

TRANSACTIONAL AND LITIGATION HOT TOPICS IN ENERGY

By Andrew L. Wallace and Christopher Norcross

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Business Transactions
Hospitality
Construction
Aviation
Green Technology &
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Andrew Wallace's primary areas of practice are commercial and business litigation, a significant portion of which focuses on matters related to real property and construction. Mr. Wallace represents a diverse group of clientele in all facets of complex litigation including lender liability, premises liability (both public and private property), negligence, fraud, business torts and contract disputes. Mr. Wallace also has significant experience litigating insurance defense cases for insured clients as well as carriers. In addition, he advises clients on matters relating to banking and finance, contracts and construction.

Mr. Wallace's experience includes defending banks and corporate clients in collection litigation matters involving the Texas Debt Collection Practices Act, the Federal Fair Debt Collection Practices Act and/or the Fair Credit Reporting Act, consumer complaints, the Deceptive Trade Practices Act, consumer protection and/or automotive finance litigation.

Mr. Wallace also has comprehensive experience representing governmental entities in a wide range of matters, including but not limited to, inverse condemnation, eminent domain, governmental immunity, the Texas Open Records Act, and the Texas Open Meetings Acts.

Mr. Wallace is the Dallas Office Chair of the firm's Diversity Committee.

Admissions

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United States District Court, Northern District of Texas
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American Bar Association
Dallas Bar Association
Dallas Bar Foundation Fellows Program
State Bar of Texas, Texas Minority Counsel Program Conference, Steering Committee
Defense Research Institute
J.L. Turner Legal Association
National Black MBA Association, former Board Member, Dallas Chapter
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Community Involvement

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Collin County Community College Paralegal School, Advisory Board
Family Gateway of Dallas, Board of Directors

Representative Experience

Examples of Mr. Wallace's extensive experience include the following:

- Successfully defended third-party action brought by competitor involving discovery of confidential, trade secret, and other proprietary and financial information. The client was a foreign corporation that was

the successor-contractor in a project to upgrade and integrate the fare collection system for Houston Metro's bus and light rail system. The claims in the underlying action involved bad faith termination, breach of contract, and quantum meruit in connection with the contract with Metro, and involved a parallel action with the Texas Attorney General's Office for claims under the Texas Open Records Act. The result precluded the competitor from utilizing the confidential, trade secret and proprietary information in other bidding contests around the country.

- Recovery of \$1,400,000 in damages and attorneys fees for breach of contract and breach of performance bond in jury trial against concrete contractor and surety. The project involved defective concrete work, and the abandonment of the project by the construction contractor. The jury denied the contractor's claim for breach of contract.
- Successfully recovered damages for a telecommunications carrier in a jury trial involving damage to underground telecommunications facilities.
- Represented the Owner of a large-scale \$24,000,000 construction and community development project from project finance to project completion.
- Successfully vacated adverse arbitration ruling in large-scale construction litigation. The reversal of the judgment against the client was monetarily significant and voided secondary lawsuit against the designer and development manager.

Publications and Presentations

Mr. Wallace is a frequent speaker on the topic of *Diversity in the Legal Profession*, and has spoken on panels on the topic at Texas State Bar and the Dallas Bar Association conferences.

Examples of his other publications and presentations include the following:

- *Yahoo Broadcast Services: Yahoo!'s B2B eBusiness*, UTA eBusiness Alliance Website, with Saleh Alshebil, Luis Chirinos, Wayne Lundquist (April 24, 2001)
- *DoCoMo's I-Mode Culture In Japan: Are You Ready For The Evernet Age*, UTA eBusiness Alliance Website (March 27, 2001)
- *A Mobile Tech Cometh: The Next Generation of Wireless Technology*, UTA eBusiness Alliance Website (March 6, 2001)
- *mCommerce: The Unrealized Vision*, UTA eBusiness Alliance Website (February 20, 2001)
- *Natural Disasters and Litigation Issues Transit Agencies Should Consider*, The Southwest Association of Transit Agencies Annual Conference (June 26, 2000)
- *Ethical Considerations In Your Law Practice* (Jesse D. Oliver, primary author, with Virginia Pendergrass-Lannen, research and drafting author) (June 16, 2000)

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EXPERIENCE

Gregory V. Luna is Senior Corporate Counsel of Legislative Affairs for CITGO Petroleum Company based in Houston, Texas. Mr. Luna advises the company on legislative affairs at the federal and state levels with emphasis on Texas, Louisiana and Illinois, where its core assets are located. Prior to this position, Mr. Luna was the primary litigation attorney providing legal counsel in matters concerning nearly all operations of the company including commercial disputes, mass torts and environmental property damage matters. CITGO is a refiner and marketer of transportation fuels, lubricants, petrochemicals, refined waxes, and other industrial products.

Before joining CITGO, Mr. Luna was Senior Counsel at ConocoPhillips Company within the Litigation Department and handled significant matters in the upstream, midstream and downstream operations. Prior to joining ConocoPhillips, Mr. Luna was employed in private practice for eight years in McAllen, Texas.

EDUCATION

Legal

TEXAS TECH UNIVERSITY SCHOOL OF LAW, LUBBOCK, TEXAS
J.D., May 1992

Undergraduate

AUSTIN COLLEGE, SHERMAN, TEXAS
B.A., May 1986

MEMBERSHIPS & AFFILIATIONS

- Admitted to Texas State Bar 1992
- Admitted to U.S. Federal Court Southern District of Texas 1993
- President – Houston Hispanic Bar Association 2007
- Board of Directors, Treasurer – Houston Hispanic Bar Association 2006
- Texas State Bar Steering Committee Member – Texas Minority Counsel Program – 2002 to 2007
- Recipient American Bar Association's Council on Legal Education Opportunity Legal Diversity Award, 2009
- Houston Bar Association
- International Association of Defense Counsel
- American Corporate Counsel Association
- Speaker at the National Hispanic Bar Association on Electronic Discovery – October, 2007

Kathleen E. Magruder

Kathleen E. Magruder is currently the Vice President of U. S. Regulatory Affairs for BP Energy Company. In that position, she is responsible for regulatory issues that affect the company's natural gas and electricity trading businesses in North America. Ms. Magruder has a long history in the U. S. energy industry, having been an oil and gas lawyer, an expert witness before the U. S. House of Representatives and a number of state legislatures and agencies on issues having to do with producing oil and gas and selling those products, a compliance officer, and a lobbyist.

Significant among Ms. Magruder's accomplishments was legislation she drafted in Texas to create a severance tax exemption for "high cost gas" that has served as a model for similar legislation in other states. In Texas alone, it is estimated the legislation has generated billions of dollars of economic activity.

Ms. Magruder was the only independent representative at the table in Texas when electric restructuring legislation was drafted in 1999. Together with representatives of the investor-owned utilities, coops, municipal utilities, consumers, and environmental groups, she helped draft a bill that has been hailed as creating the most competitive electric market in the U. S. At the same time, she lobbied for and achieved passage of electric restructuring legislation in Virginia and Oklahoma. In addition, she participated in the drafting and passage of legislation that opened the natural gas market in Atlanta Gas Light's service territory in Georgia.

Her professional acumen was recognized by Gov. Ann Richards when she appointed Ms. Magruder to the Texas Energy Coordination Council (TECC) and the Interstate Oil and Gas Compact Commission. Gov. Bush later reappointed her to the TECC. She was elected by her peers to serve as a member of the board of directors of the Electric Reliability Council of Texas, the organization that manages the electric grid for most of Texas to keep the lights on. She is currently a member of the Council of the State Bar of Texas' Section for Oil, Gas, and Energy Resources Law and a member of the Board of Directors of the Houston Chapter of the Energy Bar Association.

Ms. Magruder is a Phi Beta Kappa graduate of the University of Arkansas and she received her law degree from the University of Texas.



Charles L. Rice, Jr.
President & Chief Executive Officer
Entergy New Orleans, Inc.



Charles L. Rice, Jr.
President and CEO,
Entergy New Orleans,
a subsidiary of
Entergy Corporation

8/8/2012 (updated)
8/8/2012 ((reviewed))

Charles Rice became president and chief executive officer of Entergy New Orleans, Inc., a \$750 million a year electric and gas utility, on June 14, 2010.

Taking over the electric and gas utility that has been in a growth mode with more than 85 percent, or 160,000, of its customers returning home since Hurricane Katrina in 2005, Rice is responsible for the company's financial and operational performance, customer service, regulatory and governmental relations, economic development programs, external and internal communications, charitable contributions and environmental policy. At the core of his operational responsibilities is management of the company's electric and gas distribution systems to New Orleans customers.

Under Rice's leadership since 2010, Entergy New Orleans negotiated with the New Orleans City Council through the formula rate plan process resulting in lower rates for electric customers for four straight years. Entergy New Orleans also has improved service reliability through hundreds of electric system improvement projects throughout the city. The company is also managing the industry's largest natural gas rebuild effort in history - the replacement of approximately 844 miles of underground pipe damaged after Hurricane Katrina - and continues to be ahead of schedule and under budget, while constantly improving reliability to gas customers.

After his first legal private practice position in Louisiana with Jones, Walker, Waechter, Poitevent, Carrere & Denegre, L.L.P, Rice joined Entergy in the legal department in 2000 serving as senior counsel in the Entergy Service, Inc. litigation group and then as manager of labor relations litigation support in human resources.

Rice was recruited into New Orleans city government in 2002 as the city attorney and later took the critical role of chief administrative officer for the City of New Orleans, where he managed 6,000 employees and the city's \$600 million budget. In 2005, the law firm of Barrasso, Usdin, Kupperman, Freeman & Sarver, L.L.C. recruited him back to private practice, where he was named partner.

Returning to Entergy in 2009, Rice served as director of utility strategy where he was responsible for coordinating regulatory, legislative, and communications efforts to develop and execute strategies that advanced commercial objectives for the company's regulated service areas. He then served as director of regulatory affairs for Entergy New Orleans.

Rice holds a bachelor's degree in business administration from Howard University, a juris doctorate from Loyola University's School of Law and master's degree of business administration from Tulane University. After graduating from Howard University, he was commissioned as a lieutenant in the United States Army and served as a military intelligence officer with the 101st Airborne Division (Air Assault) at Fort Campbell, Ky. While in the Army, he earned the Airborne Badge, Air Assault badge and was awarded the Army Commendation and the Army Achievement medals.

He is a member of the Alabama and Louisiana State Bar Associations, the American Bar Association, the New Orleans Bar Association, the National Bar Association and the Omega Psi Phi fraternity. In addition to serving on the Visiting Committee of the Loyola University School of Law, he currently serves on the boards of Junior Achievement, Greater New Orleans Foundation, Audubon Institute, the National Conference for Community and Justice, the Kingsley House, the Boy Scouts of America's Southeast Louisiana Council, the United Negro College Fund Louisiana Leadership Council, the Covenant House New Orleans and the Business Council of New Orleans. The Mayor of New Orleans also appointed Rice to serve on the NOLA Alliance board, the city's first-ever public-private partnership for economic development, and the city's Tax Fairness Commission to help create a more equitable tax system.

He received the Loyola University School of Law Distinguished Moot Court Alumni Award in 2004. New Orleans City Business magazine also recognized Rice as a member of the Power Generation in 2003 and as a "Leader in Law" in 2008.

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I. INTRODUCTION

Energy law is an area of law that focuses on the use and taxation of both renewable and non-renewable energy, such as oil, natural gas, wind energy, and solar energy. Energy law developed as an academic field of study and, shortly thereafter, as a legal practice area, in the mid- to late-1970's as a result of, and reaction to, the legislative activity in the United States that was precipitated by the Arab Oil Embargo of 1973 and the Iranian Revolution in 1979.¹ Prior to the 1970's, much of what now comprises the area of energy law was thought of as disparate areas of law, often taught and practiced in isolation from one another. For instance, oil and gas law, which had an expansive body of case law prior to the 1970's, was often taught and practiced only in states that produced oil and gas.² Likewise, laws and regulations involving electricity production and consumption occupied courses in public utility and regulated industries, and was practiced by individuals with little professional interest in natural resource law beyond the use of coal in the production of electricity.³

Although much of the regulation that gave rise to the development of the area of energy law in the 1970's has since either been repealed or curtailed, energy law remains one of the fastest growing and evolving areas of law. This is due, in large part, to the ever-increasing demand for energy and advances in technology. As consumers demand more and more energy, energy producers rely on advances in technology to enable them to meet the burgeoning demand. For instance, innovations in drilling technologies enable oil

¹ Joseph P. Tomain, *The Dominant Model of United States Energy Policy*, 61 Colo. L. Rev. 355, 356 (1990); Fred Bosselman, *A Brief History of Energy Law in United States Law Schools: An Introduction to the Symposium*, 86 Chi.-Kent L. Rev. 3, 3 (2011).

² Bosselman, 86 Chi.-Kent L. Rev. at 3.

³ Bosselman, 86 Chi.-Kent L. Rev. at 3.

producers to drill deeper wells, thereby allowing them to access oil reserves that heretofore have been unattainable. Similarly, improvements in hydraulic fracturing, or simply “fracing,” allow oil and gas producers to extract deposits from formations that were previously not cost-effective to develop. Moreover, as the global supply of fossil fuel decreases, and the public’s demand for affordable, renewable energy sources increases, energy producers are developing alternative forms of energy, such as wind energy and solar energy, on a commercially viable scale in order to satisfy the consumer’s needs. The legal system, particularly those who practice energy law, stands in and amongst all of this activity, balancing the rights and interests of the various parties involved in the process.

II. HOT TOPICS IN LITIGATION

A. Keystone XL Pipeline

The Keystone XL Pipeline is a proposed pipeline segment intended to connect refineries along the Gulf Coast of Texas to the Keystone Pipeline System, an operational pipeline system jointly owned and operated by TransCanada and ConocoPhillips.⁴ As currently planned, the Keystone XL Pipeline extension will begin in the Athabasca oil sands region in northeastern Alberta, Canada and will join the Keystone-Cushing pipeline, an existing Keystone pipeline which transports oil between Steele City, Nebraska and Cushing, Oklahoma.⁵ The Keystone XL Pipeline will then continue from Cushing to Nederland, Texas.

⁴ Keystone XL Pipeline Project. Available at <http://www.transcanada.com/keystone.html>. (Last visited September 23, 2012.)

⁵ *Id.*

When plans for the Keystone XL Pipeline were announced in July 2008, TransCanada indicated that the expansion will cost approximately \$7.0 billion.⁶ The Keystone XL Pipeline expansion is expected to increase the Keystone Pipeline capacity from 590,000 barrels of oil per day to approximately 1.1 million barrels per day.⁷ TransCanada and ConocoPhillips secured long-term commitments for 830,000 barrels of oil per day from various shippers for an average term of 18 years.⁸

Although the Keystone XL Pipeline project is popular among many groups, it faces significant challenges from environmental groups. One of the most significant challenges to the Keystone XL Pipeline arose over its proposed route in Nebraska. As originally planned, the Keystone XL Pipeline was routed over the Ogallala Aquifer, one of the largest reserves of fresh water in the world. After environmental groups protested, TransCanada agreed to change the route.

The Keystone XL Pipeline remains controversial. The U.S. Department of State, which has authority over cross-border pipelines, must recommend that a Presidential Permit be issued for the project before construction can begin. However, the permitting process has become mired in the presidential election. TransCanada anticipates approval of the Presidential Permit application in the first quarter of 2013.

⁶ *TransCanada, ConocoPhillips to Expand Keystone To Gulf Coast*. Available at http://www.downstreamtoday.com/news/article.aspx?a_id=11890&AspxAutoDetectCookieSupport=1. (Last viewed on September 23, 2012.)

⁷ *Id.*

⁸ *Id.*

B. Deepwater Horizon

Deepwater Horizon was an ultra-deepwater, dynamically positioned, semi-submersible offshore oil-drilling rig owned by Triton Asset Leasing (“Triton”), a subsidiary of Transocean.⁹ Transocean, through its subsidiary Triton, was contracted by BP Exploration & Production Inc. (“BP”) to provide the *Deepwater Horizon* rig and personnel to drill the Macondo well in the Gulf of Mexico.¹⁰ In addition to BP, which was the majority owner of the well exploration rights, minority owners and co-lessees of the well included Anadarko and MOEX.¹¹

Deepwater Horizon started drilling started on February 6, 2010 and was largely finished on April 9, 2010.¹² On April 20, 2010, as the Macondo well was being readied to begin production, a blowout occurred, resulting in several explosions and an uncontrollable fire onboard the *Deepwater Horizon*.¹³ Of the 126 people onboard, eleven people lost their lives and another 17 were seriously injured.¹⁴ The fire burned for 36 hours before the rig sank, leaving the well gushing at the seabed.¹⁵ The oil spill continued for nearly three months, unabated, releasing nearly 4.9 million barrels of crude oil. Then,

⁹ *Understanding Deepwater Horizon Litigation*. Available at <http://eli-ocean.org/gulf/understanding-litigation/>. (Last visited September 10, 2012.)

¹⁰ *Id.*

¹¹ *Id.*

¹² *Deepwater Horizon Accident Investigation Report*, pg. 22. Available at http://www.bp.com/liveassets/bp_internet/globalbp/globalbp_uk_english/gom_response/STAGING/local_assets/downloads_pdfs/Deepwater_Horizon_Accident_Investigation_Report.pdf. (Last visited September 23, 2012.)

¹³ *Deepwater Horizon Accident Investigation Report, Executive Summary*, pg. 3. Available at http://www.bp.com/liveassets/bp_internet/globalbp/globalbp_uk_english/gom_response/STAGING/local_assets/downloads_pdfs/Deepwater_Horizon_Accident_Investigation_Report_Executive_summary.pdf. (Last visited September 8, 2012).

¹⁴ *Id.*

¹⁵ *Id.*

on July 15, 2010, the well was temporarily capped.¹⁶ A relief well was drilled and, on September 16, 2010, cement was pumped into the bore.¹⁷ On September 19, 2010, the federal government declared the well “effectively dead.”¹⁸

Almost immediately after the loss of the rig in April 2010, litigation commenced due to loss. The following is a summary of the three major lawsuits that are ongoing:

1. MDL No. 2179, *In re: Oil Spill*

Eventually, most of the civil lawsuits regarding the effects of the *Deepwater Horizon* incident were consolidated into *In re: Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mexico, on April 20, 2010*. The Phase I trial was originally set to begin on February 27, 2012, but was postponed pending finalization of settlements between BP and the Plaintiffs’ Steering Committee (“PSC”) of some economic losses and medical claims.¹⁹ The PSC acts on behalf of individual and business plaintiffs in the Multi-District Litigation (“MDL”) proceedings pending in New Orleans (MDL 2179). On March 3, 2012, BP announced that it reached a settlement with the PSC, subject to final written agreement and court approvals, to resolve the substantial majority of economic loss and medical claims stemming from the *Deepwater Horizon* accident and oil spill.

The proposed settlement is comprised of two separate agreements, one to resolve economic loss claims and another to resolve medical claims.²⁰ Each proposed agreement

¹⁶ National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling, *Deep Water, The Gulf Oil Disaster and the Future of Offshore Drilling, Report to the President*, pg. 168 (January 2011). Available at http://www.oilspillcommission.gov/sites/default/files/documents/DEEPWATER_ReporttothePresident_FIN_AL.pdf. (Last visited September 10, 2012.)

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Understanding Deepwater Horizon Litigation*. Available at <http://eli-ocean.org/gulf/understanding-litigation/>. (Last visited September 10, 2012.)

²⁰ *Deepwater Horizon Court-Supervised Settlement Program*. Available at <http://www.deepwaterhorizonsettlements.com/#>. (Last visited on September 10, 2012.)

provides that class members would be compensated for their claims on a claims-made basis, according to agreed compensation protocols in separate court-supervised claims processes. The proposed agreement to resolve economic loss claims includes a BP commitment of \$2.3 billion to help resolve economic loss claims related to the Gulf seafood industry and a fund to support continued advertising that promotes Gulf Coast tourism. BP estimates that the cost of the proposed settlement, expected to be paid from the \$20 billion trust fund it initially setup in the wake of the disaster, would be approximately \$7.8 billion.²¹

On April 18, 2012, BP and the Plaintiffs' Steering Committee submitted joint motions seeking the court's preliminary approval of an Economic and Property Damages Settlement Agreement and a Medical Benefits Settlement Agreement.²² The court granted preliminary approval of these agreements on May 2, 2012.²³ Affected claimants will receive notice and have an opportunity to submit objections to the settlement through September 7, 2012.²⁴ Affected claimants can opt out of the settlement through November 1, 2012.²⁵ The court

²¹ *Economic and Property Damage Settlement*. Available at <http://www.bp.com/sectiongenericarticle800.do?categoryId=9040063&contentId=7067594>. (Last visited on September 11, 2012.)

²² *Understanding Deepwater Horizon Litigation*. Available at <http://eli-ocean.org/gulf/understanding-litigation/>. (Last visited September 10, 2012.)

²³ *Id.*

²⁴ *Order re: One Week Extension of the Deadline for the Filing and Service of Objections to the Two Class Action Settlements*. Available at http://www.deepwaterhorizoneconomicsettlement.com/docs/2012_08_31_Order_re_a_One_Week_Extension.pdf. (Last visited September 10, 2012.)

²⁵ *Order re: Extending the Exclusion (Opt-Out) Deadlines for the Deepwater Horizon Economic and Property Damages Settlement Agreement and the Deepwater Horizon Medical Benefits Class Action Settlement Agreement*. Available at [http://www.deepwaterhorizoneconomicsettlement.com/docs/08272012Order\(opt-outdeadline\).pdf](http://www.deepwaterhorizoneconomicsettlement.com/docs/08272012Order(opt-outdeadline).pdf). (Last visited on September 10, 2012.)

will then hold a final “fairness hearing” to determine whether to grant final approval of the settlements. The fairness hearing is scheduled for November 8, 2012.²⁶

The proposed settlement does not include claims against BP made by the United States Department of Justice or other federal agencies (including under the Clean Water Act and for Natural Resource Damages under the Oil Pollution Act) or by the states and local governments. The proposed settlement also excludes certain other claims against BP, such as securities and shareholder claims pending in MDL 2185, and claims based solely on the deepwater drilling moratorium and/or the related permitting process.

2. MDL No. 2185, In re: BP p.l.c. Securities Litigation

In re: BP p.l.c. Securities Litigation, is a consolidation of various securities lawsuits alleging that BP misled its investors about both its safety measures and the likelihood of a spill, which resulted in dramatic investment losses for BP shareholders following the *Deepwater Horizon* incident.²⁷ The securities litigation cases, which seek compensatory and punitive damages, involve common questions of fact about BP’s safety record and duties to its shareholders, and have a different focus from the cases in MDL No. 2179.²⁸ Also, the securities cases mainly involve BP and its executives – not other defendants associated with the oil spill. For these reasons, the U.S. Judicial Panel on Multidistrict Litigation determined that it would be efficient to create a separate MDL for the securities cases.²⁹ The Panel assigned Judge Keith P. Ellison of the U.S. District Court for the Southern District of Texas to oversee this litigation.³⁰

²⁶ *Understanding Deepwater Horizon Litigation*. Available at <http://eli-ocean.org/gulf/understanding-litigation/>. (Last visited September 10, 2012.)

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

Under Federal Rule 12(b)(6), BP moved to dismiss securities claims brought by purchasers of BP ordinary shares and American Depository Shares.³¹ In a ruling issued on February 13, 2012, Judge Ellison granted in part and denied in part BP's motion.³² Specifically, the district court, following the Supreme Court's ruling in *Morrison v. National Australia Bank*, granted dismissal of all the claims of the holders of the ordinary shares. It also dismissed some claims of the purchasers of the American Depository Shares, while allowing others to go forward.³³ On April 2, 2012, the plaintiffs filed a second amended complaint to address portions of the case that were dismissed by the court.³⁴ The litigation is ongoing.

3. No. 2:10-cv-04536, United States v. BP Exploration

In *United States v. BP Exploration and Production, Inc. et al.*, filed on December 15, 2010 by the U.S. Department of Justice, the United States' complaint seeks civil penalties under the Clean Water Act and oil spill removal costs under the Oil Pollution Act ("OPA").³⁵ Additionally, the lawsuit seeks a declaratory judgment from the Court that all defendants are liable under OPA for damages resulting from the *Deepwater Horizon* spill.³⁶

³¹ Memorandum and Order, pg. 3. Available at clients.oakbridgeins.com/clients/blog/bpludlow.pdf. (Last visited September 23, 2012.)

³² BP Annual Report and Form 20F 2011. Available at http://www.bp.com/liveassets/bp_internet/globalbp/STAGING/global_assets/downloads/I/BP_Annual_Report_and_Form_20F_2011.pdf. (Last visited September 10, 2012.)

³³ *Id.*

³⁴ Second Consolidate Amended Class Action Complaint for All Purchasers of BP ADS Securities. Available at www.cohenmilstein.com/media/pnc/9/media.1179.pdf. (Last visited September 23, 2012.)

³⁵ *Understanding Deepwater Horizon Litigation*. Available at <http://eli-ocean.org/gulf/understanding-litigation/>. (Last visited September 10, 2012.)

³⁶ *Understanding Deepwater Horizon Litigation*. Available at <http://eli-ocean.org/gulf/understanding-litigation/>. (Last visited September 10, 2012.)

On February 16, 2012, the United States filed a consent order outlining a settlement with MOEX, who held a 10 percent share in Macondo well.³⁷ Under the terms of the agreement, MOEX was required to pay \$45 million in civil penalties to the U.S. and \$25 million total to Alabama, Florida, Louisiana, Mississippi, and Texas.³⁸ Additionally, MOEX will also pay \$20 million for land acquisition projects.³⁹

C. Hydraulic Fracturing

Until recently, large deposits of natural gas and oil were thought to be unrecoverable due to their placement within low-permeable rock formations, including shale. However, in the 1990's as the North Texas Barnett Shell was being developed, companies improved the technique of hydraulic fracturing, or "fracing."⁴⁰ Originally developed and used in the 1940's, hydraulic fracturing is a process used to propagate fractures in the rock layer in order to aid in the recovery of oil or gas from low-permeability rock formations.⁴¹ Typically, drillers pump large volumes of water and sand, which is treated with friction reducers and other chemicals, into the well-bore at high pressure, thereby creating fractures in the rock formation.⁴² The sand holds open the fractures, resulting in an increased surface area, which, in turn, increases the mobility of the gas or oil and allows it be extracted from the rock formations.⁴³

³⁷ Consent Decree Between the United States and Moex Offshore 2007 LLC. Available at www.deq.louisiana.gov/portal/portals/0/enforcement/.../MoexCD.pdf. (Last visited September 10, 2012.)

³⁸ *Id.* at 10.

³⁹ *Id.* at 12.

⁴⁰ Hannah Wiseman, *Beyond Coastal Oil v. Garza: Nuisance and Trespass in Hydraulic Fracturing Litigation*, *The Advocate* 8 (Winter 2011).

⁴¹ Poe L. Leggette & Mark Zoback, *The Groundswell of Concern and Activity Regarding Hydraulic Fracturing*, Presentation at Rocky Mountain Mineral Law Foundation Workshop: Hydraulic Fracturing: Core Issues & Trends (Nov. 17, 2011).

⁴² Keith B. Hall and Lauren E. Godshall, *Hydraulic Fracturing Litigation*, *The Advocate* 13 (Winter 2011).

⁴³ *Id.*

Hydraulic fracturing uses large amounts of water. For instance, fracturing of a “vertical well completion can use over 1.2 million gallons (28,000 barrels) of water, while the fracturing of a horizontal well completion can use over 3.5 million gallons (over 83,000 barrels) of water.”⁴⁴ Much of this water, which is now contaminated with oil and gas, flows back up out of the well, especially near the end of a well’s lifecycle, and must be stored.⁴⁵ Some of the water, however, remains encapsulated in the rock formations.⁴⁶

The expansive use of hydraulic fracturing has created challenging legal issues at the federal, state, and municipal levels. All levels of government have responded by implementing regulations that seek to balance the need to produce oil and gas in order to meet consumer demand with the need to protect the public from the potentially hazardous side-effects wrought by exploration and development, especially as the exploration and development encroaches on urban population settings. Moreover, courts have been called upon to settle disputes brought about by the use of hydraulic fracturing techniques by applying longstanding legal principals to situations not contemplated in the preceding decades in which the laws were being developed.

1. Federal and State Regulations

The following is a survey of federal and state regulations used to regulate the practice of hydraulic fracturing:

⁴⁴ Elizabeth Dotson, *Drilling a Hole in the Water Supply: Regulation of Injection Wells in Texas*, 10 Tex. Tech. Admin. L. J. 267, 275 (2008).

⁴⁵ Dotson, 10 Tex. Tech. Admin. L. J. at 277.

⁴⁶ *Id.*

(a) Federal Regulations

The Federal government regulates hydraulic fracturing primarily through the Safe Drinking Water Act and the Clean Water Act.⁴⁷

(i) Safe Drinking Water Act

The Safe Drinking Water Act (“SDWA”) was passed in 1974 in response to the need for national standards regulating public drinking water. The SDWA, which is administered by the Environmental Protection Agency (“EPA”), provides two regulatory schemes designed to ensure the safety of public drinking water.⁴⁸ First, the SDWA requires the EPA to promulgate national primary drinking water regulations concerning maximum contaminant levels in drinking water, as well as monitoring and reporting requirements.⁴⁹ Second, the SDWA protects the quality of U.S. drinking water and its sources by regulating wells that inject fluids underground for storage and disposal through the SDWA’s Underground Injection Control (“UIC”) program.⁵⁰ The UIC program is the primary regulatory scheme directly related to the disposal of wastewater produced by hydraulic fracturing.⁵¹

Under the UIC, EPA sets minimum standards that states must meet for the underground injection of fluids. Specifically, each state’s UIC program must: (1) prohibit all underground injections, except those specifically exempted, unless the injections are authorized; (2) require that permitted injections not endanger drinking water sources; and (3) include inspection, monitoring, recordkeeping, and reporting requirements. Once EPA

⁴⁷ Brenda L. Clayton, *Regulation of Fracking*, pg. 1, Presented to the 29th Annual Advanced Oil & Gas and Energy Resources Law Course, State Bar of Texas (October 6-7, 2011).

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 2.

approves a state's UIC program, the state has the primary enforcement responsibility for granting UIC permits and ensuring that underground injection of fluids does not endanger underground sources of drinking water.⁵²

In 1986, the SWDA was amended to strengthen EPA's enforcement authority. Where a state does not have primary responsibility for enforcing the UIC program, or in instances where EPA becomes aware of a state UIC violation, after appropriate notice, EPA is authorized to enforce the program by bringing an administrative action in which it can seek penalties of \$10,000 for each day of violation with a maximum assessment of \$125,000.⁵³ The daily penalty is reduced to no more than \$5,000 per day where the injection is related to the underground injection of brine or other fluids that are brought to the surface in connection with oil and natural gas production, or any underground injection for the secondary recovery of oil and natural gas. In addition, EPA can bring a civil action in which it can seek penalties of \$25,000 each day of a violation.⁵⁴ Moreover, EPA can also issue emergency orders seeking civil penalties of not more than \$15,000 for each day the violation of the order occurs or the failure to comply continues.⁵⁵

Prior to 1997, when the Eleventh Circuit decided *Legal Environmental Assistance Foundation, Inc. v. United States Environmental Protection Agency* ("LEAF"), EPA's interpretation of "underground injection" did not include hydraulic fracturing operations.⁵⁶ That changed with the Eleventh Circuit's decision in *LEAF*.⁵⁷ In *LEAF*, the plaintiff challenged EPA's approval of Alabama's UIC program, arguing that the program was

⁵² 42 U.S.C. § 300h(b)(1)(b).

⁵³ 42 U.S.C. § 300h-2; Clayton, *Regulation of Fracking* at 3.

⁵⁴ 42 U.S.C. § 300h-2(c).

⁵⁵ 42 U.S.C. § 300i.

⁵⁶ Clayton, *Regulation of Fracking* at 2.

⁵⁷ *Id.* (citing 118 F.3d 1467, 1471 (11th Cir. 1997)).

deficient for not regulating hydraulic fracturing associated with methane gas production. EPA countered by arguing that underground injection did not include wells using hydraulic fracturing, because the principal purpose of these wells is not the underground emplacement of fluids; rather, their principal function is methane gas production.⁵⁸ In rejecting EPA's interpretation of "underground injection," the Eleventh Circuit held that the plain meaning of "underground injection," as well as the legislative history related to the passage of the SDWA, required the regulation of all underground injection activities, including hydraulic fracturing.⁵⁹

EPA began studying the process of hydraulic fracturing and its potential effect on underground sources of drinking water shortly after the *LEAF* decision.⁶⁰ Since the most prevalent use at that time of hydraulic fracturing involved coal-bed methane formations, EPA's study focused on assessing the potential for contamination of underground sources of drinking water due to the injection of hydraulic fracturing fluids into coal-bed methane wells.⁶¹ In 2004, EPA issued its study on the potential effects on underground sources of drinking water caused by hydraulic fracturing operations in coal-bed methane reservoirs. EPA determined that the injection of hydraulic fracturing fluids into coal bed methane wells posed little or no threat to underground sources of drinking water. However, EPA noted that there were two potential mechanisms by which fracturing fluids might affect the quality of underground sources of drinking water: (1) direct injection of fluids into an

⁵⁸ *Id.*

⁵⁹ *LEAF*, 118 F.3d at note 10. In a footnote, the Court rejects an Alabama argument that since not all fracturing fluids are left in the ground that hydraulic fracturing is not an underground injection. As the court notes, this view is untenable given the admitted fact that some fluids are left in the ground and are never recovered. In addition, as the Court points out, the EPA regulates a number of other operations where fluids are temporarily injected and then produced along with other products.

⁶⁰ Clayton, *Regulation of Fracking* at 2.

⁶¹ *Id.*

underground source of drinking water; or (2) the creation of a hydraulic connection between the coal-bed methane formation and the underground source of drinking water due to hydraulic fracturing operations.⁶² Further, EPA identified certain chemicals used in hydraulic fracturing, including diesel fuel, as constituents of potential concern.⁶³

In response to the Eleventh Circuit's decision in *LEAF*, and in light of the EPA's 2004 study, Congress passed the Energy Policy Act of 2005.⁶⁴ Among other things, the Energy Policy Act, in part, amended the SDWA's definition of "underground injection" to exclude the underground injection of fluids or propping agents, other than diesel fuels, pursuant to hydraulic fracturing operations.⁶⁵ As a result, states do not have to require companies to seek permits before engaging in hydraulic fracturing operations as part of their UIC program, unless diesel fuels are used. However, there has been no determination as to what constitutes "diesel fuels," though EPA has taken the position that the use of diesel fuels in fracturing fluids will be regulated through the UIC program and their use in injection wells will be regulated as Class II wells.⁶⁶

(ii) Clean Water Act

The Clean Water Act ("CWA"), passed in 1972, regulates the discharge of fluids into surface water. Specifically, the CWA prohibits the discharge of pollutants by point sources into waters of the United States, except in compliance with certain provisions of the CWA, including section 402.⁶⁷ Section 402 of the CWA establishes the National Pollutant Discharge Elimination System ("NPDES") program, under which EPA, or an authorized

⁶² U.S. Env't'l Prot. Agency, EPA 816-R-04-003, Evaluation of Impacts to Underground Sources of Drinking Water by Hydraulic Fracturing of Coalbed Methane Reservoirs (June 2004).

⁶³ *Id.*

⁶⁴ Clayton, *Regulation of Fracking* at 2.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ 33 U.S.C. 1311(a).

state agency, may issue a permit allowing the discharge of pollutants into waters of the U.S.⁶⁸ In establishing requirements for an NPDES permit, a permit writer must consider both limits based on the technology available to control the pollutants (i.e., technology-based effluent limits) and limits that are protective of the water quality standards of the receiving water (i.e., water quality-based effluent limits).⁶⁹

In addition to direct discharges, wastewaters may be indirectly discharged into waters of the U.S. through sewer systems connected to publicly owned treatment works (“POTW”) that discharge directly to waters of the U.S. or by being introduced by truck or rail into a POTW that discharges directly. EPA regulations set standards for the pretreatment of wastewater introduced to a POTW including prohibiting introduction of wastes that interferes with, passes through, or are otherwise incompatible with POTW operations.⁷⁰ As well, EPA has developed other nationally applicable pretreatment standards under section 307(b) in its General Pretreatment Regulations for Existing and New Sources of Pollution (Pretreatment Regulations) at 40 C.F.R. Part 403. Among these national pretreatment standards is the general prohibition that prohibits any user of a POTW to introduce a pollutant into the POTW that will cause pass through or interference.

Both direct and indirect are subject to the NPDES program.⁷¹ “A direct discharge, such as through a pipeline, requires a NPDES discharge permit.”⁷² An indirect discharge, such as the one that occurs when an entity disposes of its wastewater into a POTW, is also covered under the CWA, when the POTW subsequently discharges into to waters of the

⁶⁸ 33 U.S.C. 1342(a).

⁶⁹ 33 U.S.C. § 1311; 40 CFR 125.3(a).

⁷⁰ 33 U.S.C. § 1317(b)(1).

⁷¹ Clayton, *Regulation of Fracking* at 17.

⁷² *Id.*

United States.⁷³ Generally, the entity that discharges into a POTW is required to test or pretreat its wastewater before discharging it into the POTW.

As with the SDWA, states are generally delegated primary enforcement authority with regards to the CWA. However, EPA administers the NPDES program until EPA has reviewed and approved a state's program. Therefore, EPA and the states regulate the indirect disposal of fracking wastewater into a POTW – whether via sewer systems or trucks – under the CWA, as long as the discharge ultimately leads to waters of the U.S.⁷⁴

(b) State Regulations

Established in 1891, the Railroad Commission of Texas (“RRC”) is the state agency that is charged with regulating the oil and gas industry and administering the portion of the UIC program related to the underground injection for the purposes of oil and gas exploration and development.⁷⁵ The RRC's primary regulatory authority stems from its authority to issue permits related to activities surrounding the drilling of oil and gas wells, including certain aspects of hydraulic fracturing.

Hydraulic fracturing is not a distinct type of drilling. Rather, it is a type of well-completion process whereby water, in combination with proppants, is injected under increasing pressure into a well-bore. As the pressure is increased, the low-permeable rock formations fracture, thereby allowing oil and gas, which was previously trapped in the rock layers, to flow freely to the well-bore. Although no permit is required to complete a well using hydraulic fracturing, the drilling of the well that is later fracked is subject to the same permitting requirements as any other well.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* at 13.

The process of fracing a well can require upwards of 5 million gallons of water. Generally, up to 80 percent or more of hydraulic fracturing fluids return to the surface as flowback, which must be stored temporarily at the drillsite before it can be disposed of through any one of a number of methods approved by the RRC. Temporary storage usually takes place in open pits that are synthetically lined or in metal storage containers. The flowback fluids, along with the formation water that is produced with oil and gas (known as produced water), are then disposed of in accordance with rules propogated by the RRC.

The RRC regulates oil and gas waste disposal primarily through Statewide Rules 8, 9, 46, and 98.⁷⁶ Rule 8 outlines rules governing the transportation and storage of oil and gas wastes, including detailed requirements for the use of pits for temporary storage of fluids.⁷⁷ Rules 9 and 46 provide for the disposal of oil and gas wastes, including flowback fluids and produced water, by underground injection.⁷⁸ Rule 9 authorizes the RRC to grant permits allowing for the disposal of oil and gas waste into formations not productive of oil and gas by underground injection. Rule 46 authorizes the RRC to grant permits for the disposal of oil and gas wastes into formations that are productive of oil and gas for disposal and secondary recovery. Statewide Rule 98 contains provisions governing the identification, handling, and transportation of hazardous oil and gas waste, so as to ensure that hazardous oil and gas waste is properly managed and safely transported to facility authorized to treat, store, dispose of, or recycle the waste.⁷⁹

⁷⁶ Paul R. Tough, *Drilling Waster Disposal: Options for Disposal, Permitting*, pg. 4, Presented to the 29th Annual Advanced Oil & Gas and Energy Resources Law Course, State Bar of Texas (October 6-7, 2011).

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* at 5

Proper disposal of hydraulic fracturing fluids is essential for the protection of groundwater. Flowback fluids and produced water are usually disposed of by either injecting them into disposal wells pursuant to the RRC's UIC regulatory program or recycling them. The primary method for disposing of flowback fluids and produced water from oil and gas wells is in underground injection into Class II injection wells.⁸⁰ Generally, the liquids are injected into saltwater formations, the original formations, or older formations that are no longer producing. However, the RRC also authorizes various water recycling efforts designed with the purpose of treating the hydraulic fracturing fluids so that it can be reused for hydraulic fracturing.⁸¹

(i) **H.B. 3328 – Disclosure of Hydraulic Fracturing Fluids**

In response to the public's increasing concern about the safety of drinking water near drilling operations that utilize the practice of hydraulic fracturing, the 82nd Legislature passed legislation requiring hydraulic fracturing operators to disclose to the public the chemicals used in their operations.⁸² The law, codified at section 91.851 of the Natural Resource code, requires the RRC to promulgate rules to require operators to complete forms detailing (1) the total amount of water used in the operations; and (2) each chemical ingredient used in the operation that is listed on the OSHA-required material safety data sheet.

The forms must then be posted on a publically available Internet site. Additionally, the law requires operators to provide the RRC with a list of all the other chemical ingredients that were used in the fracturing of the well, though the law prevents the RRC

⁸⁰ Clayton, *Regulation of Fracking* at 14.

⁸¹ Tough, *Drilling Waste Disposal* at 6.

⁸² TEX. NAT. RES. CODE ANN. § 91.851.

from requiring that the concentration of the ingredients be identified. The additional ingredients will also be posted on a publically available Internet site.

The law includes trade secret protection. Specifically, the law requires the RRC to prescribe a process by which operators may withhold and declare certain information as a trade secret. Persons desiring to challenge a claim of entitlement to trade secret protection must file a challenge within two years of the operator's filing a completion report with regards to the relevant well. However, the law sets restrictions on the entities that may challenge an operator's trade secret protection. The class of people entitled to challenge a claim of trade secret status is limited to the landowner on whose property the well is located, an adjacent landowner, and a department or agency of the state with jurisdiction over a matter to which the claimed trade secret is relevant.

(ii) Texas Water Code

Groundwater can be managed either individually by landowners pursuant to the rule of capture or by groundwater conservation districts ("GCD"). Groundwater conservation districts were first created in Texas in 1949, when the Legislature passed a law authorizing the creation of special underground water conservation districts. In later years, the Texas Legislature passed additional legislation, codified in Chapter 36 of the Texas Water Code, to further encourage the establishment of GCDs.

Under Chapter 36 of the Texas Water Code, a GCD is authorized to develop and implement comprehensive management plans to conserve, protect, and recharge groundwater resources in order to control subsidence and prevent degradation of water quality.⁸³ Groundwater conservation districts have the authority to enforce Chapter 36 by

⁸³ TEX. WATER CODE ANN. § 36.101.

injunction or other appropriate remedy. Additionally, GCDs may set reasonable civil penalties, at an amount up to \$10,000 per day per violation, for breach of any rule of the district.⁸⁴ However, the GCD's power to regulate is restricted by section 36.117(1) of the Texas Water Code.

Under section 36.117(1) of the Texas Water Code, the use of potable groundwater for oil and natural gas exploration is exempt from the regulatory requirements of the GCD. Chapter 36 states, in part, that the Texas Water Code provisions that authorize the GCDs to regulate does not apply to "production or injections wells drilled for oil, gas...or for injection of gas, saltwater, or other fluids, under permits issued by the Railroad Commission...." Thus, operators are free to drill as many water wells as they want and use as much fresh groundwater as they need with few restrictions or guidelines.

2. Causes of Action

Despite assurances by EPA and the Railroad Commission of Texas that hydraulic fracturing is safe and poses little danger to groundwater, as well as the fact that there has been no documented cases of contamination brought about by hydraulic fracturing operations, numerous individuals have filed suit alleging that their groundwater has been contaminated by hydraulic fracturing. Generally, the litigants seek monetary damages for: (1) personal injury caused by contaminated water; (2) replacement of their domestic water supply; (3) remediation and clean up of property or underground aquifer; and (4) diminution of property value.⁸⁵

The following are the most common causes of action brought in Texas for alleged injuries arising from hydraulic fracturing operations:

⁸⁴ Id. at § 36.102(b).

⁸⁵ Hall and Godshall, *Hydraulic Fracturing Litigation* at 13.

(a) Trespass/Nuisance

With the increased use of hydraulic fracturing, Texas courts are being asked to address claims related to drainage caused by fractures, pollution of the surface or subsurface by wastewater used in the fracing process, and the potential damage of the subsurface by fractures.⁸⁶

Although the Supreme Court of Texas's opinion in *Garza* made clear that a trespass claim arising from drainage caused by fractures will not succeed in Texas, the Court left open the question as to whether the subterranean fractures themselves constitute a trespass.⁸⁷ Moreover, the Court's reasoning in *Garza* that the rule of capture precludes a trespass claim related to drainage of an underground oil or gas reservoir does not apply to injection wells containing hydraulic fluid. Thus, a party claiming nuisance or trespass from a leaking injection well will likely find Texas courts receptive to the argument that a subsurface contamination resulting from a leaking injection well constitutes an actionable tort. Of course, the easiest nuisance or trespass claims for either a neighboring landowner or the property owner to raise is one involving the pollution of the surface by hydraulic fracturing operations.⁸⁸

(b) Negligence

As hydraulic fracturing operations continue to come under scrutiny, and additional regulations of the fracing process are put into place establishing standards for well-construction and -operation, Texas courts must determine whether the regulations establish the standard of conduct of a reasonable person. If so, then a violation of the

⁸⁶ Wiseman, *Beyond Coastal Oil v. Garza: Nuisance and Trespass in Hydraulic Fracturing Litigation* at 8.

⁸⁷ *Coastal Oil and Gas Corp. v. Garza Energy Trust*, 268 S.W.3d 1, 12 (Tex. 2008).

⁸⁸ Wiseman, *Beyond Coastal Oil v. Garza: Nuisance and Trespass in Hydraulic Fracturing Litigation* at 10.

regulations would constitute negligence per se and compliance with the regulations would serve as a defense to a negligence cause of action.

(c) Breach of Contract

Many oil and gas companies operate under a mineral lease agreement with the mineral rights holder and a surface use agreement with the owner of the surface estate. Each of these contracts provides potential exposure to mineral lessees in the event of a contamination or other injury to the surface or subsurface estate.

(d) Fraud

Although difficult to prove, many landowners are alleging that they acted in reliance on the misrepresentations of oil and gas companies, suffering harm as result.

D. Limitations Issues

A statute of limitations establishes a time limit for a plaintiff to file a lawsuit. The primary purpose of limitations is to prevent the litigation of stale claims. In Texas, hydraulic fracturing contamination claims generally must be brought within two years of discovery.

Texas courts are reluctant to allow exceptions to the limitations period in oil and gas cases. In particular, Texas courts exert a high standard in applying the “reasonable diligence” test. Nevertheless, Texas courts have recognized the following two exceptions to limitations.

1. The Discovery Rule

Under the discovery rule, the Statute of Limitations is tolled such that it does not begin to run until the date on which the claimant knew, or by exercising reasonable diligence should have known, of the facts giving rise to its cause of action. The discovery

rule applies if (a) the injury is inherently undiscoverable; and (b) the evidence of the injury is objectively verifiable.

An injury is inherently undiscoverable if it is, by its nature, unlikely to be discovered within the prescribed limitations period despite due diligence.⁸⁹ “Inherently undiscoverable” does not mean that a particular plaintiff did not discover his or her particular injury within the applicable limitations period.⁹⁰ Instead, whether an injury is inherently undiscoverable is determined categorically, by examining whether the particular type of injury claimed is generally discoverable through the exercise of reasonable diligence.

An injury is objectively verifiable if the presence of injury and the producing wrongful act cannot be disputed, and the facts upon which liability is asserted are demonstrated by direct, physical evidence.⁹¹

2. The Doctrine of Fraudulent Concealment

Fraudulent concealment is an equitable doctrine that is fact-specific.⁹² Under the doctrine of fraudulent concealment, the Statute of Limitations is tolled after the cause of action accrues, but only until the fraud is discovered or could have been discovered by the defrauded party by exercise of reasonable diligence. For fraudulent concealment to apply, the plaintiff must prove (1) the defendant had actual knowledge of the wrong; (2) the defendant concealed the wrong by making a misrepresentation or by remaining silent

⁸⁹ *S.V. v. R.V.*, 933 S.W.2d 1, 7 (Tex. 1996).

⁹⁰ *Id.*

⁹¹ *S.V.*, 933 S.W.2d at 6–7.

⁹² *BP Am. Prod. Co. v. Marshall*, 342 S.W.3d 59, 67 (Tex. 2011).

when it had a duty to speak; (3) the defendant had a fixed purpose to conceal the wrong; and (4) the plaintiff reasonably relied on the misrepresentation or silence.⁹³

Reasonable diligence requires that owners of property interests make themselves aware of relevant information available in the public record. For example, in *BP America*, The Supreme Court of Texas held that the limitations period was not tolled as a matter of law because BP's fraudulent misrepresentations about its good faith efforts to develop a well could have been discovered from publicly available information within the limitations period.⁹⁴ Likewise, in *Kerlin v. Saucedo*, the Court held that a deed holder's descendants who had been given notice that deeds executed by their predecessors contained royalty reservations, but had not received any royalty payments for minerals on their property, could have discovered the existence of their claims for unpaid royalties by investigating public records of case settlements and conveyances.⁹⁵

E. Recent Cases

1. *Coastal Oil & Gas Corp. v. Garza Energy Trust*, 268 S.W.3d 1 (Tex. 2008).

Issue: Whether drainage from a neighbor's property through the use of hydraulic fracturing is constitutes a trespass.

Royalty interest owners of a natural gas lease brought an action against a gas well operator for subsurface trespass resulting from hydraulic fracturing operations on neighboring property.⁹⁶ The royalty interest owners alleged that the hydraulic fracturing operations created subsurface fractures that allowed gas to be drained from their property.

⁹³ *Shah v. Moss*, 67 S.W.3d 836, 841 (Tex. 2001).

⁹⁴ 342 S.W.3d at 68–69.

⁹⁵ *Kerlin v. Saucedo*, 263 S.W.3d 920, 926 (Tex. 2008).

⁹⁶ *Coastal Oil & Gas Corp. v. Garza Energy Trust*, 268 S.W.3d 1 (Tex. 2008).

In denying the royalty interest owners' claims, the Court held that the rule of capture bars recovery of such damages.⁹⁷

The rule of capture is a cornerstone of the oil and gas industry and is fundamental both to property rights and to state regulation.⁹⁸ The "rule of capture" gives a mineral rights owner title to the oil and gas produced from a lawful well bottomed on the property, even if the oil and gas flowed to the well from beneath another owner's tract.⁹⁹

The Court explained that while a mineral rights owner has a real interest in oil and gas in place, this right does not extend to specific oil and gas beneath the property.¹⁰⁰ Ownership must be considered in connection with the law of capture, which is recognized as a property right.¹⁰¹ The Court made clear that the minerals owner is entitled, not to the molecules actually residing below the surface, but to a fair chance to recover the oil and gas in or under his land, or their equivalents in kind.¹⁰²

2. FPL Farming Ltd. V. Env'tl. Processing Sys., L.C., 351 S.W.3d 306 (Tex. 2011).

Issue: Whether a permit allowing for the operation of a wastewater injection well protected the holder of the permit from liability for the migration of subsurface wastewater.

Landowner brought a tort action against a wastewater injection well operator, alleging that the wastewater migrated onto the landowner's property and contaminated the landowner's water supply.¹⁰³ Environmental Processing Systems, L.C. (EPS) obtained permits from the Texas Natural Resource Conservation Commission (now the Texas

⁹⁷ *Id.* at 4.

⁹⁸ *Id.* at 13.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 15.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *FPL Farming Ltd. V. Env'tl. Processing Sys., L.C.*, 351 S.W.3d 306 (Tex. 2011).

Commission on Environmental Quality) to construct and operate two deep wastewater injection wells on a tract next to land FPL Farming Ltd. (FPL) owns in Liberty County.¹⁰⁴ The Supreme Court held that operator's receipt of permits under the Injection Well Act, which authorized injections of wastewater that could extend under the landowner's property, did not immunize operator from civil tort liability related to injections.¹⁰⁵

The Court explained that the wastewater injection well operator's receipt of permits under the Injection Well Act authorizing injections of waste that could extend under neighboring landowner's property did not immunize the operator from civil tort liability related to injections, where both the Act and administrative code section governing permits specifically provided that such permits did not relieve permit-holders from liability.¹⁰⁶ The Court noted that, as a general rule, a permit granted by an agency does not act to immunize the permit holder from civil tort liability from private parties for actions arising out of the use of the permit.¹⁰⁷

3. *BP Am. Prod. Co. v. Marshall*, 342 S.W.3d 59 (Tex. 2011).

Issue: Whether the statute of limitations bars a fraud claim where the lessors assert that the lessee's fraudulent concealment tolled the statute of limitations.

Oil and gas lessors brought separate suits against lessee and its successor-in-interest, asserting claims for fraud arising out of termination of lease.¹⁰⁸ The lessee and its successor-in-interest argued, in part, that the claims against it were time-barred.¹⁰⁹ The lessors, however, argued that either (1) the discovery rule delayed the accrual of the cause

¹⁰⁴ *Id.* at 307.

¹⁰⁵ *Id.* at 308.

¹⁰⁶ *Id.* at 310.

¹⁰⁷ *Id.*

¹⁰⁸ *BP Am. Prod. Co. v. Marshall*, 342 S.W.3d 59 (Tex. 2011).

¹⁰⁹ *Id.* at 65.

of action or (2) the limitations period was tolled due to lessee's fraudulent concealment.¹¹⁰ The Court held that the discovery rule exception did not operate to defer accrual of the cause of action.¹¹¹ The Court held, further, that the limitations was not tolled by BP's fraudulent concealment of the cessation of good faith operations.¹¹²

Although Texas courts are reluctant to allow exceptions to the limitations period in oil and gas cases, the Supreme Court of Texas has recognized the discovery rule and fraudulent concealment doctrine as exceptions to limitations. The discovery rule delays the accrual of a cause of action, rather than tolling the statute of limitations after a cause of action has accrued.¹¹³ A defendant's fraudulent concealment of wrongdoing may toll the statute of limitations after the cause of action accrues.¹¹⁴

The Court premised its holding that the discovery rule did not apply to defer the accrual of the lessor's claims on the fact that the lessor did not exercise reasonable diligence in protecting its mineral interests and, thus, the injury was not inherently undiscoverable.¹¹⁵ Specifically, the Court argued that the lessor did not examine information that, although somewhat technical in nature, would have led them to understand that the lessee was not operating in good faith.¹¹⁶ Likewise, the Court based its holding that the fraudulent concealment doctrine did not apply to toll the statute of limitations after the cause of action accrued on the Court's belief that the lessor did not reasonably rely on the lessee's representations.¹¹⁷ The Court argued that the lessor was

¹¹⁰ *Id.* at 64.

¹¹¹ *Id.* at 65.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.* at 67.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 68.

obligated to perform additional investigation to protect its interest and, had the lessor done so, then the lessor could have discovered the lessee's wrongdoing.¹¹⁸

III. TRANSACTIONAL ISSUES

A. Contractual Indemnity

Most oil and gas contracts contain contractual indemnification and additional insured provisions.¹¹⁹ In order to meet their contractual indemnification obligations, oil and gas operators typically obtain a commercial general liability ("CGL") policy, a commercial auto policy, and an umbrella policy. Insurance coverage related to additional insured provisions is generally provided by various endorsements that are added to a CGL and commercial auto policy.¹²⁰

Contractual indemnification provisions in oil and gas contracts are governed by Chapter 127 of the Texas Civil Practice and Remedies Code. Failure to comply with the requirements of Chapter 127 can result in surprising, and harsh, consequences for oil and gas operators. But even those oil and gas operators who have complied with the requirements of Chapter 127 face potential coverage issues pertaining to their contractual indemnification obligations.

B. Chapter 127 of Texas Civil Practice and Remedies Code

Pursuant to the provisions of section 127.001, *et seq.*, indemnification provisions supporting indemnity in an agreement pertaining to a well for oil or gas, or in an agreement collateral to or affecting an agreement pertaining to a well for oil or gas, against one's own fault are void and unenforceable.

¹¹⁸ *Id.*

¹¹⁹ Robert H. Etnyre, Jr. and Marcus R. Tucker, *Insurance Coverage Issues Raised by Typical Contractual Indemnity and Additional Insured Provisions in Oil and Gas Contracts*, pg. 45, *The Advocate* (Winter 2011).

¹²⁰ *Id.*

Specifically, section 127.003 provides that a provision in an agreement pertaining to a well for oil and gas that requires indemnification against an indemnitee's own negligence, or the negligence of the indemnitee's agent or employee, or any third party under the control or supervision of the indemnitee, and that results in loss arising from personal injury, death, or property injury, is void and unenforceable as against public policy.

However, there are several exceptions to the prohibition against indemnification. Section 127.002 allows for joint operating agreement provisions for the sharing of costs or losses arising from joint activities, including costs or losses attributable to the negligent acts or omissions of any party conducting the joint activity since joint operating agreements are commonly understood, accepted, and desired by the parties and encourage mineral development. The joint operating agreements are not against public policy and are enforceable *unless* the costs and losses are expressly excluded by written agreement.

Further, section 127.005(a) provides that Chapter 127 does not apply to an agreement that provides for indemnity if the parties agree in writing that the indemnity obligation will be supported by liability insurance coverage to be furnished by the indemnitor. However, section 127.005(a) is subject to the limitations specified in 127.005(b) and 127.005(c). Subsection (b) provides that, with respect to a mutual indemnity obligation, the indemnity obligation is limited to the extent of the coverage and dollar limits of insurance or qualified self-insurance each party as indemnitor has agreed to obtain for the benefit of the other party as indemnitee. Section 127.001(3) defines "mutual indemnity obligations" as indemnity obligations whereby the parties to the contract agree to indemnify one another "and each other's contractors and their employees" for claims brought by their respective employees" and their respective contractors and their

employees and invitees for bodily injury, death, and damage to property. Subsection (c) states that, with respect to a unilateral indemnity obligation, the amount of insurance required may not exceed \$500,000. Section 127.001(6) defines a “unilateral indemnity obligation” as one whereby the indemnitor agrees to indemnify the indemnitee for personal injury or death to the employees of the indemnitor or of the indemnitor’s contractors, with no reciprocal indemnification by the indemnitee to the indemnitor.

Likewise, according to section 127.006, Chapter 127 does not effect the validity of an insurance contract or a benefit conferred by the state’s workers’ compensation statutes.

In addition to the exceptions found in sections 127.002, 127.005, and 127.006, section 127.004 states that Chapter 127 does not apply to loss or liability for damages or an expense arising from the following:

- a. personal injury, death, or property injury that results from radioactivity;
- b. property injury that results from pollution, including cleanup and control of the pollutant;
- c. property injury that results from reservoir or underground damage, including loss of oil, gas, other mineral substance, or water or the well bore itself;
- d. personal injury, death, or property injury that results from the performance of services to control a wild well to protect the safety of the general public or to prevent depletion of vital natural resources; or
- e. cost of control of a wild well, underground or above the surface.

C. Comparative Indemnity Agreements

It is quite common for oil and gas contracts to include comparative indemnification agreements, wherein the parties agree to contractually indemnify each other for bodily injury or property damage claims resulting from the party’s own negligence.¹²¹ There is

¹²¹ Etnyre and Tucker, *Insurance Coverage Issues Raised by Typical Contractual Indemnity and Additional Insured Provisions in Oil and Gas Contracts* at 46.

disagreement, however, among the courts in the various oil and gas producing states as to whether comparative indemnification agreements constitute “insured contracts.” A number of courts, including those in Texas, have held that comparative indemnification agreements do not constitute insured contracts since the tort liability being assumed is the tort liability for the party’s own negligence and not the tort liability of the other party.¹²² Consequently, the courts find that there is no insurance coverage. Other courts, though, have held that comparative indemnification agreements do constitute insured contracts and that coverage is provided for them.¹²³ These courts reason that the tort liability being assumed in a comparative indemnity agreement is not the tort liability of the indemnitor; rather, the tort liability being assumed is that of the indemnitee, who is another party, to the extent of the indemnitor’s negligence.

D. Flow-through Agreements

Just as it is quite common for oil and gas contracts to include comparative indemnification agreements, many oil and gas contracts contain flow-through contractual indemnity provisions.¹²⁴ Under a flow-through contractual indemnity provision, indemnitors agree to contractually indemnify an indemnitee for both the indemnitee’s tort liability and for any contractual liability that the indemnitee may have to a third party arising out of the same tort liability. Although only two courts have addressed the issue of whether a flow-through contractual indemnity claim is an insured contract, some insurers assert that there is no coverage under CGL and commercial auto policies for flow-through contractual indemnity claims because the named insured is not assuming the tort liability

¹²² *Id.*; *Am. Economy Ins. Co. v. Texas Instruments, Inc.*, 2006 U.S. Dist. LEXIS 9754 (N.D. Tex. 2006).

¹²³ Etnyre and Tucker, *Insurance Coverage Issues Raised by Typical Contractual Indemnity and Additional Insured Provisions in Oil and Gas Contracts* at 46.

¹²⁴ *Id.*

of another party. Rather, the named insured is assuming a contractual liability of another party.

IV. HOT TOPICS

A. Alternative Energy

The movement towards developing alternative energy, or energy sources other than those derived from conventional fossil fuels, stems from both a national desire to be energy independent and the recognition that the burning of fossil fuels has a demonstrable, negative impact on the environment. Over the last several years, public and private partnerships have emerged with the goal of developing affordable, renewable alternative energy sources designed to supplement existing energy production, thereby reducing the country's dependence on foreign oil and cutting carbon emissions. Two of the more popular alternative energy sources is wind energy and solar energy. Although both offer the prospect of a clean, renewable energy source, each has met with varying degrees of success.

1. Wind Energy

(a) The Texas Renewable Portfolio Standard

The proliferation of wind energy over the last two decades in Texas is due, in large part, to the renewable portfolio standard. A renewable portfolio standard ("RPS") is a regulation that requires electricity providers to produce a minimum percentage of their power from renewable energy sources.¹²⁵ Although adoption of a RPS is encouraged by the federal government through the use of renewable energy production tax credits, RPS

¹²⁵ Austin Conner, *Twenty Percent Wind Energy by 2030: Keys to Meeting the DOE's Goal*, 5 *Env'tl. & Energy L. & Pol'y J.* 130, 130 (2010).

programs are state-based and designed to take into account state-specific policy objectives. Additionally, each state defines “renewable” differently.

The Texas Renewable Portfolio Standard was originally created by Senate bill 7 in 1999. The Texas RPS mandated that utility providers install 2,000 MW of new renewable energy capacity by 2009.¹²⁶ Additionally, each individual provider was required to provide its share of the 2,000 MW in proportion to its share of total competitive energy sales.¹²⁷

By 2005, the Texas RPS requirement was met. In the nearly six years since the passage of Senate Bill 7, utility providers had installed nearly 1,800 additional wind turbines in the plains of the Texas Panhandle and the Gulf region. In 2005, the Legislature passed Senate bill 20, which increased the Texas RPS requirement to 5,880 MW by 2015 and set a non-binding target of 10,000 MW by 2025.¹²⁸ By 2008, Texas utility providers had installed 7,113 wind turbines, surpassing California as the nation’s leading producer of wind generated electricity.¹²⁹ The RPS’s 2025 non-target of 10,000 MW was surpassed during the fourth quarter of 2011, when Texas wind farms began producing just over 10,377 MW.

(b) Objections to Wind Farms

Despite being ranked nationally in potential wind capacity, two barriers remain in Texas’ quest to develop wind energy: (1) the lack of capacity to transmit the energy to the population regions in the north and east; and (2) the sound pollution created by the wind turbines.

(i) The Transmission Grid

¹²⁶ David Francis, *Better Together: Co-Sitting Wind and Solar Production in Texas*, 42 Tex. Envtl. L. J. 177, 179 (Winter 2012).

¹²⁷ *Id.*

¹²⁸ Drew Thornley, *Texas Wind Energy: Past, Present, and Future*, 4 Envtl. & Energy L. & Pol’y J. 68, *2 (2009).

¹²⁹ *Id.* at *4.

Although Texas has achieved a nationally recognized level of success in terms of the growth of its wind industry, it continues to face obstacles related to the transmission of wind energy.¹³⁰ Despite the heavy investment by utility providers in the erection of wind turbines to generate power, there remains a lack of electric-transmission capacity. This is particularly troublesome since the majority of the state's population is located far from its wind resources.¹³¹

Wind farms must be near high-voltage transmission lines capable of carrying power over long distances.¹³² Moreover, these transmission lines must have the capacity to handle the additional generation. The permitting process for a high-voltage transmission line on new rights-of-way can take from six to eighteen months, and, once the permitting process is complete, construction takes from nine months, for short-distance lines and substation upgrades, to two years, for long-distance lines.¹³³

Besides the lengthy permitting process, high-voltage transmission lines cost up to \$1.5 million per mile to build.¹³⁴ In 2008, ERCOT released a study of the costs of various wind energy transmission plans. Specifically, the study estimated costs for the transmission lines and transmission substations needed to carry wind power from the Panhandle to North Texas. According to the study, the installed costs would exceed \$5 billion, much of which Texas utilities are allowed to recover from the consumer through the electricity rates charged to consumers.¹³⁵

(ii) Sound Pollution

¹³⁰ Kathryn B. Daniel, *Winds of Change: Competitive Renewable Energy Zones and the Emerging Regulatory Structure of Texas Wind Energy*, 42 Tex. Tech. L. Rev. 157, 166 (2009).

¹³¹ *Id.*

¹³² Thornley, 4 *Env'tl. & Energy L. & Pol'y J.* at 10.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

Although litigation involving wind energy is sparse, the sound created by the turbine is one of the primary sources of contention between wind farm operators and neighboring landowners. Typically, wind turbines emit a humming sound caused by the moving parts inside the turbine.¹³⁶ Additionally, the large blades create a whooshing noise as wind passes over them. Landowners often complain that the noise created by the wind turbines is sufficient to create a nuisance.¹³⁷ Such was the case in *Rankin*, perhaps the most important Texas case on wind energy.¹³⁸

In *Rankin*, the plaintiffs, landowners who lived on tracts of between 100 and 700 acres, brought suit seeking both a temporary and permanent injunction against the construction and operation of a large wind farm situated just south of Abilene. The plaintiffs alleged, in part, that the 421 wind turbines located on the 47,000 acre wind farm created both a public and private nuisance.¹³⁹ Additionally, the plaintiffs sought to prove that the defendant's wind farm had an adverse aesthetic impact on the neighboring properties.¹⁴⁰ In upholding the trial court's order that the wind farm did not create a nuisance, the court of appeal held that an aesthetic complaint cannot form the basis of a nuisance action.¹⁴¹ Further, the court found that the noise created by the wind turbines, which measured 44 decibels at its loudest, did not constitute a nuisance.¹⁴²

¹³⁶ Trey Cox, *In Defense of the Wind: Legal Challenges Facing Wind Power Are a Breeze with Proper Planning*, pg. 95, *The Advocate* (Winter 2011).

¹³⁷ *Id.*

¹³⁸ *Rankin v. FPL Energy, LLC*, 266 S.W.3d 506 (Tex. App.—Eastland 2008, pet. denied).

¹³⁹ *Id.* at 510.

¹⁴⁰ *Id.* at 511.

¹⁴¹ *Id.* at 512.

¹⁴² *Id.* at 515.

2. Solar Energy

Solar energy is energy radiated from the sun in the form of heat and light. Solar energy can be harnessed for solar power on both the large and small scale.¹⁴³ Large-scale solar energy systems involve the use of large tracts of rural land to collect and distribute solar power to multiple end users.¹⁴⁴ Many factors influence the decision to implement large-scale use of solar energy, including the availability of adequate land and water supplies, the accessibility to adequate electrical transmission lines, and access to backup power sources and storage technologies.¹⁴⁵ While these factors can prove to be prohibitive to the implementation of large-scale solar energy devices, small-scale solar energy systems provide a more feasible alternative to individual homeowners.¹⁴⁶ Small-scale solar energy systems produce power at, or very close to, the point of use and can be placed on existing buildings, eliminating the need for land dedicated solely to energy production. Moreover, small-scale solar energy systems do not use water.¹⁴⁷

Although Texas is the nation's leader in wind energy, the state has yet to enact a comprehensive solar energy program. This is due, in part, to the limited availability of state budgetary resources. Nevertheless, Texas has one of the highest solar power potentials in the country, second only to California.

(a) Senate Bill 981

Perhaps the most important bill for the Texas solar industry in years, Senate Bill 981 clarifies that third-party owners of small-scale distributed renewable generation are not subject to the same regulation as large power producers participating in the retail electric

¹⁴³ Jamie E. France, *A Proposed Solar Access Law for the State of Texas*, 89 Tex. L. Rev. 187, 191 (2010).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 192.

¹⁴⁷ *Id.*

market.¹⁴⁸ Under a third-party ownership arrangement, the owner of the site where the solar energy system is installed either leases the system equipment or purchases electricity produced by the system under a power purchase agreement from the owner of the solar energy system.¹⁴⁹ Such arrangements allow retail electric customers to obtain solar energy without incurring the initial start-up costs of purchasing a solar energy system by allowing the customer to pay these costs over time under a long-term contract.¹⁵⁰

Additionally, the bill eliminates the requirement that anyone with a solar panel on the roof of their home register as a wholesale power generator.

(b) House Bill 362

House Bill 362 limits Property Owners' Associations' ("POA") ability to prevent homeowners from installing a solar energy device. Although a POA may still require the property owner to first seek approval from the POA before installing the solar energy device, the POA may not deny or unreasonably delay approval so long as the solar energy device is (i) installed no higher than the roofline; (ii) conforms to the slope of the roof and has a top edge that runs parallel to the roofline; (iii) is comprised of solar panel frames and wiring that are silver, bronze, or black in color; and (iv) is no taller than the fence line if installed in a yard or patio.¹⁵¹

However, under certain conditions, the POA may still deny approval if of a solar energy device it even if the applicant meets the above requirements. For instance, the POA can deny approval of a solar energy device if it determines that the solar installation

¹⁴⁸ Dick Watt, Ben Elmore, Robert C. Campbell, Cynthia R. Redwine, *Recent Developments in Texas, United States, and International Energy Law*, 7 Tex. J. of Oil, Gas, and Energy L. 383 (2011-2012).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

“substantially interferes with the use and enjoyment” of adjacent property owners, though the applicant may negate the POA’s determination if it obtains written approval from each adjoining property owners.¹⁵² Additionally, a POA may deny approval of a solar installation, including installations: (i) on property owned or maintained by the POA; (ii) on commonly owned property; (iii) located anywhere other than the property owner's roof or fenced in areas; (iv) installed in violation of manufacturers' installation or warranty requirements; or (v) installed in a way that violates the law or threatens public health or safety. Perhaps the most important exemption is that POAs can also prohibit solar installations during a subdivision's “development period,” or the period when a development or subdivision is still under the developer's control and the POA has not yet been transferred to the property owners.¹⁵³

B. Climate Change

1. Global Warming

Climate change is “a change in climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable periods of time.”¹⁵⁴ Simply put, solar energy enters the earth’s atmosphere, which consists primarily of nitrogen and oxygen, as well as trace amounts of greenhouse gases such as carbon dioxide, ozone, and other gases, and warms the planet’s surface.¹⁵⁵ Some of the sun’s heat reflects

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ United Nations Framework Convention on Climate Change. Available at http://unfccc.int/essential_background/convention/background/items/2536.php. (Last visited September 13, 2012.)

¹⁵⁵ The Ocean-Atmosphere System. Available at http://www.tulane.edu/~sanelson/Natural_Disasters/oceanatmos.htm. (Last visited on September 13, 2012.)

back into the atmosphere and is scattered, while the remainder of the heat is trapped by the greenhouse gases, of which carbon dioxide constitutes approximately 60 percent.¹⁵⁶ As the use of fossil fuels has increased, so too has the discharge of carbon dioxide and other greenhouse gases.¹⁵⁷ It is thought that as the level of greenhouse gases increase in the atmosphere, the amount of retained heat increases as well, thereby artificially increasing the ambient temperature.

2. The Role of the Judiciary in Setting Caps for Greenhouse Gas Emissions.

American Electric Power Co. v. Connecticut. was brought by eight states, the City of New York, and three private land trusts against the nation's five largest carbon dioxide polluters under the federal common law of nuisance, seeking to force them to cap and reduce their greenhouse gas emissions.¹⁵⁸ The Second Circuit denied a motion to dismiss, allowing the case to move forward. The Supreme Court was presented with the following questions:¹⁵⁹

1. Whether States and private parties have standing to seek judicially fashioned emissions caps on five utilities for their alleged contribution to harms claimed to arise from global climate change caused by more than a century of emissions by billions of independent sources.

2. Whether a cause of action to cap carbon dioxide emissions can be implied under federal common law where no statute creates such a cause of action, and the Clean Air Act

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *American Electric Power Co. v. Connecticut*, 131 S.Ct. 2527 (June 20, 2011).

¹⁵⁹ Questions Presented. Available at <http://www.supremecourt.gov/qp/10-00174qp.pdf>. (Last accessed September 23, 2012.)

speaks directly to the same subject matter and assigns federal responsibility for regulating such emissions to the Environmental Protection Agency.

3. Whether claims seeking to cap defendants' carbon dioxide emissions at "reasonable" levels, based on a court's weighing of the potential risks of climate change against the socioeconomic utility of defendants' conduct, would be governed by "judicially discoverable and manageable standards" or could be resolved without "initial policy determination[s] of a kind clearly for nonjudicial discretion." *Baker v. Carr*, 369 U.S. 186, 217 (1962).

The Supreme Court held that plaintiffs could not proceed under federal common law because the Clean Air Act delegates the federal role in managing greenhouse gas emissions to the Environmental Protection Agency (EPA).¹⁶⁰ The Court argued that there is no room for parallel action under federal common law. Another reason to defer to agency action, the Court held, is that the agency is better equipped than federal judges to decide how strictly to regulate emissions.¹⁶¹

The Court noted that plaintiffs may not be without recourse. "If States (or EPA) fail to enforce emissions limits against regulated sources, the Act permits 'any person' to bring a civil enforcement action in federal court."¹⁶² Further, "[i]f the plaintiffs in this case are dissatisfied with the outcome of EPA's forthcoming rulemaking, their recourse under federal law is to seek Court of Appeals review, and, ultimately, to petition for certiorari in this Court."¹⁶³

¹⁶⁰ *American Electric*, 131 S.Ct. at 2538.

¹⁶¹ *Id.* at 2539.

¹⁶² *Id.* at 2538.

¹⁶³ *Id.* at 2539.