policy judgment of a legislative nature, rather than resolving the dispute through legal and factual analysis.'"[34] The plaintiffs alleged that there was no need for the court to delve into the task of retroactively determining what emission limits should have been imposed. The court found this argument flawed, holding the plaintiffs were in fact asking the court to make an initial policy decision in contravention of the political question doctrine.[35] As such, the court held that the plaintiffs' claims were barred by the political question doctrine.[36]

Having concluded its examination of the *Baker* factors and determining that the plaintiffs' claims were barred by the political question doctrine, the district court next turned to the defendants' allegation that the village lacked Article III standing. The district court pointed out that "[t]he standing dispute in this case centers on what the Supreme Court has defined as 'the causation requirement' of standing, i.e., fair traceability."[37] The court noted that to satisfy the causation requirement, the plaintiff must "demonstrate a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court."[38] The village conceded that it was not able to trace its alleged injuries to any particular defendant. It claimed, however, that it did not need to do so. Instead, the village argued it "need only allege that Defendants 'contributed' to their injuries." The village admitted that its version of Article III standing

31. *Id.* at 873 (citing Wang v. Masaitis, 416 F.3d 992, 996 (9th Cir. 2005)).
32. *Id.* at 874.
33. *Id.* at 875 (citing Alperin v. Vatican Bank, 410 F.3d 532, 552 (9th Cir. 2005)).
34. *Id.* at 876 (citing EEOC v. Peabody W. Coal Co., 400 F.3d 774, 784 (9th Cir. 2005)).
35. *Id.* at 877.
36. *Id.* at 883.
37. *Id.* at 877 (citing Bennett v. Spear, 520 U.S. 154, 167 (1997)).
38. *Id.* at 877–78 (citing Salmon Spawning & Recovery Alliance v. Gutierrez, 545 F.3d 1220, 1227 (9th Cir. 2008); Ecological Rights Found. v. Pacific Lumber Co., 230 F.3d 1141, 1152 (9th Cir. 2000)).

stemmed from cases brought under the Clean Water Act, which found "the 'fairly traceable' requirement 'is not equivalent to a requirement of tort causation,' and as such, the plaintiffs 'need only show that there is a '*substantial likelihood*' that defendant's conduct caused plaintiffs' harm.'"[39] However, the district court contrasted these cases finding that there was a critical distinction between the Clean Water Act cases and a federal nuisance law claim and that the village therefore lacked standing. Significantly, in Clean Water Act cases, the court noted that when a plaintiff exceeds "Congressionally-prescribed federal limits" there arises a presumption that "there is a 'substantial likelihood' that defendant's conduct caused plaintiffs' harm."[40] The Court stated that only when this presumption exists, is "it permissible for the plaintiff to rely on the notion that the defendant 'contributed' to plaintiff's injury on the ground that it may not be possible to trace the injury to a particular entity."[41]

Two years later, the U.S. Supreme Court closed the door on the use of federal common law nuisance claims to address climate change in *American Electric Power Co. v. Connecticut*.[42] Asserting federal common law nuisance claims, eight states, New York City, and three land trusts separately sued four electric power plants seeking abatement of contributions to global warming. The United States District Court for the Southern District of New York dismissed the plaintiffs' federal common law nuisance claims as nonjusticiable under the political question doctrine.[43] The plaintiffs appealed. The Second Circuit vacated and remanded, but the Supreme Court granted *certiorari*.

The Supreme Court explained that the lawsuits at issue in the instant case began well before EPA initiated efforts to regulate greenhouse gases. In the instant case, the plaintiffs asserted that the defendants' emissions substantially and unreasonably interfered with public rights, in violation of the federal common law nuisance, or, in the alternative, of state tort law. The plaintiffs wanted the courts to place an initial cap on the carbon dioxide emissions from each defendant, to be further reduced annually. The Court held that the Clean Air Act and EPA's rulemaking actions displace any federal common-law right to seek abatement of carbon dioxide emissions from fossil-fuel fired power plants. According to the Court, Congress determined that EPA is the party best suited to serve as the regulator of emissions, and therefore empowered EPA to set greenhouse gas emissions limits; federal judges do not have concurrent jurisdiction to do so.[44] The Court, however, did not reach the issue of whether any state law nuisance claims that the plaintiffs could have asserted were preempted by the Clean Air Act.

39. *Native Vill. of Kivalina*, 663 F. Supp. 2d at 878.
40. *Id.* at 879.
41. *Id.* at 880.
42. 131 S. Ct. 2527 (2011).
43. Connecticut v. Am. Elec. Power Co., 406 F. Supp. 2d 265 (S.D.N.Y. 2005).
44. *Am. Elec. Co.*, 131 S. Ct. at 2535–40.

In *Comer v. Murphy*, it appeared that the Fifth Circuit was perfectly situated to address the issue of whether state nuisance law claims were preempted by the Clean Air Act.[45] Owners of real property along the Mississippi Gulf Coast brought a putative class action against oil and energy companies asserting a variety of claims, including private and public nuisance claims. The plaintiffs claimed that the operation of these oil and energy companies caused emissions of greenhouse gases that contributed to global warming and added to the ferocity of a hurricane that destroyed their property. The district court granted the defendants' motion to dismiss. The plaintiffs appealed.

Unlike *Kivalina*, the Fifth Circuit ruled that the plaintiffs had Article III standing to bring nuisance, trespass, and negligence claims because they satisfied the traceability requirement.[46] However, the Fifth Circuit held that the plaintiffs lacked Article III standing to bring claims for unjust enrichment, fraudulent misrepresentation, and civil conspiracy because they did not have federal prudential standing.[47] The Fifth Circuit defined "prudential standing" as standing, "which embodies 'judicially self-imposed limits on the exercise of federal jurisdiction . . .'"[48] With respect to the plaintiffs' unjust enrichment, fraudulent misrepresentation, and civil conspiracy claims, the circuit stated, "[e]ach of the plaintiffs' second set of claims presents a generalized grievance that is more properly dealt with by the representative branches and common to all consumers of petrochemicals and the American public."[49]

The Fifth Circuit also ruled, unlike *Kivalina*, that the plaintiffs' nuisance, trespass, and negligence claims did not present a nonjusticiable political question. The circuit noted, "[a] question, issue, case or controversy is 'justiciable' when it is constitutionally capable of being decided by a federal court."[50] "A 'nonjusticiable' question is also known as a 'political question,' denoting that it has been constitutionally entrusted exclusively to either or both the executive or the legislative branch, which are called the 'political' or 'elected' branches."[51] The Fifth Circuit stated that "[a] case or question that is 'political' only in the broad sense, i.e., that it has political implications or ramifications, is capable of being decided constitutionally by a federal court, so long as the question has not been committed by constitutional means exclusively to the elected or political branches." In holding that the plaintiffs' nuisance, trespass, and negligence claims did not present a nonjusticiable political question, the circuit held that "[t]he questions posed by this case . . . whether defendants are liable to plaintiffs in damages under Mississippi's common law torts of

45. Comer v. Murphy Oil, 607 F.3d 1049 (5th Cir. 2010).
46. Comer v. Murphy Oil, 585 F.3d 855, 867 (5th Cir. 2009).
47. *Id.* at 868.
48. *Id.* (citing Allen v. Wright, 468 U.S. 737, 751 (1984)).
49. *Id.*
50. *Id.* at 869.
51. *Id.*

nuisance, trespass or negligence, are justiciable because they plainly have not been committed by the Constitution or federal laws or regulations to Congress or the president."[52]

Appellee applied for *en banc* rehearing and a vote was taken. By six to three, the nine qualified judges voted to grant rehearing *en banc*. The grant of rehearing *en banc* "vacate[d] the panel opinion and judgment of the court."[53] However, shortly thereafter, one of the six judges who voted for an *en banc* rehearing recused herself thereby causing the circuit to lose its quorum. The Fifth Circuit ruled, "a court without a quorum cannot conduct judicial business."[54] There existed no rule allowing for reinstatement of the panel decision in the event there was a loss of quorum after a grant of rehearing *en banc*. As such, the holding of the district court, dismissing the plaintiffs' claims against the defendants, remains in effect.

These cases indicate that while federal nuisance law may not be an avenue for recovery of damages stemming from global climate change, state common law nuisance claims may still be a viable legal theory under which complainants may seek relief.

In *AES Corp. v. Steadfast Insurance Co.*, the Virginia Supreme Court addressed an issue tangentially related to the assertion of nuisance claims to abate the effects of climate change—the issue of insurance coverage for nuisance claims.[55] A commercial general liability (CGL) insurer (Steadfast) for an electric company (AES) brought a declaratory judgment action that it owed no duty to defend AES against the nuisance claims asserted by the Native Village of Kivalina against AES' alleged contribution global warming. The trial court entered judgment in Steadfast's favor. AES appealed to the Virginia Supreme Court.

The Virginia Supreme Court held that damage to the Alaskan island, which made the native village uninhabitable (allegedly as a result of global warming), was not caused by an "accident" and, thus, was not caused by "occurrence" within meaning of the CGL policy.[56]

In each of the CGL policies at issue, Steadfast agreed to defend AES against suits claiming damages for bodily injury or property damage, if such damages were "caused by an 'occurrence.'" The policies defined an "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful condition." The Virginia Supreme Court found that the terms "occurrence" and "accident" are "synonymous and . . . refer to an incident that was unexpected from the viewpoint of the insured."[57] The court, citing its previous holdings, stated, "an 'accident' is commonly understood to mean 'an event which creates an effect which is not the natural or probable consequence of the means employed and is not intended, designed, or reasonably anticipated.'"[58] The

52. *Id.* at 870.
53. *Comer*, 607 F.3d at 1053 (citing 5th Cir. R. 41.3; Thompson v. Connick, 578 F.3d 293 (5th Cir. 2009)).
54. *Id.* at 1055 (citing Nguyen v. United States, 539 U.S. 69, 82 n.14 (2003)).
55. 725 S.E.2d 532 (Va. 2012).
56. *Id.* at 537–38.
57. *Id.* at 536 (citing Utica Mut. Ins. Co. v. Travelers Indem. Co., 286 S.E.2d 225, 226 (Va. 1982)).
58. *Id.* (citing Lynchburg Foundry Co. v. Irvin, 16 S.E.2d 646, 648 (Va. 1941)).

dispositive issue with respect to whether or not an accidental injury occurred was not, in the court's opinion, whether the action undertaken by the insured was intended, but rather, "whether the resulting harm is alleged to have been reasonably anticipated or the natural or probable consequence of the insured's intentional act."[59] The court concluded that whether the underlying complaint alleges a covered "occurrence . . . turns on whether the Complaint can be construed as alleging that Kivalina's injuries, at least in the alternative, resulted from unforeseen consequences that were not natural or probable consequences of AES's deliberate act of emitting carbon dioxide and greenhouse gases."

AES asserted that the underlying complaint alleged that AES "[i]ntentionally or negligently" created the nuisance and global warming, and that the defendants' concerted action in causing the nuisance "constitutes a breach of duty." AES contended that this language shows that Kivalina alleged both intentional and negligent tortuous acts. AES asserted that an insured is entitled to a defense when negligence is alleged. AES further asserted that because the complaint alleged that AES "knew or should know" that its activities in generating electricity would result in the environmental harm suffered by Kivalina, Kivalina alleges, at least in the alternative, that the consequences of AES's intentional carbon dioxide and greenhouse gas emissions were unintended. AES reasoned that the damage alleged by Kivalina was therefore accidental from the viewpoint of AES and within the definition of an "occurrence" under the CGL policies. In essence, AES argued that the alleged damage to the village purportedly caused by AES's electricity-generating activities was accidental because such damage may have been unintentional. However, the Virginia Supreme Court rejected this argument. The court held that the policies at issue do not provide coverage or a defense for all suits against the insured alleging damages not caused intentionally. Likewise, the court held that the policies in this case do not provide coverage for all damages resulting from AES's negligent acts. According to the court, the relevant policies only require Steadfast to defend AES against claims for damages for bodily injury or property damage caused by an "occurrence" or "accident."[60] The court held:

> [u]nder the CGL policies, Steadfast would not be liable because AES's acts as alleged in the complaint were intentional and the consequences of those acts are alleged by Kivalina to be not merely foreseeable, but natural or probable. Where the harmful consequences of an act are alleged to have been not just possible, but the natural or probable consequences of an intentional act, choosing to perform the act deliberately, even if in ignorance of that fact, does not make the resulting injury an "accident" even when the complaint alleges that such action was negligent.[61]

59. *Id.* (citing Eric M. Holmes, *Appleman on Insurance 2d* § 129.2(I)(5) (2002 & Supp. 2009); Fidelity & Guar. Ins. v. Allied Realty Co., 238 Va. 458, 462, 384 S.E.2d 613, 615 (1989)).
60. *Id.* at 537.
61. *Id.* at 537–38.

The court reasoned that "[e]ven if AES were actually ignorant of the effect of its actions and/or did not intend for such damages to occur, Kivalina alleges its damages were the natural and probable consequence of AES's intentional actions." As such, the court found that Kivalina did not allege its damages were "the result of a fortuitous event or accident," and thus, were not covered under the relevant CGL policies.[62]

This case likely reflects the lack of coverage that will exist from damages allegedly stemming from effects of climate change.

Workplace Exposure

Workplace exposure remains a robust area of toxic tort litigation. One emerging or hot topic with respect to workplace exposure toxic tort litigation is "take home" exposure. "Take home" exposure extends an employer's potential liability to the employee's household members, usually a spouse or children. The case discussed below provides an in-depth analysis of this emerging liability theory wherein the concepts of "forseeability" and "duty" are quite significant. This liability theory opens up a new class of potential plaintiffs and leaves open the limits of employer liability for workplace exposure.

In *Simpkins v. CSX Corp.*, the Fifth District of the Appellate Court of Illinois concluded that an employer owes a duty of care to the family members of employees who bring home asbestos fibers on their work clothes.[63] In doing so, the court held that, while a duty still requires that the two parties stand in an applicable relationship to one another, "[t]he term 'relationship' does not necessarily mean a contractual, familial, or other particular special relationship. . . . As the Supreme Court has noted, 'the concept of duty in negligence cases is very involved, complex, and indeed nebulous.'" The court added, "every person owes every other person the duty to use ordinary care to prevent any injury that might naturally occur as the reasonably foreseeable consequence of his or her own actions."[64]

The issue, the court wrote, is not whether the employer "actually foresaw" the risk, but whether it "should have." "[W]e believe that it takes little imagination to presume that when an employee who is exposed to asbestos brings home his work clothes, members of his family are likely to be exposed as well."[65] Therefore, according to the appellate court, the harm was foreseeable. The court also found that preventing against take-home exposure through substitution of products, issuance of warnings, and updating of hygienic practices is not unduly burdensome.[66]

However, several other jurisdictions have found that the relationship present here is not substantial enough that a duty can be built upon it. Thus, for instance, in *Estate of*

62. *Id.* at 538.
63. 929 N.E.2d 1257, 1266 (5th Dist. 2010).
64. *Id.* at 1261–62.
65. *Id.* at 1264.
66. *Id.* at 1266.

Holmes v. Pneumo Abex, the estate of Jean Holmes, who died of peritoneal mesothelioma, brought an action to recover damages for wrongful death.[67] Mrs. Holmes's husband had worked at an asbestos plant from 1962 to 1963. Both Johns-Manville and Raybestos allegedly supplied asbestos to the plant during that time period. The action alleges that Mrs. Holmes's husband brought home asbestos fibers on his person and on his clothes, resulting in her exposure, illness, and death.

The estate argued that literature "going back as far as 1913 showed the potential for disease as a result of workers bringing home toxic substances. . . ."[68] However, this literature did not specifically address asbestos. The *Holmes* court noted that the U.S. States Court of Appeals for the Sixth Circuit had noted that "other courts have found there was no knowledge of bystander exposure in the asbestos industry in the 1950's," and found that the "first studies of bystander exposure were not published until 1965."[69] Likewise, the *Holmes* court also noted the Fourteenth District Court of Appeals of Texas, in a 2007 case, held that "the risk of 'take home' asbestos exposure was, in all likelihood, not foreseeable by defendant while [the plaintiff] was working at defendant's premises from 1954 to 1965."[70] Studies on nonoccupational asbestos exposure were also not first published until 1965.[71]

In *Holmes*, an industrial hygienist who testified on behalf of the defendants, said that he had found only a 1960 article that discussed mesothelioma that allegedly resulted from a worker bringing home asbestos fibers, resulting in his family's exposure. Even the plaintiff's own expert admitted at trial that the first epidemiological study "showing an association between disease and asbestos fibers brought home from the workplace" was presented and published in October 1964. The Illinois court's analysis, therefore, came to hinge upon what was known about the likelihood of injury from secondary, nonoccupational exposure to asbestos during the pertinent time.

The Illinois appellate court ultimately found that the defendants did not owe a duty to Jean Holmes.[72] The likelihood of injury from secondary exposure was simply too abstract of a theory at the time her husband worked with and around asbestos products for the defendants to have realistically anticipated the possibility of injury to a worker's immediate family. Even if the requisite relationship did exist between the defendants and Jean Holmes, the court said "we would find no duty existed because of the lack of foreseeability in this case."[73]

67. 955 N.E.2d 1173 (Ill. App. 2011).
68. *Id.* at 1178.
69. *Id.* at 1178 (citing Martin v. Cincinnati Gas & Elec. Co., 561 F.3d 439, 445 (6th Cir. 2009)).
70. *Id.* at 1179 (citing *In re* Certified Question from the Fourteenth District Court of Appeals of Texas, 740 N.W.2d 206, 218 (2007)).
71. *Id.* (citing Alcoa, Inc. v. Behringer, 235 S.W.3d 456, 461 (Tex. App. 2007)).
72. *Id.*
73. *Id.*

This Illinois court wanted something more in order to establish that the defendants owed a duty to the household family member. "To show the injury was reasonably foreseeable here, plaintiff had to establish that when decedent's husband worked at Unarco from 1962 to 1963, it was reasonably foreseeable asbestos affixed to a worker's clothes during work would be carried home and released at levels that would cause an asbestos-related disease in a household member."[74] In conclusion, whether the defendant owes a duty is based upon the reasonable forseeability of injury.

As evidenced by the cases discussed above, in the context of emerging toxic torts, courts are frequently asked to extend the boundaries of traditional tort law principles to new types of claims. This is particularly true in emerging areas for which there is an absence of comprehensive federal legislation. The result, oftentimes, is a patchwork of conflicting legal precedent, thus resulting in predictive uncertainty for the toxic tort practitioner.

Significant Legal Issues in Toxic Tort Litigation

Class Actions

Although personal injury classes have long been disfavored, class actions have sometimes been a vehicle for toxic tort litigation involving property damage claims. What has emerged recently, however, are more heightened restrictions with respect to class certification for such claims. The cases below discuss emerging case law in the area of toxic tort class litigation.

In *Benefield v. International Paper Co.*, the United States District Court for the Middle District of Alabama denied the plaintiffs' motion for class certification in a lawsuit alleging that International Paper's manufacturing facility contaminated neighboring residential properties.[75]

The plaintiffs proposed to define the class as everyone who "owned residential property within two miles of the outer boundary of the Facility . . . [and whose] property was contaminated by releases of various substances into the environment from the Facility, and [who] suffered in excess of $100 of diminution in value of the real property." The district court, however, rejected the plaintiffs' proposed class definition because the description was not sufficiently definite so that it would be administratively feasible for the court to determine whether a person was a member.[76]

First, the district court found that the plaintiffs had to do more than select a broad geographical region to identify potential class members. They failed to establish that all residential property owners within a two-mile radius of the facility actually owned "contaminated" property. Second, the court stated that it was not plausible to identify property

74. *Id.* at 1178–79.
75. 270 F.R.D. 640, 654 (M.D. Ala. 2010).
76. *Id.* at 644–45.

owners who have suffered a diminution in excess of $100 to their property's value simply by using the mass appraisal formula offered by the plaintiffs' expert.

The court also concluded that none of the named plaintiffs were adequate representatives for the putative class because (1) one named plaintiff did not own property in the area, and (2) the other named plaintiff's claims were not typical of the class because he owned a single-family home while others owned vacant lots, mobile homes, and multi-family residential properties.[77] Thus, the court held that redefinition would not cure the deficiencies identified above.

The Fourth Circuit also has heightened restrictions with respect to standing in class action suits. In *Rhodes v. E.I. Du Pont De Nemours & Co.*, the plaintiffs sued Du Pont alleging it discharged perfluorooctanoic acid (PFOA) into the public water supply.[78] The plaintiffs raised various claims, individually and on behalf of a class of customers of the water department in West Virginia.[79]

The plaintiffs sought damages and injunctive relief to obtain medical monitoring of any latent diseases that might arise from the contamination of the water. The district court denied class-certification and concluded that the "elements of a medical monitoring tort could not be proved on a class-wide basis using the type of evidence presented by the plaintiffs."[80]

In order to appeal the adverse ruling, the plaintiffs filed a stipulation of voluntary dismissal of their individual claims for medical monitoring. On appeal, the manufacturer argued that the Fourth Circuit lacked jurisdiction to address the district court's denial of class certification. Specifically, the manufacturer asserted, "plaintiffs no longer have standing to advance this argument on appeal because, by voluntarily dismissing their individual claims for medical monitoring, the plaintiffs abandoned their interest in litigating the certification question."[81]

The Fourth Circuit agreed with the manufacturer, holding "when a putative class plaintiff voluntarily dismisses the individual claims underlying a request for class certification . . . there is no longer a 'self-interested party advocating' for class treatment in the manner necessary to satisfy Article III standing requirements."[82] Without standing, the Fourth Circuit held that it lacked jurisdiction to address the district court's denial of class certification.

In *Westwood Apex v. Contreras*, the Ninth Circuit joined the Fourth and Seven Circuits in holding that third parties joined to a class action as additional counterclaim defendants are not "true defendants" within the definition of 28 U.S.C. §§ 1446 or 1453(b) and may

77. *Id.* at 646–47.
78. *Id.* at 92–93.
79. 636 F.3d 88, 92-93 (4th Cir. 2011).
80. *Id.* at 93.
81. *Id.* at 98.
82. *Id.* at 100.

not remove the class action to federal court under the Class Action Fairness Act (CAFA).[83] The Ninth Circuit held that CAFA did not amend the definition of "defendant" or "defendants" in the removal statute. As such, only traditional defendants, or those against whom the original plaintiff asserts claims, may seek removal under CAFA.[84] The right of removal under CAFA does not extend to counterclaim defendants, third-party defendants, or additional counterclaim defendants.

The Ninth Circuit stated, "[t]he plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole."[85] "Where language is susceptible to varying interpretations, we will look to other sources to determine congressional intent, such as the canons of construction or a statute's legislative history."[86] In examining these factors, the Ninth Circuit found that the defendants' assertion gave too much weight to the "adjective—'any.'"[87] Furthermore, the circuit noted that the defendants' argument ran afoul of the established meaning of "defendant" in Chapter 89 of the Judicial Code. The circuit noted that it was well settled that the term "defendant" meant or referred only to "original" or "true defendants" and excluded "plaintiffs and non-plaintiff parties who become defendants through a counterclaim."[88] The circuit determined that Congress's intent when enacting CAFA did not change or alter this interpretation of "defendant."[89]

In *Gates v. Rohm & Haas Co.*, an opinion addressing several important questions of class action law, the Third Circuit affirmed a district court's decision denying certification of medical monitoring and property damage classes in a suit alleging environmental contamination.[90] The plaintiffs in *Gates* alleged that, by dumping wastewater, companies operating a nearby manufacturing facility released vinyl chloride into the air over the plaintiffs' residential community. The plaintiffs requested certification of a class of asymptomatic residents seeking medical monitoring for diseases associated with vinyl chloride exposure as well as a class seeking compensation for property damage. The district court denied class certification under Fed. R. Civ. P. 23, and the plaintiffs sought interlocutory review.

The Third Circuit held that the district court properly denied class certification under Rule 23(b)(2).[91] Citing the U.S. Supreme Court's recent inference that monetary relief may be unavailable in 23(b)(2) classes,[92] the Third Circuit also "question[ed]" whether medical

83. 644 F.3d 799, 807 (9th Cir. 2011).
84. *Id.* at 807.
85. *Id.* at 803 (citing Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997)).
86. *Id.* (citing Jonah R. v. Carmona, 446 F.3d 1000, 1005 (9th Cir. 2006)).
87. *Id.* at 804.
88. *Id.* (citing Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100 (1941)).
89. *Id.* at 805–06.
90. 655 F.3d 255 (3d Cir. 2011).
91. *Id.* at 270.
92. *Id.* at 263–64 (citing Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2557, 2561 (2011)).

monitoring claims can ever be certified under (b)(2).[93] Even if they can, however, the Third Circuit held that the plaintiffs' claims lacked the requisite cohesion.

The Third Circuit explained that the plaintiffs failed to show how they could prove, on a class-wide basis, three of the elements of a medical monitoring claim under governing Pennsylvania law. First, expert evidence about average daily exposure to vinyl chloride in the plaintiffs' community did not "constitute common proof of exposure above background levels."[94] Levels of vinyl chloride in the air varied over the decades-long class period, the plaintiffs had differing susceptibilities to exposure, and the plaintiffs' varying work and recreational schedules resulted in different levels of exposure. Thus, "[a]verages . . . would not be probative of any individual's claim because any one class member may have an exposure level well above or below the average." According to the Third Circuit, the plaintiffs could not "substitute evidence of exposure of actual class members with evidence of hypothetical, composite persons in order to gain class certification."[95]

Second, the *Gates* plaintiffs did not establish a level of vinyl chloride exposure that "would create a significant risk of contracting a serious latent disease for all class members." EPA's regulatory threshold limit for vinyl chloride exposure "would not be the threshold for each class member who may be more or less susceptible to diseases from exposure to vinyl chloride."[96]

Third, the plaintiffs could not prove on a class-wide basis that the proposed medical monitoring regime was "reasonably medically necessary." The Third Circuit credited defense experts who testified that the negative effects of medical monitoring, such as dangers from the contrast agent used for MRIs to patients with kidney disease, might outweigh any benefits. Individual inquiries would be needed "to consider class members' individual characteristics and medical histories and to weigh the benefits and safety of a monitoring program."[97]

The Third Circuit also affirmed denial of a medical monitoring class under Rule 23(b)(3). Citing the same factors that prevented (b)(2) certification, the circuit held that individual issues predominated over common questions. While the plaintiffs suggested that their experts could provide evidence to overcome these individual issues, the circuit observed "[a] party's assurance to the court that it intends or plans to meet the requirements is insufficient."[98]

93. *Id.* at 268–69 (citing Barnes v. American Tobacco Co., 161 F.3d 127, 146 (3d Cir. 1998) ("Although the general public's monitoring program can be proved on a classwide basis, an individual's monitoring program by definition cannot."); *Principles of the Law of Aggregate Litigation* § 2.04 reporter's notes cmt. *b*, at 126 (2010) ("[A]fter *Barnes*, courts often have withheld class certification for medical monitoring due to the presence of individualized issues. . . .")).
94. *Id.* at 265.
95. *Id.* at 266.
96. *Id.* at 267–68.
97. *Id.* at 268–69.
98. *Id.* at 270.

The Third Circuit also rejected certification of a property damage class under Rule 23(b)(3). Distinguishing cases that have certified property damage classes, the circuit stated that "the potential difference in contamination on the properties" meant "common issues do not predominate."[99]

Finally, the Third Circuit rejected the plaintiffs' request for an "issues-only" class on liability under Rule 23(c)(4). Noting a circuit split concerning whether Rule 23(c)(4) permits issue certification when common questions do not predominate "for the cause of action as a whole," the circuit adopted a third approach, reciting a "non-exclusive list of factors" to consider.[100] Applying that standard, the circuit held that the district judge properly denied issue certification. A class trial would leave "significant and complex questions" concerning causation and damages "unanswered," and "common issues" were "not divisible from individual issues."

By holding that the plaintiffs may not use statistical averages or regulatory pronouncements to overcome differences in putative class members' risk factors, the Third Circuit's decision in *Gates* imposes a high bar on certifying medical monitoring classes. Thus, even in the minority of states that recognize medical monitoring as a claim or remedy for the plaintiffs who have not incurred physical injuries, application of the *Gates* standard substantially reduces the dangers posed by medical monitoring suits.

The difficulty of certifying a class is also demonstrated by *Kemblesville HHMO Center LLC v. Landhope Realty Co.*[101] In *Kemblesville*, the plaintiffs sued based on a theory that the presence of MTBE in sites surrounding a gas station diminished the value of property out to a 2,500-foot (roughly, half-mile) radius. The plaintiffs asked the Pennsylvania federal district court to certify a class of all property owners within that radius.

The district court began by noting the burden the plaintiffs carry in arguing for certification, and the fact that "[t]he requirements set out in Rule 23 are not mere pleading rules."[102] The court also articulated why overly broad class definitions are not a good idea, stating the class must be sufficiently identifiable without being overly broad. "Overbroad

99. *Id.* at 272.

100. *Id.* at 273. The factors considered by the Court were ". . . the type of claim(s) and issue(s) in question; the overall complexity of the case; the efficiencies to be gained by granting partial certification in light of realistic procedural alternatives; the substantive law underlying the claim(s), including any choice-of-law questions it may present and whether the substantive law separates the issue(s) from other issues concerning liability or remedy; the impact partial certification will have on the constitutional and statutory rights of both the class members and the defendant(s); the potential preclusive effect or lack thereof that resolution of the proposed issue class will have; the repercussions certification of an issue(s) class will have on the effectiveness and fairness of resolution of remaining issues; the impact individual proceedings may have upon one another, including whether remedies are indivisible such that granting or not granting relief to any claimant as a practical matter determines the claims of others; and the kind of evidence presented on the issue(s) certified and potentially presented on the remaining issues, including the risk subsequent triers of fact will need to reexamine evidence and findings from resolution of the common issue(s)." *Id.*

101. No. 08-2405, 2011 U.S. Dist. LEXIS 83324 (E.D. Pa. July 28, 2011).

102. *Id.* at *8 (citing *In re* Hydrogen Peroxide, 552 F.3d 305, 311 (3d Cir. 2008)).

class descriptions violate the definiteness requirement because they 'include individuals who are without standing to maintain the action on their own behalf.'"[103]

The plaintiffs tried to avoid any overbreadth by claiming that the relationship between the alleged contamination and the geographic boundary of their class was a "merits issue." Nevertheless, the district court disagreed, stating:

> Plaintiffs' proposed class includes properties simply because they exist, irrespective of any actual connection to Defendants' activities. The Court does not at this stage require Plaintiffs to adduce definitive evidence about the specific amount and effect of MTBE dispersion. However, to enable this Court to conclude that there is a reasonable relationship between the relevant MTBE release and the proposed class area, Plaintiffs need to adduce some evidence of dispersion that indicates MTBE may have traveled, or will ever travel, near a radius of 2,500 feet.[104]

The district court also found a numerosity problem that stemmed from the overbreadth of the class. The court stated:

> because this class definition is too overbroad, I cannot accept Plaintiffs' numerosity argument. Plaintiffs have failed to provide evidence that MTBE contamination is present throughout the class area . . . According to Plaintiffs, many properties are in contaminated or soon-to-be contaminated areas. However, that estimate is purely speculative, and conclusory allegations do not satisfy Rule 23(a)(1)'s numerosity requirement.[105]

Experts

Like class action certification, emerging toxic tort litigation demonstrates a trend toward heightened standards for the admissibility of expert testimony and the role of such testimony with respect to proving causation. The cases below illustrate this emerging pattern and discuss what may or may not meet the *Daubert* standard or equivalent state evidentiary laws with respect to utilizing expert testimony to prove causation in toxic tort cases.

In *Kuxhausen v. Tillman Partners, LP*, the Kansas Supreme Court rejected an expert's opinion that a plaintiff's medical symptoms were caused by chemical sensitivity stemming from exposure to paint fumes, finding that the testimony at issue lacked an evidentiary

103. *Id.* at *13–14 (citing Oshana v. Coca-Cola Bottling Co., 225 F.R.D. 575, 580 (N.D. Ill. 2005); Guillory v. American Tobacco Co., No. 97-C-8641, 2001 WL 290603 at *2 (N.D. Ill. Mar. 20, 2001) (stating that a well-recognized prerequisite to class certification is that the proposed class must be sufficiently definite and identifiable)).
104. *Id.* at *5.
105. *Id.* at *25–26.

basis sufficient to differentiate it from mere speculation.[106] Accordingly, the Kansas Supreme Court held that the expert opinion was inadmissible.

After working in the defendant's building and being exposed to fumes from epoxy-based paints for brief periods over three days, the plaintiff claimed a variety of medical ailments, including an "ongoing sensitivity to a variety of chemicals." The plaintiff filed suit and sought to introduce the expert testimony of three physicians to establish her chemical sensitivity diagnosis, however, only one expert testified that the plaintiff's symptoms were caused by her exposure to paint fumes at the defendant's building. That expert's physical examination of the plaintiff and other test results indicated no abnormalities and while he evaluated a material safety data sheet (MSDS) for the paint, he offered no information on whether there existed any relationship between the potential adverse health issues identified on the MSDS and the plaintiff's medical ailments.

The Kansas Supreme Court upheld the trial court's grant of summary judgment in favor of the defendant. Under Kansas law, the court noted, "[e]xpert witnesses should confine their opinions to relevant matters which are certain or probable, not those which are merely possible" when testifying to causation.[107] Here, the court found that the expert's causation opinion lacked factual support and therefore had to be stricken as mere speculation. Without the causation evidence, the court found the plaintiff could not maintain her claim and summary judgment was appropriate.[108]

Similarly, in *Pluck v. BP Oil Pipeline Co.*, the Sixth Circuit ruled that a causation expert's opinion was unreliable based on his inability to quantify the plaintiff's dose of benzene exposure.[109] The Sixth Circuit therefore upheld the dismissal of a benzene exposure suit alleging the plaintiff's non-Hodgkin's lymphoma was caused by benzene migrating to her drinking water from a pipeline.

The plaintiff and her family purchased a home in Franklin Township, Ohio, in 1996. They used well water to drink, wash, shower, and irrigate their yard and garden. BP, the prior owner, had purchased the home along with other homes as part of a settlement with local residents over groundwater contamination from an underground gasoline pipeline that passed through the town. In October 1996, benzene was detected in the well on their property. This time frame also coincided with the time the plaintiff noticed a gasoline odor in her home and water. EPA's maximum permissible contaminant level for benzene was 5 parts per billion (ppb). Even though the well's benzene level was measured at 3.6 ppb, BP made several attempts to remediate the area. However, samples continued to show trace amounts of benzene in the well water. In 2002, the plaintiff was diagnosed

106. 241 P.3d 75 (Kan. 2010).
107. *Id.* at 79 (citing State v. Struzik, 269 Kan. 95 (2000)).
108. *Id.* at 80–81.
109. 640 F.3d 671 (6th Cir. 2011).

with non-Hodgkin's lymphoma. In 2005, on the recommendation of her treating physician, the plaintiff moved out of the home.

The plaintiff filed suit for strict liability for hazardous activity, negligence, and loss of consortium based on alleged benzene exposure. To support her claims, the plaintiff retained two experts on causation to demonstrate that benzene is generally capable of causing non-Hodgkin's lymphoma and that benzene specifically caused the plaintiff's non-Hodgkin's lymphoma.

BP filed a motion *in limine* to exclude the testimony of the plaintiff's causation expert on the grounds that his testimony failed to satisfy the standard for reliability set forth in *Daubert*. BP argued the expert's testimony was unreliable "because he formulated a specific causation opinion without evidence of dose, and subsequently performed an unreliable dose reconstruction in an attempt to support his opinion."[110]

Approximately one month after BP filed its *Daubert* motions and motion for summary judgment, the challenged expert submitted a supplemental declaration in which he evaluated the plaintiff's illness now under a differential diagnosis methodology. The trial court agreed with BP, and concluded that the expert formulated his opinion on dose "without any exposure data, only having been told that [Pluck] had been 'heavily' exposed to benzene in her water"; he relied upon a "no safe dose" theory that had been discredited by other courts as a basis for establishing specific causation; he could not explain the "scribbles" used to calculate the plaintiff's dose of benzene; and he filed an untimely supplemental declaration that contradicted his previous testimony and employed "an entirely new differential diagnosis methodology that was not mentioned at any point prior to the submission of his declaration."[111] Without any expert opinion on specific causation, the trial court granted summary judgment in favor of BP.

On appeal, the plaintiff argued that the district court improperly demanded precise data regarding dose of benzene and ignored the expert's differential-diagnosis methodology. The plaintiff's appeal also challenged the district court's exclusion of the expert's supplemental declaration, which was filed five months after the deadline for expert reports. The plaintiff conceded that the expert did not establish dose, and instead argued that the expert used differential diagnosis to determine specific causation, and that the district court "ignore[d] the ability of a physician to apply causal and probabilistic reasoning to arrive at a differential diagnosis and offer an opinion on specific causation."[112]

In response, BP maintained that the expert did not apply differential diagnosis in either his expert opinion or his deposition, but did so only in an untimely supplemental declaration filed five months after the deadline for expert reports. The Sixth Circuit agreed with BP. The Sixth Circuit concluded that the expert's causation of proof failed under *Daubert*

110. *Id.* at 674–75.
111. *Id.* at 675–76.
112. *Id.* at 677–78.

because the expert "did not ascertain Mrs. Pluck's level of benzene exposure, nor did he determine whether she was exposed to quantities of benzene exceeding the EPA's safety regulations."[113] The circuit also explained that it is well settled that the mere existence of a toxin in the environment is insufficient to establish causation without proof that the level of exposure could cause the plaintiff's symptoms.

The plaintiff's expert offered no evidence of the level of exposure. Rather, in attempting to estimate exposure, the expert relied upon a gasoline-vapor-concentration study. The study discussed the correlation between benzene exposure and leukemia, but did not find a statistically significant association between residing near a gasoline spill and non-Hodgkin's lymphoma.

The Sixth Circuit noted that even if the expert had properly ruled that benzene exposure caused the illness, the expert failed to rule out alternative causes, "as is required under the differential-diagnosis methodology."[114] Due to her extensive smoking habit and her exposure to other organic solvents, the plaintiff was exposed to other sources of benzene, but the expert did not identify these other solvents and did not determine the potential level of exposure to them. Thus, the expert did not properly "rule out" alternative causes of the non-Hodgkin's lymphoma. The Sixth Circuit also concluded that the expert's supplemental declaration containing an alternative differential diagnosis, filed one month after BP filed its *Daubert* motions and motion for summary judgment and five months after the deadline for expert reports, was an untimely attempt to introduce a new causation methodology, and as such rejected it.[115]

The Third Circuit has also recently exhibited stringent requirements for the admissibility of expert opinions. In *Pritchard v. Dow Agro Sciences*, the Third Circuit affirmed the exclusion of expert testimony in a toxic tort suit in which the plaintiff alleged the defendants' insecticide products caused his non-Hodgkin's lymphoma.[116] His wife claimed to have suffered derivative injuries. The plaintiffs retained an expert who provided testimony stating that the pesticide caused the cancer. Although the trial court found the expert to be qualified, the court ruled that the expert's proposed testimony was unreliable and therefore inadmissible at trial under *Daubert*. The exclusion doomed the lawsuit, because the plaintiffs presented no other evidence of causation.

On appeal, the plaintiffs asserted that the trial court violated the doctrine set forth in *Erie v. Railroad Co. v. Tompkins*,[117] by applying substantive rules of federal common law in a diversity action that is properly governed by state law. The plaintiffs argued that the trial court erroneously relied on principles that were supposedly at odds with Pennsylvania

113. *Id.* at 679.
114. *Id.* at 680 (citing Tamraz v. Lincoln Elec. Co., 620 F.3d 665, 674 (6th Cir. 2010)).
115. *Id.* at 680–81.
116. 430 Fed. App'x 102 (3d Cir. 2011).
117. 304 U.S. 64 (1938).

state law governing the level of certainty required to establish causation related to idiopathic disease and epidemiological studies. In reaching the holding in the case, the trial court noted that the plaintiffs' expert did not rule out unknown or idiopathic causes and the epidemiological study on which the doctor wished to rely showed only a relative risk of 2.0.[118] The trial court also observed that the proposed testimony was not grounded in science as the expert did not present any statistically significant evidence showing an association between the chemical agent at issue and non-Hodgkin's lymphoma.

The trial court considered these factors among "a host of other deficiencies," in determining that the proffered testimony failed to satisfy the admissibility standard. The trial court did not adopt any bright-line rules, but instead evaluated the plaintiffs' proffer using a "flexible" approach.[119] The trial court never reached any substantive issues regarding causation, but merely addressed procedural issues related to the admissibility the expert's testimony. The Third Circuit explained that the trial court's decision was an evidentiary ruling and federal law governs such procedural issues. As such, the trial court did not violate the *Erie* doctrine.[120]

The plaintiffs also argued that the trial court "improperly 'invaded the province of the jury' by excluding [the expert's] testimony after weighing the plaintiffs' proffered evidence against the defendants'—the suggestion being that a jury should have been presented with both sides' testimony and allowed to decide which was more credible." The Third Circuit noted that the Federal Rules of Evidence "embody a strong preference for admitting any evidence that may assist the trier of fact" and "should not be excluded simply because a judge thinks its probative value is outweighed by other evidence." [121]

The Third Circuit found, however, that the trial court did not engage in any such balancing test. Instead, the Third noted that the trial court concluded the expert's proposed testimony was unreliable due to numerous cracks in its scientific foundation. As such, the trial court committed no error in excluding the testimony.

Medical Monitoring

In this section, we discuss emerging trends with respect to medical monitoring class actions.

In *Alsteen v. Wauleco, Inc.*, seventy plaintiffs appealed an order dismissing their personal injury claims against the defendant.[122] The plaintiffs alleged that they were exposed to carcinogenic chemicals, which the defendant purportedly released from a nearby window factory. The plaintiffs fell into three groups: (1) those that alleged that their exposure had caused various health problems; (2) those that alleged the defendant's release damaged

118. *Pritchard*, 430 Fed. App'x at 103–04.
119. *Id.* at 104 (citing Heller v. Shaw Indus., 167 F.3d 146 (3d Cir. 1999)).
120. *Id.*
121. *Id.* (citing Pineda v. Ford Motor Co., 520 F.3d 237, 243 (3d Cir. 2008)).
122. 335 Wis. 2d 473, 476 (Wis. Ct. App. 2011).

their property; and (3) those who did not allege any current adverse health effects but "alleged that their exposure . . . 'significantly increased their risk of contracting cancer' at some point in the future."[123] For damages, the risk of cancer group sought future expenses related to medical monitoring.

The defendant moved to dismiss the risk of cancer claims, arguing that Wisconsin law requires a plaintiff to allege actual injury in order to sustain a tort claim, rather than only an increased risk of future harm. The trial court granted the defendant's motion, concluding those plaintiffs failed to state a claim.

On appeal, the Wisconsin Appellate Court affirmed, noting that a plaintiff does not have a personal injury claim until he or she has suffered "actual" injury or damage. Increased risk of future harm is not an actual injury under Wisconsin law.[124]

In *Hirsch v. CSX Transportation Corp.*, the Sixth Circuit recently affirmed denial of class certification in a medical monitoring case where it found that the "alleged injuries consist solely of the increased risk of . . . certain diseases."[125] The *Hirsch* case arose from a train derailment in which cars carrying hazardous materials were overturned. A fire burned for three days, allegedly consuming more than 2,800 tons of combustibles, which the plaintiffs claimed resulted in the release of toxic materials into the atmosphere. As a result of these events, some 1,300 residents within a half-mile radius were forced to evacuate for three days.

The plaintiffs brought suit for negligence, nuisance, strict liability, trespass, and medical monitoring under Ohio law, but CSX obtained dismissal of all claims save negligence, under which the district court permitted the plaintiffs to seek medical monitoring as a remedy. The plaintiffs' own experts, however, placed the risk at one in one million exposed persons of additional risk of developing cancer. Accordingly, their alleged injuries consisted solely of the increased risk of—and corresponding cost of screening for—certain diseases that the plaintiffs claimed were likely to occur because of the train crash and fire. Stating that not every risk of disease warrants increased medical scrutiny, the Sixth Circuit emphasized that Ohio law required medical monitoring only if a "*reasonable*" physician would deem monitoring necessary. A mere "risk" was deemed insufficient to confer Article III standing.[126] The Sixth Circuit affirmed the district court's decision.

Risk Assessments to Prove Causation

Plaintiffs frequently seek to use risk assessments prepared in developing government regulations as the basis to prove causation in toxic tort litigation. However, as the following cases demonstrate, plaintiffs may do so at their peril.

123. *Id.*
124. *Id.* at 476.
125. 656 F.3d 359, 363 (6th Cir. 2011).
126. *Id.* at 364.

In addition to its significance in the emerging trends within the context of class actions, which is discussed in more detail above, *Gates v. Rohm and Haas Co.*, is equally significant with respect to the use of risk assessments to prove causation. In *Gates*, the Third Circuit held, "plaintiffs could not carry their burden of proof for a class of specific persons simply by citing regulatory standards for the population as a whole."[127]

Similarly, in *Baker v. Chevron USA Inc.*, a federal district court in Ohio held that "probably" in a regulatory context does not mean "more probable than not" in a tort context.[128] In *Baker*, residents of nearby villages sued the defendant asserting state law tort claims based on personal injuries and property damage they claimed were sustained as a result of air emissions from the defendant's refinery. The defendant moved to exclude the plaintiffs' expert opinions. The district court provided an in-depth analysis of the plaintiffs' expert's causation opinions, ultimately holding that the opinions were unreliable and consequently, inadmissible.

Specifically, the plaintiffs' expert found that the plaintiffs' illnesses occurred because they were exposed to benzene in excess of regulatory levels. However, the district court noted that "[t]he mere fact that Plaintiffs were exposed to benzene emissions in excess of mandated limits is insufficient to establish causation."[129] The court stated, "regulatory agencies are charged with protecting public health and thus reasonably employ a lower threshold of proof in promulgating their regulations than is used in tort cases."[130]

Furthermore, the court recognized that "an expert's opinion does not have to be unequivocally supported by epidemiological studies in order to be admissible under *Daubert*."[131] However, the court found that the "opinions expressed" by the plaintiffs' expert were based on "a scattershot of studies and articles which superficially touch on each of the illnesses at issue."[132] The court found that the expert provided "no depth of opinion . . . in any of the selected references as to any of Plaintiffs' illnesses."[133]

127. *Gates*, 655 F.3d at 268; *cf.* Wright v. Willamette Indus., Inc., 91 F.3d 1105, 1107 (8th Cir. 1996) ("Whatever may be the considerations that ought to guide a legislature in its determination of what the general good requires, courts and juries, in deciding cases, traditionally make more particularized inquiries into matters of cause and effect.").
128. 680 F. Supp. 2d 865, 884 (S.D. Ohio 2010).
129. *Id.* at 880 (citing 243 F.3d 244, 252–53 (6th Cir. 2001); David L. Eaton, *Scientific Judgment and Toxic Torts—A Primer in Toxicology for Judges and Lawyers*, 12 J.L. & Pol'y 5, 39 (2003) ("[R]egulatory levels are of substantial value to public health agencies charged with ensuring the protection of the public health, but are of limited value in judging whether a particular exposure was a substantial contributing factor to a particular individual's disease or illness.")).
130. *Id.* (citing Allen v. Penn. Eng'g Corp., 102 F.3d 194, 198 (5th Cir. 1996)).
131. *Id.* at 887 (citing Knight v. Kirby Inland Marine, Inc., 482 F.3d 347, 354 (5th Cir. 2007)).
132. *Id.*
133. *Id.*