

CHAPTER FOUR: TORTS (Updated September 2018)

Items that are new or modified in 2018 are in yellow highlight.

Add Note 5 to page 195:

5. An industrial activity that has become increasingly contentious in many areas of the country is what is commonly known as “fracking” – drilling operations designed to extract underground quantities of natural gas or oil through horizontal drilling coupled with multi-stage hydraulic fracturing. While fracking is touted by many as a means of reaching untapped domestic oil and natural gas reserves, it is condemned by others as an inherently “dirty” process – one that can contaminate groundwater, release large quantities of methane gas, and produce waste material that (because of naturally-occurring radium and radon) is often radioactive. Thus far, as we shall see, Congress has made the policy choice to encourage the use of this technology as a means of tapping oil and gas reserves, and thus has exempted various aspects of the fracking industry from federal environmental regulation. Some states have taken a more aggressive regulatory approach, but most have followed the lead of Congress, seeing fracking as a boon to state and local economies. In the absence of more comprehensive state or federal regulation, the tort system has emerged as a potentially major regulatory force for this industry. According to a private law firm usually associated with business interests, a total of 35 state tort lawsuits had been filed against fracking companies in nine different states as of July 2013. Arnold & Porter, LLP, *Hydraulic Fracturing* (July 13, 2013), available from <http://www.arnoldporter.com/resources/documents/Hydraulic%20Fracturing%20Case%20Chart.pdf>. Many of these cases focus on alleged contamination of drinking water supplies.

Add to the end of Note 10 on page 205:

A divided opinion of the Supreme Court brought an apparent end to the Exxon Valdez punitive damages saga in 2008, when that Court reduced the award to just above \$500 million, an amount equal to the compensatory damages already assessed against Exxon. See *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605 (2008). The Court’s decision was not grounded in constitutional law, but rather in admiralty law, a rare form of federal tort law in which the federal courts effectively function as common law tribunals.. After rejecting Exxon’s argument that the Clean Water Act’s oil spill provisions (see Chapter 8) preempt the award of punitive damages, Justice Souter’s majority opinion decries “the unpredictability of high punitive awards,” reasoning that

a penalty should be reasonably predictable in its severity, so that even Justice Holmes's “bad man” can look ahead with some ability to know what the stakes are in choosing one course of action or another. See *The Path of the Law*, 10 *Harv. L. Rev.* 457, 459 (1897). And when the bad man's counterparts turn up from time to time, the penalty scheme they face

ought to threaten them with a fair probability of suffering in like degree when they wreak like damage.

128 S. Ct, at 2627.

Drawing from various studies of punitive damage awards, the Court concluded that

a median ratio of punitive to compensatory damages of about 0.65:1 probably marks the line near which cases like this one largely should be grouped. Accordingly, given the need to protect against the possibility (and the disruptive cost to the legal system) of awards that are unpredictable and unnecessary, either for deterrence or for measured retribution, we consider that a 1:1 ratio, which is above the median award, is a fair upper limit in such maritime cases

Id. at 2633. In *dictum*, the majority opinion notes that, in cases (like this one) where the compensatory damages are “substantial,” the 1:1 ratio may constitute “the constitutional outer limit” as well. *Id.* at 2634 n.28. The reduced award was roughly equal to four days of Exxon Mobil's reported profits for the business quarter preceding the decision. *See* “Justices Cut Damages Award in Exxon Valdez Spill,” *Associated Press*, June 25, 2008. Are there policy arguments *in favor* of allowing punitive damages to remain unpredictable?

Add to the end of Note 3 on page 217:

On appeal, the Second Circuit Court of Appeals disagreed with the district court, holding that the political question doctrine does *not* bar the plaintiffs’ federal common law action to address global warming. In an opinion running some 84 pages, the Second Circuit found “no textual commitment in the Constitution that grants the Executive or Legislative branches responsibility to resolve issues concerning carbon dioxide emissions or other forms of alleged nuisance,” *Connecticut vs. American Electric Power Co., Inc.*, 582 F.3d 309, 325 (2nd Cir. 2009), and “no unified [federal] policy on greenhouse gas emissions,” *id.* at 332-33. “Allowing this litigation where there is a lack of a unified policy,” the court reasoned, “does not demonstrate any lack of respect for the political branches, contravene a relevant political decision already made, or result in multifarious pronouncements that would embarrass the nation.” *Id.* at 333. The Second Circuit then went on to find that the plaintiffs *had* properly stated a claim under federal common law, and that this claim had not been displaced by federal environmental statutes.

The defendants in the Second Circuit case (supported by the Obama administration) asked the U.S. Supreme Court to review the Second Circuit’s opinion. The Supreme Court agreed to hear the case, and in 2011 issued a unanimous opinion upholding the district court’s dismissal of the plaintiffs’ claims. *See American Power Co., Inc. v. Connecticut*, 564 U.S. ___, 131 S. Ct. 2527 (2011). The Supreme Court reaffirmed that there *is* a federal common law relating to interstate pollution, and noted that the federal

courts had applied that doctrine decades earlier to permit the State of Illinois to sue the City of Milwaukee for pollution discharged into Lake Michigan. Nonetheless, the Court noted, federal courts are leery of usurping the federal legislative role through the articulation of common law, and Congress can “displace” federal common law by enacting federal statutes. *See Illinois v. Milwaukee*, 406 U.S. 91 (1972) (finding federal common law applicable to Lake Michigan lawsuit) and *Milwaukee v. Illinois*, 451 U.S. 304 (1981) (holding that subsequent amendments to the Clean Water Act had displaced federal common law on issues of interstate water pollution).

The Supreme Court went on to hold that the Clean Air Act does displace federal common law on the issue of greenhouse gas emissions. The test for displacement, noted the Court, is “whether the statute speaks directly to [the] question at issue.” The key is not whether EPA has actually regulated greenhouse gases, but whether it has the authority to do so. “Indeed,” the Court noted, “were EPA to decline to regulate carbon-dioxide emissions altogether,” federal courts “would have no warrant to employ the federal common law of nuisance to upset the agency’s expert determinations.” The Court also expounded on its preference for a legislative solution to issues such as global warming:

It is altogether fitting that Congress designated an expert agency, here, EPA, as best suited to serve as primary regulator of greenhouse gas emissions. The expert agency is surely better equipped to do the job than individual [federal] district judges issuing ad hoc, case-by-case injunctions. Federal judges lack the scientific, economic, and technological resources an agency can utilize in coping with issues of this order.

131 S. Ct. at 2529. The Supreme Court did not reach the “political question” issue; nor did it reach the issue of whether federal common law would be applicable to this case if the Clean Air Act did not address the issue of greenhouse gases. (See Chapter 5 for an explanation of the structure and jurisdiction of the federal court system and federal preemption. See Chapter 7 for a discussion of the 2007 decision in which a sharply-divided Supreme Court held that the Clean Air Act does authorize EPA to regulate carbon dioxide and other greenhouse gases.)

Add Notes 5, 6, 7, and 8 at the end of page 217:

5. In *Anderson v. Teck Metals, Ltd.*, 2015 WL 59100 (E.D.Wash.), the court held that the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), commonly known as the federal Superfund statute (see Chapter 9), displaces federal common law actions for damages from the release of hazardous substances.

6. In the *American Power* case discussed in note 4 above, the Supreme Court noted that it did not reach the issue of whether the Clean Air Act preempts *state* common law. Two federal courts of appeal have addressed this issue in the context of greenhouse gases and global warming, with differing results. One was a suit brought in the U.S. District Court

for the Southern District of Mississippi against various oil, chemical, and energy companies by victims of Hurricane Katrina. The plaintiffs alleged “that defendants’ operation of energy, fossil fuels, and chemical industries in the United States caused the emission of greenhouse gasses that contributed to global warming, viz., the increase in global surface air and water temperatures, that in turn caused a rise in sea levels and added to the ferocity of Hurricane Katrina, which combined to destroy the plaintiffs’ private property, as well as public property useful to them.” *Comer v. Murphy Oil USA*, 585 F.3d 855, 859 (5th Cir. 2009). The district judge (in an unwritten opinion) dismissed the suit, but a three-judge panel of the Fifth Circuit reversed, holding both that the case was not barred by the political question doctrine and that the case stated claims under Mississippi common law that could be heard in federal court. Thereafter, however, the defendants petitioned the Fifth Circuit for an *en banc* rehearing – a reargument and reconsideration of the case by all the judges of the Fifth Circuit. That petition was granted, and the three-judge panel’s decision was accordingly vacated. In something of a bizarre twist, so many of the Fifth Circuit’s judges found it necessary to “recuse” (withdraw) themselves from the case – because they held a financial interest in one or more of the defendants – that the court was unable to field the minimum number of judges that, under the Fifth Circuit’s rules, are required for *en banc* review. Thus, no rehearing was held and, since the panel’s decision had been vacated, the district judge’s opinion dismissing the case was allowed to stand.

In a more straightforward appeal, the Fourth Circuit Court of Appeals overturned an injunction issued by a federal district court against the Tennessee Valley Authority. The Fourth Circuit held that the plaintiffs’ claim under North Carolina nuisance law was preempted (foreclosed) by the comprehensive system of federal environmental and energy statutes.

If allowed to stand, the injunction would encourage courts to use vague public nuisance standards to scuttle the nation’s carefully created system for accommodating the need for energy production and the need for clean air. The result would be a balkanization of clean air regulations and a confused patchwork of standards, to the detriment of industry and the environment alike.

State of North Carolina v. Tennessee Valley Authority, 615 F.3d 291, 296 (4th Cir. 2010). (How does this reasoning compare with that of the majority opinion in the 1970 *Boomer* case discussed at the end of this chapter?)

7. And in another attempt to avoid the result in *American Power*, a group of mostly teenagers filed suit against the federal government in U.S. district court in Oregon in 2015, alleging that the government’s failure to meaningfully address global climate change violated their (asserted) constitutional right to a healthy environment. The plaintiffs contend that that “the harm to the climate system threatens the very foundation” of their lives and the lives of future generations, including their “personal security, liberties, and property,” and they seek a court order directing the government to limit the emission of greenhouse gases. Like the Obama administration before it, the Trump

administration has sought, thus far to no avail, to have the case dismissed. In July 2018, the U.S. Supreme Court rejected the government's motion to dismiss the plaintiffs' claims, although it did direct the district court to take the "striking" breadth of those claims into account in its disposition of the case. Greg Stohr, "U.S. Supreme Court Won't Halt Teenagers' Climate-Change Lawsuit," *Environment Reporter* (July 30, 2018).

8. The Second Circuit Court of Appeals has held that the Clean Air Act's reformulated gasoline program for mobile sources, under which Exxon Mobil had added the chemical Methyl Tertiary Butyl Ether (MTBE) as an oxygenating agent to gasoline in an effort to attain the act's oxygenation goals, did not preempt New York state tort law claims for damages allegedly caused by MTBE contamination of groundwater. Accordingly, the Circuit Court upheld a \$104.7 million jury award against Exxon Mobil for losses associated with contaminated drinking water. See *In re Methyl Tertiary Butyl Ether (MTBE) Products Liability Litigation*, 725 F.3d 65 (2nd Cir, 2013). (See Chapter 7 for a more detailed discussion of the use of MTBE as a gasoline additive.)