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REUTERS/Victor Fraile

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# Compensation through legislation for 9/11 responders and victims: An analysis of Zadroga

By Paul Napoli, Esq., and Brian Crosby, Esq.  
Napoli Bern Ripka LLP

On Jan. 2, 2011, President Obama signed into law the James Zadroga 9/11 Health and Compensation Act of 2010, P.L. 111-347, providing a long-awaited victory for responders, victims, survivors, workers and other individuals affected by the collapse of the World Trade Center towers in the Sept. 11 terrorist attacks. With the enactment of Zadroga, the Sept. 11 Victim Compensation Fund of 2001 will reopen. Title IV of P.L. 107-42, enacted shortly after the 2001 terrorist attacks, established the "original" Sept. 11 Victim Compensation Fund of 2001. That VCF, however, was closed to new claims by statutory mandate Dec. 22, 2003.

Subsequently, and prior to the recent enactment of Zadroga, the only recourse available to the thousands of injured rescue, recovery and debris-removal workers and volunteers was through costly and lengthy litigation. Zadroga now allows for an alternate route to litigation: compensation through legislation. While not to be discussed here, another momentous perk to Zadroga is health benefits under the World Trade Center Health Program. The aim here is to summarize and highlight certain important aspects of the VCF as amended under the newly enacted Zadroga.

This type of federal no-fault compensation fund legislation is historic but not unprecedented. Zadroga follows in the footsteps of other notable acts such as the Price-Anderson Nuclear Industries Indemnity Act, the National Vaccine Injury Compensation Program and the War Hazards Compensation Act of 1942.

Zadroga's Title II reopens the VCF. Title II does not replace the original VCF; rather, it amends and supplements certain provisions of Title IV of the original VCF. Section 403 of the original VCF provides the still-applicable purpose of the VCF: "to provide compensation to any individual (or relatives of a deceased individual) who was physically injured or killed as a result of the terrorist-related aircraft crashes of Sept. 11, 2001."

This simply stated purpose, however, becomes more complex in light of the provisions concerning eligible "individuals" under the VCF and other requirements. Section 405(c) discusses eligibility for compensation in general. Eligibility generally hinges on whether the claimant:

- Meets the definition of "individual."
- Meets the timing and other eligibility requirements as provided under the act.

The following will summarize these components of eligibility.

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Before the enactment of Zadroga, the only recourse available to the thousands of injured rescue, recovery and debris-removal workers and volunteers was through costly and lengthy litigation.

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## INDIVIDUAL: SUBCATEGORY ONE

The definition of "individual" under the act has three subcategories, any of which may qualify a claimant as an individual. The first subcategory provides two requirements, one focusing on location and duration of exposure, and the other focusing on physical harm. Location and duration of exposure will be addressed first below.

Under the first requirement of subcategory one, the "individual" must have been present at "the World Trade Center, the Pentagon, the site of the aircraft crash at Shanksville, Pa., or at any other 9/11 crash site at the time, or in the immediate aftermath, of the terrorist-related aircraft crashes of Sept. 11, 2001." Two terms in the foregoing clause must be further examined as defined under Zadroga: "9/11 crash site" and "immediate aftermath."

Section 201 further defines the location of "9/11 crash site" as:

- (a) The World Trade Center site, Pentagon site, and Shanksville, Pa., site.

- (b) The buildings or portions of buildings that were destroyed as a result of the terrorist-related aircraft crashes of Sept. 11, 2001.
- (c) Any area contiguous to a site of such crashes that the special master determines was sufficiently close to the site that there was a demonstrable risk of physical harm resulting from the impact of the aircraft or any subsequent fire, explosions or building collapses (including the immediate area in which the impact occurred, fire occurred,

portions of buildings fell, or debris fell upon and injured individuals).

- (d) Any area related to, or along routes of debris removal, such as barges and fresh kills.

As for duration, "immediate aftermath" is defined as "any period beginning with the terrorist-related aircraft crashes of Sept. 11, 2001, and ending on May 30, 2002."

Therefore, as for location and duration of exposure, an "individual" must have been present within a location as defined under "9/11 crash site" between Sept. 11, 2001, and May 30, 2002.

The second requirement under subcategory one is that the "individual" must have "suffered physical harm or death as a result of such an air crash or debris removal." Notably, Zadroga adds the phrase "or debris removal" to this clause, broadening the type of activity to which the injury or death must be causally related.

Further, Zadroga defines "debris removal" broadly as "rescue and recovery efforts,

removal of debris, cleanup, remediation and response during the immediate aftermath of the terrorist-related aircraft crashes of Sept. 11, 2001, with respect to a 9/11 crash site.”

It can be deduced from the foregoing that the second requirement is that the individual must have suffered physical — as opposed to mental or psychological — harm that is causally related to an air crash or debris removal.

Therefore, to be considered an individual under subcategory one, the individual must satisfy the geographical and durational requirement along with the causally related physical harm or death requirement.

## INDIVIDUAL: SUBCATEGORY TWO

This subcategory is specific to individuals who were present on the planes that crashed on 9/11. Thus, an individual “who was a member of the flight crew or a passenger on American Airlines Flight 11 or 77 or United Airlines Flight 93 or 175” qualifies as an individual under this provision. However, this subcategory excepts “participant[s] or conspirator[s] in the terrorist-related aircraft crashes of Sept. 11, 2001.”

## INDIVIDUAL: SUBCATEGORY THREE

This subcategory simply applies to personal representatives of decedents who fall into the two foregoing subcategories of “individual.”

## TIMING AND OTHER ELIGIBILITY REQUIREMENTS FOR FILING CLAIMS

As stated previously, in addition to satisfying the definition of one of the three subcategories of the term “individual,” a claimant must comply with timing and other eligibility requirements provided in the Zadroga-supplemented Sections 405(a)(3) and 405(c)(3)(A). Timing requirements for filing claims will be addressed first.

The timing requirements generally hinge on when the regulations are promulgated and when the regulations are updated. The dates on which these events occur, respectively, appear in Section 407. The following will first examine Section 407 and how it was amended by Zadroga, prior to delving into the sections of the VCF that provide the timing requirements for filing claims that rely on Section 407.

In the original VCF, Section 407 had no subsections (a) and (b) as it does now under

Zadroga. In the original VCF, Section 407 stated, *inter alia*, “Not later than 90 days after the date of enactment of *this act*, the Attorney General ... shall *promulgate regulations* to carry out this title.” The phrase “90 days after the enactment of this act” was deemed to be Dec. 22, 2001.

Now, Zadroga has placed an “(a)” before the foregoing language, making it subsection 407(a). Further, Zadroga has added a second subsection, 407(b), which provides:

Not later than 180 days after the date of the enactment of the *James Zadroga 9/11 Health and Compensation Act of 2010*, the Special Master shall *update* the regulations promulgated under subsection (a) to the extent necessary to comply with the provisions of title II of such Act [emphasis added].

We interpret this to mean 180 days after the enactment of Zadroga Jan. 2, 2011, or no later than July 1, 2011. The reason for belaboring the foregoing will become clear as the following will show.

In comparing Section 407’s subsections (a) and (b) and looking at the italicized terms, it is clear that subsection (a) concerns the promulgation of the regulations under the *original VCF*, and subsection (b) concerns *updating* those same regulations pursuant to the newly enacted Zadroga. This is supported by two comparisons.

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It can be deduced from the language of the law that a covered individual must have suffered physical — as opposed to mental or psychological — harm that is causally related to an air crash or debris removal.

---

First, subsection (a) uses the language “promulgate regulations” and subsection (b) uses the language “update the regulations promulgated under subsection (a).” Second, subsection (a) bases the date on the enactment of “this act,” while subsection (b) bases the date on the enactment of the “James Zadroga 9/11 Health and Compensation Act of 2010.”

Now that Section 407’s two subsections and their respective dates and bases are clear, the timing requirements can be further explored. In general, pursuant to Section 405(a)(3)(A), “no claim may be filed ... after the date that is two years after the date on which *regulations are promulgated* under

Section 407(a)” (emphasis added). Since this section refers to 407(a), our interpretation of 405(a)(3)(A) is that it refers to the original VCF and the date on which regulations were to be promulgated there: 90 days after the enactment of the original VCF.

Thus, the two-year period outlined in 405(a)(3)(A) begins Dec. 22, 2001, and ends Dec. 22, 2003, or the filing deadline for the *original VCF*. The language “regulations are promulgated” used here, as opposed to “updated,” further supports this notion. And, since this filing period has passed for every potential new VCF claimant as of Dec. 22, 2003, Zadroga supplemented this deadline by adding an exception (or extended filing period) under Section 405(a)(3)(B).

Section 405(a)(3)(B) provides that “[a] claim may be filed ... in accordance with subsection (c)(3)(A)(i) by an individual ... during the period beginning on the date on which the regulations are *updated* under Section 407(b) and ending on the date that is five years after the date on which such regulations are *updated*” (emphasis added).

Since this section refers to 407(b), our interpretation of 405(a)(3)(B) is that it refers to the newly enacted Zadroga and when the regulations are to be updated: 180 days after the enactment of Zadroga.

Thus, the five-year extended period likely begins no later than July 1, 2011, and likely

ends no later than July 1, 2016. The language “regulations are updated” used here, as opposed to “regulations are promulgated,” further supports this notion. However, a claim must be filed in accordance with subsection 405(c)(3)(A)(i), which requires another complex step in the timing requirements for filing claims as will be discussed below.

## TIMING REQUIREMENTS FOR FILING CLAIMS

The timing requirements for filing claims in accordance with Section 405(c)(3)(A)(i) are broken into two prongs, both of which specify a two-year filing period. The difference between the two prongs is when the two-year



REUTERS/Larry Downing

**Joseph Zadroga speaks at a news conference Nov. 29, 2010, calling for the passage of the bill named after his son, James Zadroga, a New York City police detective who died of a respiratory disease he contracted during recovery operations at ground zero.**

filing period begins, which generally depends on the special master's determination of when the claimant knew or should have known that he or she was injured *and* when the claimant knew or should have known that he or she was eligible to file a VCF claim under Zadroga.

### **Prong one: 'Knowledge' before a certain date**

The first prong provides:

In the case that the special master determines the individual knew (or reasonably should have known) before the *date specified in clause (iii)* that the individual suffered a physical harm at a 9/11 crash site as a result of the terrorist-related aircraft crashes of Sept. 11, 2001, or as a result of debris removal, and that the individual knew (or should have known) before *such specified date* that the individual was eligible to file a claim under this title, the individual may file a claim not later than the date that is two years after *such specified date* [emphasis added].

The timing of the foregoing clause hinges on "the date specified in clause (iii)."

Prior to flushing out or summarizing prong one, the date specified in clause (iii) must be scrutinized. Clause (iii) provides: "the date specified in this clause is the date on

which the regulations are *updated* under Section 407(a)" (emphasis added). Now we have come to the reason that the differences between Sections 407(a) and 407(b) are so crucial and needed to be discussed in such detail earlier: Those subsections show that *clause (iii) is errant*.

If clause (iii) said instead "the date on which the regulations are updated under Section 407(b)," such a provision would be logical since Section 407(b) provides when the regulations are updated. In the alternative, if clause (iii) referred to "the date on which the regulations are *promulgated* under 407(a), this language also would be logical because 407(a) provides when the regulations are promulgated. However, since 407(a) does not provide when the regulations are updated, we are at an impasse.

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Some potential claimants with potential, pending or settled civil actions related to 9/11 aircraft must consider the interplay between the civil action and the Victim Compensation Fund.

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The significance of this is that the analysis under the first prong (and the second prong as will be discussed later) of 405(c)(3)(A)(i) completely hinges on the date specified in clause (iii). If we believe that Congress in clause (iii) meant to specify 407(b) instead

of 407(a), then our analysis hinges on a date likely no later than July 1, 2011.

However, if we believe that Congress meant to specify 407(a) in clause (iii) but errantly used the word "updated" there, then our analysis hinges on a date of Dec. 22, 2001. We submit that a typographical error of utilizing "(a)" instead of "(b)" is more likely than errantly using the word "updated" instead of "promulgated." In further support, the two-year period for filing a claim under prong one (if an individual falls under its parameters) would end Dec. 22, 2003, if 407(a) is used, which would result in many potential claimants being time-barred as of more than seven years ago.

To further compound the issue, the Congressional Research Service appears to use the 407(a) promulgation date. The following excerpt from the Congressional Research Service's memorandum of Jan. 19, 2011, to the co-author of Zadroga, U.S. Rep. Carolyn Mahoney of New York, titled "Section-by-Section Summary of Titles I and II of P.L. 111-347, the James Zadroga 9/11 Health and Compensation Act of 2010," summarizes "Prong One":

In cases that the special master determines the individual knew, or reasonably should have known, that they suffered physical harm at a 9/11 crash site or as a result of debris removal, and the individual knew or should have known before the *original deadline for filing a claim*, the deadline for filing would be up to two years after the date specified in the bill (*90 days after enactment*) [emphasis added].

It appears clear that the use of the phrases "original deadline for filing a claim" and "90 days after enactment," suggests an interpretation of clause (iii) as the date specified in 407(a), which is a 90-day period from

enactment, or Dec. 22, 2001. We respectfully disagree with the Congressional Research Service's interpretation of the statute.

As further support that the date specified in 407(b) should be used, note the title of Section 202(b) of Zadroga, under which

the filing extension appears: “Extension of Deadline for Claims Under Sept. 11 Victim Compensation Fund of 2001.” If the date specified in 407(a) is used under prong one, then the “extension” for those who fall under its parameters would be only until Dec. 22, 2003. This appears to be illogical and not the intent of Congress.

With this discrepancy in mind, the analysis returns to a summary of prong one timing requirements for filing claims under Zadroga. To paraphrase prong one and using 407(b) as our basis date, if the special master determines that an individual (a) knew or reasonably should have known of physical harm as a result of 9/11-related exposure *and* (b) knew or should have known that he or she was eligible to file a VCF claim under the newly enacted Zadroga, *and both* before July 1, 2011, then the individual has two years from *July 1, 2011*, to file a claim.

later than the last day of the two-year period beginning on the date the special master determines the individual first knew (or should have known) that the individual *both* suffered from such harm and was eligible to file a claim under this title [emphasis added].

Prior to paraphrasing the foregoing, our interpretation of the phrase “such a physical harm” here is that it refers to the prong one language, “suffered a physical harm at a 9/11 crash site as a result of the terrorist-related aircraft crashes of Sept. 11, 2001, or as a result of debris removal.”

Keeping the clause (iii) discrepancy in mind and utilizing the date specified in Section 407(b), prong two, paraphrased, provides: If the special master determines the individual (a) first knew or reasonably should have known *on or after* about July 1, 2011, that the individual suffered physical

Prong two will not be completely paraphrased here. In order to use the date specified in 407(a) instead, simply insert Dec. 22, 2001, in the two places that July 1, 2011, is used in the above summary.

## OTHER ELIGIBILITY REQUIREMENTS

In addition to the two prongs of timing requirements for filing claims provided in Section 405(c)(3)(A)(i), Section 405(c)(3)(A)(ii) provides other eligibility requirements for filing claims:

An individual may file a claim during the [extended filing period under 405](a)(3)(B) only if — (I) the individual was treated by a medical professional for suffering from a physical harm described in [prong one] within a reasonable time from the date of discovering such harm; and (II) the individual's physical harm is verified by contemporaneous medical records created by or at the direction of the medical professional who provided the medical care.

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If the special master determines that the claimant is an eligible individual, the review turns to the extent of harm to the claimant and the amount of compensation to which the claimant is entitled.

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The alternative, using the date specified in 407(a), would be this: If the special master determines that an individual (a) knew or reasonably should have known of physical harm as a result of 9/11-related exposure *and* (b) knew or should have known that he or she was eligible to file a VCF claim under the newly enacted Zadroga, *and both* before Dec. 22, 2001, then the individual has two years from *Dec. 22, 2001*, to file a claim. This alternative would bar any claimant whom the special master deems as falling under the parameters of prong one. We submit that Congress intended the former.

### **Prong two: ‘Knowledge’ after a certain date**

Prong two provides:

In the case that the special master determines the individual first knew (or reasonably should have known) *on or after* the date specified in clause (iii) that the individual suffered such a *physical harm* or that the individual first knew (or should have known) *on or after* such specified date that the individual was eligible to file a claim under this title, the individual may file a claim not

harm as a result of 9/11-related exposure *or* (b) first knew or should have known *on or after* about July 1, 2011, that the individual was eligible to file a VCF claim under the newly enacted Zadroga, then the two-year period to file a claim begins when the individual first knew or should have known that the individual *both* suffered harm and was eligible to file a claim under Zadroga.

Note that here, unlike in prong one where “and” is the connector, “or” is the connector. Therefore, if the special master determines that *either* the harm *or* the knowledge is known (or should have been known) after about July 1, 2011, then an individual falls under the more lenient timing requirements of prong two.

As to the discrepancy concerning clause (iii), when the date specified in 407(b) is used under prong two, the two-year period, by default, cannot begin to run until on or after July 1, 2011, and not before. Contrast that with the use of the date specified in 407(a), where the two-year period could begin as early as Dec. 22, 2001, which is a drastically different result.

## POTENTIAL, PENDING AND SETTLED 9/11-RELATED CIVIL ACTIONS AND THE VCF

In addition to the foregoing, certain potential VCF claimants with potential, pending or settled civil actions “in any federal or state court for damages sustained as a result of terrorist-related aircraft crashes or Sept. 11, 2001, or for damages arising from or related to debris removal” must consider the interplay between the civil action and the VCF.

### **Waiver of potential civil action**

For a potential civil action, a potential VCF claimant must consider that pursuant to Section 405(c)(3)(C)(i), “[u]pon the submission of a claim under this title, the claimant waives the right to file a civil action (or to be a party to an action),” with such type of action described above.

### **Pending actions**

There are two scenarios provided here under Section 405(c)(3)(C)(ii), one of which addresses individuals who had pending actions around the time of the original VCF, so that scenario, being irrelevant, will not be commented on here. The other scenario provides that [a]n individual who is a party to a civil action ... may not submit a claim ... during [extended filing period under 405]

(a)(3)(B) unless such individual withdraws from such action by the date that is 90 days after the date on which the regulations are updated under Section 407(b)."

In other words, an individual with a pending 9/11-related action may not submit a claim under the VCF unless he or she withdraws from the action by 90 days after July 1, 2011 (or whenever Congress updates the regulations pursuant to Section 407(b)).

### Settled actions

Section 405(c)(3)(C)(iii) provides:

In the case of an individual who settled a civil action described in clause (i), such individual may not submit a claim under this title unless such action was commenced after Dec. 22, 2003, and a release of all claims in such action was tendered prior to the date on which the James Zadroga 9/11 Health and Compensation Act of 2010 was enacted.

A simple reading of the foregoing is that an individual with a settled, post-Dec. 22, 2003, 9/11-related civil action must tender a release of all claims in the action prior to Jan. 2, 2011, or may not submit a claim under the VCF.

Section 405(c)(3)(C)(iii) does not define what "a release of all claims in such action was tendered" means, or, more specifically, what "tender" or "release" mean under Zadroga. However, the purpose of the VCF — when combined with the lack of clarity here — sheds light on this issue. The purpose of the VCF is to compensate individuals with viable claims, even those who settled civil actions. Thus, it seems clear that the release of all claims could occur on the date that a settlement agreement is entered into with a defendant, on the date when the trial judge enters an order approving a settlement as fair and reasonable, on the date that releases signed by lawyers on a client's behalf are tendered, or upon tender of a stipulation of discontinuance releasing all claims.

The foregoing focused on sections of the VCF applicable to eligibility. The following sections will briefly touch on VCF administration; filing, review and determination of a claim; payments and attorney fees under the statute.

### THE SPECIAL MASTER

Section 404 of the act concerns the administration of the VCF. It provides, generally, that the attorney general is to

appoint a special master to administer the VCF. More specifically, the special master is charged with promulgating "all procedural and substantive rules for the administration" of the VCF and employing certain personnel to perform duties under the VCF. The attorney general has not yet identified the special master for the reopened VCF, but the designation is anticipated to occur by the date specified in Section 407(b).

### FILING OF CLAIM, REVIEW AND DETERMINATION

Pursuant to Section 405(a), generally a claimant "may file a claim for compensation ... with the special master" by filing a claim form developed by the special master. Certain information must be provided in the claim form, such as:

- Information about the physical harm or death related to the "aircraft crashes of Sept. 11, 2001, or debris removal in the immediate aftermath."
- Information about economic and noneconomic losses.
- "Information regarding collateral sources of compensation the claimant has received or is entitled to receive."

The determination is "final and not subject to judicial review."

Prior to continuing with the next section, a brief tangent about what constitutes "physical harm" under Zadroga would be appropriate as many parties are likely interested in what injuries are compensable under the VCF section of Zadroga. Unfortunately, however, the answer appears to be that there is no clear answer. As the following will show, when Titles I and II of Zadroga are compared, it appears that the VCF allows far more discretion as to what types of conditions can be considered by the special master as opposed to the types of conditions that allow for further treatment under the WTC Health Program.

Section 3312 of Title I of Zadroga, which lays out the WTCHP, defines and expounds at length what constitutes a "WTC-related health condition." Stated simply, under the WTCHP, those who are deemed to suffer from a WTC-related health condition are entitled to more treatment and medical benefits than those who are not. The section enumerates specific conditions that explicitly fit the criteria and provides a procedure to add to the enumerated conditions, including cancers, which are currently not on the list

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Stated simply, under the World Trade Center Health Program, those who are deemed to suffer from a WTC-related health condition are entitled to more treatment and medical benefits than those who are not.

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It is important to highlight that a claimant can seek economic losses under the VCF.

The special master must review the claim form and determine "whether the claimant is an eligible individual" (as discussed earlier herein). If the special master determines that the claimant is an eligible individual, the review turns to (i) the extent of harm to the claimant, including any economic and noneconomic losses and (ii) the amount of compensation to which the claimant is entitled.

The special master is given broad discretion to consider the claimant's individual circumstances in determining the amount of compensation: "Not later than 120 days" after the filing of a claim, the special master is to "complete a review, make a determination, and provide written notice to the claimant."

of enumerated conditions. The significance of the foregoing is that while the WTCHP focuses considerable energy in defining what constitutes a WTC-related health condition, the VCF does not.

In addition, the VCF does not borrow or even reference the definition of WTC-related health condition as laid out in the WTCHP. The VCF simply states the special master is to review and determine "the extent of the harm to the claimant, including any economic and noneconomic losses." There is no definition of "physical harm" or "harm" provided under the VCF.

Therefore, two points can be inferred from the foregoing:

- It does not appear that the special master is bound or limited by the definition of WTC-related health condition as laid out

in the WTCHP in determining whether a claimant has a compensable injury.

- The special master has broad discretion in determining “the extent of harm to the claimant.”

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Attorney fees are capped at 10 percent of the VCF award with a further limitation: For individuals who were charged a legal fee in association with the settlement of a 9/11-related civil action, the attorney may not charge a fee in any amount under the VCF.

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### PAYMENTS TO ELIGIBLE INDIVIDUALS

Section 406 addresses this topic. Subject to limitations that will be discussed next, the special master is to authorize payment not later than 20 days following the special master’s determination as previously discussed. However, the amount set aside under the VCF to pay claimants is capped at \$2.775 billion, of which no more than \$875 million will “be available to pay claims during the five-year period beginning” on the date specified in Section 407(b), or on or about July 1, 2011. The significance of the \$875 million availability limit during the first five years will be addressed in the following section.

### PRO-RATION AND PAYMENT OF REMAINING CLAIMS

Generally, the special master is required to pay all of those claimants who are entitled to a payment to receive a payment during the initial five-year period above, but that payment must be ratably reduced in such a way as to not exceed the \$875 million cap during the five-year period.

Then, following the five-year period, all claimants who received a ratably reduced payment during the initial five-year period are to be paid a remainder of claim amount between the first day after the five-year

period and one year after the end of the five-year period. The remainder amount is the difference between the amount the claimant would have been paid during the five-year period had there been no \$875 million cap during that period, and the ratably reduced amount paid during the five-year period.

### ATTORNEY FEES

Attorney fees are capped at 10 percent of the VCF award with a further limitation: For individuals who were charged a legal

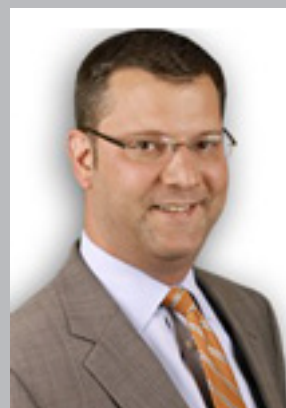
fee in association with the settlement of a 9/11-related civil action, the attorney may not charge a fee in any amount under the VCF. The only exception to the limitation is where the fee for the civil action was less than 10 percent. In addition, the special master has the discretion to lower the fee below 10 percent where the special master finds the fees excessive.

### UPDATE OF REGULATIONS

To reiterate a point that has been glanced upon throughout the above, notably, the regulations of Zadroga have not yet been updated pursuant to Section 407(b). The significance of this observation is that there are outstanding questions not yet answered and other details not yet known.

In short, on or no later than July 1, 2011, once the regulations are updated, the picture of Zadroga as discussed herein should be more complete, and the analysis may be different in the end. We eagerly anticipate updated regulations that militate in favor of just, sufficient and efficient compensation for the self-sacrificing heroes of 9/11 and thereafter.

WJ



**Paul Napoli** (left) is a senior partner of **Napoli Bern Ripka LLP** in New York. As the plaintiffs’ co-liaison counsel in the *In re World Trade Center Disaster Site Litigation*, he was the lead attorney responsible for achieving settlements totaling more than \$800 million for injured WTC workers. **Brian Crosby** (right) is an associate in the firm’s New York office, where his practice is concentrated in mass tort litigation. He has played an integral role in representing injured rescue, recovery and debris removal workers in the WTC litigation since its inception.



REUTERS/John Gress

The plaintiff's expert said benzene from a BP refinery in Ohio caused or contributed to her disease. The company's Whiting, Ind., refinery is shown here.

## BENZENE

# 6th Circuit upholds dismissal of benzene exposure case

An Ohio woman who claims she developed cancer from exposure to benzene released from a BP pipeline has failed to convince the 6th U.S. Circuit Court of Appeals that her causation expert sufficiently linked the exposure to her disease.

***Pluck et al. v. BP Oil Pipeline Co., No. 09-4572, 2011 WL 1794293 (6th Cir. May 12, 2011).***

A three-judge appeals panel upheld a trial judge's grant of summary judgment to BP, which successfully argued the methodology used by the plaintiff's expert was unreliable.

According to the 6th Circuit's written opinion, Sue Pluck's lawsuit in the U.S. District Court for the Northern District of Ohio said she was diagnosed in 2002 with non-Hodgkin's lymphoma.

Pluck, who was 42 at the time, claimed that the cancer was caused by exposure to benzene in well water on her property in Summit County, Ohio. She underwent chemotherapy and has been in remission since January 2009, the opinion said.

Benzene is a component of gasoline that has been identified as a carcinogen. The substance allegedly contaminated wells in the area after a series of gas-pipeline

releases from 1948 to 1962, the opinion said.

During the litigation, Pluck produced an expert report from Dr. James Dahlgren, who concluded that benzene from a nearby BP refinery caused, or contributed to, her disease.

BP challenged the opinion as unreliable under *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), and the company contemporaneously moved for summary judgment.

About a month later, Dahlgren produced a supplemental report in which he evaluated Pluck's illness using the differential-diagnosis methodology.

The trial court granted both of BP's motions in November 2009. It found the initial report suffered from methodological flaws, and that the subsequent report was untimely.

Pluck unsuccessfully appealed to the 6th Circuit.

The appeals panel has recognized differential diagnosis as an "appropriate method for making a determination of causation for an individual instance of disease," the opinion said.

The appeals court agreed that Dahlgren failed to ascertain the level of Pluck's benzene exposure or to determine whether she was exposed to quantities of benzene exceeding the Environmental Protection Agency's safety regulations.

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The 6th Circuit has recognized differential diagnosis as an "appropriate method for making a determination of causation for an individual instance of disease," the opinion said.

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Rather, he concluded that "chronic, low-level exposure can and does cause" non-Hodgkins lymphoma, that Pluck "probably had an injurious exposure to benzene and other organic solvents," and that "[t]here is no safe level for benzene in terms of causing cancer," the opinion said, quoting Dahlgren's report.

The 6th Circuit called Dahlgren's analysis "unpersuasive" and "pure conjecture," noting that the benzene levels in Pluck's wells never exceeded the maximum amount permitted by the EPA.

The appeals court also criticized his first report for not ruling out alternative causes of Pluck's illness as required by the differential-diagnosis methodology.

Although Dahlgren did use a differential diagnosis in his supplemental report, the trial court acted within its power to strike it as untimely and contradictory to the prior opinion, the 6th Circuit said.

"Dahlgren's supplemental declaration served as an untimely attempt to introduce a new causation methodology," the appeals court said. **WJ**

**Attorneys:**

*Plaintiffs:* Thomas R. Houlihan, Amer Cunningham Co., Akron, Ohio.

*Defendant:* Robin G. Weaver, Squire Sanders & Dempsey, Cleveland

**Related Court Document:**

Opinion: 2011 WL 1794293

**See Document Section A (P. 21) for the opinion.**

## Supreme Court

CONTINUED FROM PAGE 1

and *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993).

Carlini had testified that exposure to manganese from welding rods caused Jeff Tamraz's "manganese-induced parkinsonism."

The 6th Circuit said Carlini's testimony that Tamraz's manganese exposure along with a genetic predisposition caused the plaintiff's parkinsonism "was speculation." The appeals court said Carlini failed to back up his testimony with scientific evidence.

Tamraz sued BOC Group Inc., Lincoln Electric Co., Hobart Brothers Co., ESAB Group Inc. and TDY Industries in the U.S. District Court for the Northern District of Ohio, alleging he developed symptoms similar to Parkinson's disease from his exposure to welding fumes from their welding rods.

The case, one of thousands consolidated in the welding fume multidistrict litigation in the District Court, was chosen as a bellwether trial. Bellwether trials are used to test the viability of some of the plaintiffs' claims.

U.S. District Judge Kathleen O'Malley entered a \$20.5 million judgment for Tamraz on his

claims of strict liability and negligence after a jury found the defendants strictly liable.

However, the judge ruled for the defendants on claims of fraudulent concealment and punitive damages.

The companies then moved to overturn the verdict.

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### The appeals court vacated the verdict and remanded the case for a new trial.

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Judge O'Malley said the evidence supported the jury's finding that Tamraz would have stopped welding or would have worked differently if a different warning had been included with the welding products he used.

The judge also disagreed with the defendants' argument that Tamraz had to show he was exposed to toxic levels of manganese in order to prevail at trial.

"Tamraz was required only to show with reasonable medical probability that exposure to the defendants' products or emissions caused his injuries," Judge O'Malley said.

The plaintiff was required to prove only that he was exposed to unsafe levels of

manganese fumes. He did not need to quantify the amount, Judge O'Malley said.

She therefore upheld the \$20.5 million award.

The manufacturers appealed the verdict to the 6th Circuit, arguing that Judge O'Malley should not have admitted Carlini's opinion that their products triggered manganese-induced parkinsonism in Tamraz.

The appeals court agreed, vacated the verdict and remanded the case for a new trial.

The 6th Circuit said allowing the law to get ahead of the science would be unfair, destroy jobs and stifle innovation.

Tamraz then petitioned the Supreme Court for review.

He argued in his petition that *Daubert* does not require that a given methodology be devoid of unprovable assumptions or that it have no gaps in its reasoning.

Tamraz said the 6th Circuit's decision nullifies "*Daubert's* flexible standard to the admission of expert evidence under Rule 702, ignores its liberal standard for the admissibility of such testimony and undercuts the preeminent goal of the Rules of Evidence that claims be 'justly determined' and that the truth may be ascertained."

The high court denied review May 16. [WJ](#)

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## WESTLAW JOURNAL ENVIRONMENTAL



This reporter offers coverage of significant litigation involving how courts interpret the *Daubert* and *Frye* standards regarding the admission of expert and scientific testimony. It covers all stages of litigation, from complaint to final appellate decision and each issue. It is a source for determining which evidence courts are likely to allow and which evidence courts tend to disallow, which is especially important in situations where there may be conflicting opinions within the scientific community about the same subject. It covers both federal and state cases on all major issues in this area.

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REUTERS/Lee Celano

The plaintiffs claim the use of the insecticide Icon in crawfish ponds in Louisiana caused the annual crawfish crop to drop from 60 million pounds to 10 million pounds.

## DEFECTIVE PRODUCT

# Louisiana appeals court changes its mind on 'proprietary interest' test

A Louisiana appeals court has reversed its prior ruling that to maintain an action against a manufacturer for property damage caused by a defective product, the plaintiff must have some proprietary interest in the damaged property.

***Phillips et al. v. G&H Seed Co. et al., No. 10-1405, 2011 WL 1773269 (La. Ct. App., 3d Cir. May 11, 2011).***

Courts instead should conduct a duty-risk analysis to determine the scope and extent of the defendant's duty to the plaintiff, the 3rd Circuit Court of Appeal said May 11.

The appeal involves dozens of cases brought against Bayer CropScience, the manufacturer of the insecticide Icon, and various companies that purchased the product and applied it to rice seed.

The plaintiffs, crawfish buyers and processors, claim the use of Icon in rice fields and crawfish ponds in Louisiana caused the annual crawfish crop to drop from 60 million

pounds to 10 million pounds, the opinion says.

Bayer moved for dismissal, arguing that because the plaintiffs are not crawfish farmers and did not own the crawfish crops, they did not have any proprietary interest in the damaged crop.

The St. Landry Parish Circuit Court denied the motion, rejecting the "proprietary interest" rule in favor of a duty-risk analysis that examines a defendant's duty to the plaintiff on a case-by-case basis.

During a trial in three test cases, the court entered a directed verdict for the plaintiffs on the issue of whether the defendants' duty to crawfish farmers extended to them. The jury then returned six-figure damages awards to the three representative plaintiffs.

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"Our review of the jurisprudence establishes that the Louisiana Supreme Court in *PPG*, and the cases that followed, abandoned the per se no-duty rule in favor of a duty-risk analysis."

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On appeal, a five-judge panel reversed the verdict, saying the plaintiffs had failed to prove a proprietary interest in the damaged crawfish crop.

With the case back in the trial court, the defendants obtained summary judgment.

The trial court said it disagreed with the appellate court's ruling but that it was constrained to dismiss the claims under the proprietary-interest rule.

The case then returned to the Court of Appeal, this time on appeal by the plaintiffs.

The panel ruled this time that it had failed during the first go-round to consider the state Supreme Court's holding in *PPG Industries v. Bean Dredging*, 447 So. 2d 1058 (La. 1984), that a duty-risk analysis should be performed to determine the scope and extent of a particular defendant's duties.

"Our review of the jurisprudence establishes that the Louisiana Supreme Court in *PPG*, and the cases that followed, abandoned the per se no-duty rule in favor of a duty-risk analysis," the appeals court said.

As a result, the panel reversed the trial court again and returned the case for further proceedings. **WJ**

### Attorneys:

**Plaintiffs:** Elwood C. Stevens Jr., Domengeaux Wright Roy & Edwards, Lafayette, La.; Jerald Edward Knoll Sr., Marksville, La.; Andre F. Toce, Lafayette

**Defendant (Bayer):** Gary A. Bezet, Robert E. Dille, Carol L. Galloway and Allison N. Benoit, Kean Miller Hawthorne D'Armond McCowan & Jarman, Baton Rouge, La.; Raymond P. Ward, Adams & Reese, New Orleans

### Related Court Document:

Opinion: 2011 WL 1773269

**See Document Section B (P. 32) for the opinion.**

## U.S. must pay \$43 million for failing to take utilities' spent nuclear fuel

A divided federal appeals panel has upheld a \$43 million judgment against the United States in a lawsuit seeking mitigation damages for the Department of Energy's breach of its contractual obligation to dispose of spent nuclear fuel.

***Dominion Resources Inc. et al. v. United States, Nos. 09-5031 and 09-5032, 2011 WL 1532145 (Fed. Cir. Apr. 25, 2011).***

The 2-1 majority of the U.S. Court of Appeals for the Federal Circuit agreed with a trial court's finding that Dominion Nuclear Connecticut Inc. could seek damages incurred by its predecessor-in-interest.

The trial court rejected a portion of Dominion's demand but awarded the utility nearly \$43 million in mitigation damages. The award included \$10.9 million for costs incurred by Northeast Utilities.

As it did at trial, the government argued on appeal to the Federal Circuit that Dominion is not entitled to recover amounts incurred

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"We see no merit whatsoever to the government's argument that Dominion may have benefited from the government's breach," the appeals court majority said.

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The government had argued that the Assignment of Claims Act, 31 U.S.C. § 3727, barred Dominion from prosecuting a claim for its predecessor's storage costs.

According to the opinion, the Department of Energy has partially breached contracts with nuclear utilities because it has yet to accept spent nuclear fuel, despite an obligation to do so by Jan. 31, 1998. The majority added that it is unknown when the DOE will perform this obligation.

Dominion sued in the U.S. Court of Federal Claims for mitigation damages incurred in storing spent nuclear fuel that the DOE has yet to accept.

In addition to seeking \$40 million for its own interim storage costs, Dominion sought \$12.1 million allegedly incurred by Northeast Utilities, its predecessor-in-interest as to three nuclear power plants in New London, Conn.

by its predecessor because the Assignment of Claims Act bars the transfer of the claim against the government.

The majority quickly disposed of that argument, explaining that the Nuclear Waste Policy Act, 42 U.S.C. § 10222, expressly

states that all contractual rights regarding the disposal of spent fuel are assignable.

This statutory language, the majority ruled, demonstrated Congress' intent to waive the government's use of the Assignment of Claims Act as a defense.

The majority also upheld the trial court's refusal to allow the government to conduct discovery into whether Dominion may have benefited from the DOE's breach.

The government argued that because the DOE has yet to perform under the contract, Dominion has not yet had to pay the government a one-time fee for disposal. As a result, the government said, Dominion may have profited by having retained the use of that money.

"We see no merit whatsoever to the government's argument that Dominion may have benefited from the government's breach," the majority said.

The dissent argued against a finding that the government had waived its rights under the Assignment of Claims Act. [WJ](#)

**Attorneys:**

*Plaintiff-appellee:* Brad Fagg, Morgan Lewis & Bockius, Washington

*Defendant-appellant:* Lisa L. Donahue, Justice Department, Washington

**Related Court Document:**

Opinion: 2011 WL 1532145

**See Document Section C (P. 40) for the opinion.**



REUTERS/Kevin Lamarque

## Federal judge strikes down California law on rocket site cleanup

A federal judge has ruled that a California law enacted solely for the cleanup of a former nuclear and rocket testing site is unconstitutional because it impinged on the U.S. government's regulation of nuclear safety.

***Boeing Co. v. Robinson, No. 10-4839, 2011 WL 1748312 (C.D. Cal. Apr. 26, 2011).***

U.S. District Judge John Walter of the Central District of California found that S.B. 990, now codified as Cal. Health & Safety Code § 25359.20, is preempted by the Atomic Energy Act, 42 U.S.C. § 2011.

The state bill gave the California Department of Toxic Substances Control authority over the cleanup at the Santa Susana Field Laboratory in Ventura County. The law's cleanup requirements for both radiological and chemical contamination did not apply to any other site in the state.

Boeing said in an April 26 statement that it was pleased the judge ruled the cleanup of Santa Susana should not be treated differently from other sites.

"We will apply the same standards to Santa Susana that are applied to cleanup sites throughout the state in a manner that also ensures protection of the invaluable natural and cultural resources for future generations," the company said.

The site is a former research and development facility at which Boeing acted as a government contractor in the areas of nuclear energy, defense and space exploration.

When the Santa Susana lab was built in the late 1940s, it was located in a remote area. When S.B. 990 was enacted in 2007, at least 500,000 people were living within 10 miles of the site, according to the opinion.

The Department of Energy also owned and operated 16 experimental nuclear test facilities at the site to research the production of electricity and to develop energy sources for the federal space program.

As a result of the federal rocket testing and other operations, the site became contaminated with a variety of chemicals, including radioactive materials, dioxins, trichloroethylene, PCBs and perchlorate.



REUTERS/Robert Sorbo

***The site involved in the case is a former research and development facility at which Boeing Co. acted as a government contractor in the areas of nuclear energy, defense and space exploration.***

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"We will apply the same standards to Santa Susana that are applied to cleanup sites throughout the state in a manner that also ensures protection of the invaluable natural and cultural resources for future generations," Boeing said.

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S.B. 990 criminalized any effort by Boeing or the federal government to sell, lease or transfer the property until it was cleaned up.

Boeing challenged the legislation in the District Court, arguing it was federally preempted.

Judge Walter ruled on Boeing's motion for summary judgment that the state law violated the supremacy clause of the U.S. Constitution.

Citing *Goodyear Atomic Corp v. Miller*, 486 U.S. 174 (1988), he said it was well settled "that the activities of federal installations are shielded by the supremacy clause from direct state regulation unless Congress provides clear and unambiguous authorization for such regulation."

That rule even applies when the facility is operated by a private party under a contract with the federal government, the judge added.

Judge Walter also found that the law violated the doctrine of intergovernmental immunity. That doctrine prohibits states without federal governmental authorization from regulating the government's operations or property.

Boeing, the Energy Department and NASA are currently conducting the cleanup of soil and groundwater at the facility as part of a 2007 consent order. [WJ](#)

**Related Court Document:**  
Order: 2011 WL 1748312

# \$8 million settlement reached in some Chinese-drywall suits

Two insurers of a Louisiana company accused of selling toxic drywall from China will pay \$4 million each to a fund for 3,000 affected homeowners involved in the massive federal multidistrict litigation over the wallboard.

***In re Chinese-Manufactured Drywall Products Liability Litigation, No. 09-2047, settlement reached (E.D. La. Apr. 26, 2011).***

The agreement, the first monetary settlement in the two-year-old litigation, involves nine suits against drywall distributor Interior/Exterior Building Supply.

Interior/Exterior's two primary insurers, Arch Insurance Co. and Liberty Mutual Fire Insurance Co., will put their policy limits of \$4 million each into an escrow account.

U.S. District Judge Eldon Fallon of the Eastern District of Louisiana, who has been presiding over the litigation, will determine how to disburse the money.

Interior/Exterior admits no liability in the settlement. It is one of numerous manufacturers and distributors named in some 10,000 lawsuits consolidated in the multidistrict litigation. The suits allege that drywall manufacturers in China negligently made wallboard now suspected of corroding wiring and piping in U.S. homes and causing health hazards.

The defendants allegedly made the drywall from waste material from coal-fired power plants, causing the wallboard to emit sulfur dioxide and hydrogen sulfide. The acids also emit a rotten-egg smell and affect some residents' eyes, sinuses and breathing.

According to an April 27 article in the New Orleans Times Picayune, the Consumer Product Safety Commission has received more than 6,000 complaints about the drywall from 38 states. Louisiana has the second highest number of complaints, and Florida has the highest.

Lead plaintiff attorney Russ Herman said he hopes the agreement spawns more drywall settlements.

"This sets a template for other class actions. We're hopeful that it's a domino effect," Herman told the Times Picayune.

In a non-monetary settlement reached in October, Germany-based drywall manufacturer Knauf Plasterboard Tianjin agreed to pay for repairs to 300 homes in Florida, Louisiana, Alabama and Mississippi that contain Knauf wallboard.



The "demonstration remediation program" included removal and replacement of all drywall and replacement of the homes' electrical wiring, home-security and fire systems. According to the newspaper, remediation is complete on 49 homes, 100 homes are ready for work to begin and enrollment has begun on 70 others.

Judge Fallon said he expects to see more movement toward resolution of the ongoing litigation in light of recent developments.

"I think we've got the momentum because of the [remediation] program," the judge told the Times Picayune. "Hopefully, we'll have some breakthroughs now that the pilot program is in full swing and the ... [Interior/Exterior] matter has been resolved." [WJ](#)

**Related Court Document:**

Settlement agreement: 2011 WL 1870751

## Union Carbide wants Mississippi judge recused after \$322 million verdict

Union Carbide Corp. says a Mississippi judge who presided over an asbestos-related trial that resulted in a \$322 million verdict should recuse himself because his father was a plaintiff in a case that raised similar allegations.

***Brown v. Phillips 66 Co. et al., No. 2006-196, motion for recusal filed (Miss. Cir. Ct., Smith County May 16, 2011).***

A jury found May 5 that Union Carbide and Chevron Phillips Chemical Co. were liable for injuries to plaintiff Thomas Brown Jr., who developed asbestosis after working as a roughneck in oil fields.

He developed the disease at age 30 and is now on oxygen 24 hours a day, his lawyer said.

Brown sued the companies in the Smith County Circuit Court, alleging Union Carbide made, and Chevron Phillips sold, asbestos-containing products used in drilling mud in oil fields.

Brown inhaled asbestos dust while mixing drilling mud, his lawyers said in a statement.

The jury found the defendants liable for defectively designing their products and failing to adequately warn users.

The \$322 million verdict was “the single largest plaintiff’s asbestos verdict in United States history,” **Allen Hossley** of **HossleyEmbry**, one of Brown’s attorneys, said in a statement.

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Union Carbide said it did not think “the existence of such a blatant conflict of interest was even a possibility in this case.”

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With liability split evenly between the two companies, the jury awarded \$300 million in punitive damages, and \$22 million in future medical expenses and noneconomic damages.

In finding the defendants liable for punitive damages, the jury concluded the companies “acted with gross negligence which evidence[d] willful, wanton or reckless disregard for the safety of the plaintiff.”

Now Union Carbide says Judge Eddie H. Bowen should not have presided over the trial.

In a May 16 motion filed in Judge Bowen’s court, the company said the judgment should be vacated and all proceedings stayed until the recusal motion is resolved.

The company said it discovered May 10 that Judge Bowen’s father filed two asbestos personal injury suits in Mississippi circuit courts, naming Union Carbide, among others, as defendants.

“Just like plaintiff Brown, Judge Bowen’s father asserted in each of his lawsuits that he had contracted asbestosis due to workplace exposure to asbestos,” Union Carbide said.



Although potential jurors who had personal or familial connections to asbestos litigation were excused from service for cause, the company said it did not think “the existence of such a blatant conflict of interest was even a possibility in this case.”

“During the course of the trial, Judge Bowen ruled impartially and without bias to either party,” Hossley said.

“The jury heard the evidence presented from both the plaintiff and the defendants, and after receiving the instructions on the law from Judge Bowen, they found in favor of the plaintiff,” Hossley added.

Union Carbide said it first began to explore the judge’s personal connection to asbestos litigation during the second week of trial when Judge Bowen “made one or more casual, off-the-record remarks to individual attorneys regarding the potential exposure of his own father to asbestos while working at Ingalls Shipbuilding on the Mississippi Gulf Coast.”

In moving for recusal, Union Carbide said it reserves the right to request a mistrial or a new trial. **WJ**

**Attorneys:**

*Plaintiff:* Allen Hossley, Dawn Smith, Ray Trucotte, HossleyEmbry, Dallas; Gene Tullos, Gary King, Tullos & Tullos, Raleigh, Miss.

*Defendant (Union Carbide):* Marcy Bryan Croft, Laura D. Goodson, Forman Perry Watkins Krutz & Tardy, Jackson, Miss.

*Defendant (Chevron Phillips):* Alex Cosculluela, Adams & Reese, Houston; Jeffrey Trotter, Adams & Reese, Jackson

**Related Court Document:**

Motion for recusal: 2011 WL 1879726

Jury verdict: 2011 WL 1790607



## PUNITIVE DAMAGES

# Kentucky court OKs punitive damages against Garlock

A Kentucky appeals court has affirmed an award of \$400,000 in punitive damages against Garlock Sealing Technologies in the case of a pipe fitter who died of lung cancer.

***Garlock Sealing Technologies LLC v. Robertson, No. 2009-CA-000483-MR, 2011 WL 1811683 (Ky. Ct. App. May 13, 2011).***

Evidence that Garlock interfered with testing of its gaskets to minimize the appearance of risk supports a finding of intentional malice on the company's part, the Court of Appeals found.

Dolores Robertson brought the case in the Jefferson County Circuit Court against several companies.

She alleged her husband, Thomas, was exposed to the defendant's asbestos-containing products while working as a pipe fitter for almost 40 years, beginning in 1961.

He died of lung cancer in 2006.

Prior to trial, Robertson settled with all defendants except Garlock and DuPont.

A jury returned a verdict against the companies totaling about \$1.5 million. The jury apportioned 25 percent of the compensatory damages against Garlock but assessed the entire \$400,000 in punitive damages against it.

Garlock appealed.

The company said it was entitled to a directed verdict because the plaintiff failed to establish the company made defective gaskets. It argued the punitive damages award was unconstitutional because there was no evidence of reprehensible behavior.

### DEFECTIVE DESIGN

The appeals court noted there was evidence Garlock itself advertised it started making asbestos-free gasket materials in the 1970s.

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Garlock argued the punitive damages award was unconstitutional because there was no evidence of reprehensible behavior.

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"It's time to stop using asbestos and nobody has been more aware of it than Garlock," read one advertisement the company ran in the 1990s, according to the opinion.

"Such evidence was sufficient to support the jury's conclusion that an alternative product was available at the time Robertson was exposed to asbestos in Garlock gaskets," the court said.

### PUNITIVE DAMAGES

Punitive damages are available when a defendant's conduct is found to be reprehensible, the panel said.

It said the factors to be considered are whether:

- The harm caused was physical as opposed to economic.
- The tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others.
- The target of the conduct had financial vulnerability.
- The conduct involved repeated actions or was an isolated incident.
- The harm was the result of intentional malice, trickery or deceit, or mere accident.

The appeals court said each of these conditions, found in *State Farm v. Campbell*, 538 U.S. 408 (2003), is met in Garlock's conduct.

The panel affirmed the judgment, holding that the jury's decision was based on reasonable conclusions. **WJ**

**Related Court Document:**  
Opinion: 2011 WL 1811683

# Petroleum group wants industry reps on federal gas drilling panel

The American Petroleum Institute has expressed its disappointment that a government advisory panel reviewing safety and environmental issues related to natural gas drilling operations lacks industry representation.

While the members of the panel are "impressive," none of them is directly engaged in gas exploration and production, API President Jack Gerard said in a May 12 letter to Energy Secretary Steven Chu, who appointed the panelists (see box).

Gerard said it is important to include viewpoints and technical expertise of all stakeholders, especially those in the industry who have experience with drilling in the Marcellus Shale, the Barnett shale and the Fayetteville shale.

The Marcellus Shale spans parts of New York, Pennsylvania, New Jersey, Ohio, Maryland, West Virginia, Kentucky and Tennessee.

The Barnett Shale is located in Texas, and the Fayetteville Shale is in Arkansas.

Numerous lawsuits have been filed over the alleged contaminated of groundwater from chemicals added to fluids by gas exploratory companies using the hydraulic fracturing method of drilling.

In hydraulic fracturing, also known as "fracking," large volumes of water, sand and chemicals are injected at high pressure to extract oil and natural gas from underground rock.

Members of the government advisory panel
John Deutch, professor at the Massachusetts Institute of Technology and former CIA director
Stephen Holditch, head of the Petroleum Engineering Department at Texas A&M University
Fred Krupp, president of the Environmental Defense Fund
Kathleen McGinty, former secretary of the Pennsylvania Department of Environmental Protection
Susan Tierney, managing principal of Analysis Group
Daniel Yergin, chairman of HIS Cambridge Energy Research Associates
Mark Zoback, professor of geophysics at Stanford University

Gerard has urged Chu to consider a series of industry guidance documents on fracking recently completed by API. One of the documents deals with water management and hydraulic fracturing.

"API has a long and outstanding 90-year history of involvement in developing industry standards and best practices that are used worldwide — many of which have been

adopted as official government standards in the United States and abroad," the letter says.

Chu announced the creation of the panel May 5. [WJ](#)

### WATER POLLUTION SUIT REMOVED TO FEDERAL COURT

A lawsuit brought by residents of Horseheads, N.Y., against gas driller Anschutz Exploration Co. has been removed to the U.S. District Court for the Western District of New York because the matter in controversy exceeds \$75,000. The lawsuit, originally filed in the Chemung County Supreme Court, seeks \$150 million in compensatory and punitive damages, as well as a medical monitoring fund. The complaint alleges the defendant and its drilling subcontractors contaminated the residents' groundwater with methane, propane, toxic sediments and hazardous chemicals because of improper drilling and insufficient cement casing. The lawsuit contends that the plaintiffs live in constant fear of future physical illness, especially cancer. The complaint includes claims of negligence, private nuisance, premises liability and trespass. The defendants failed to warn the residents of the risk of groundwater contamination from their drilling operations, the complaint says.

***Baker v. Anschutz Exploration Corp., No. 11-06119, notice of removal filed (W.D.N.Y. Mar. 9, 2011).***

### MARYLAND TO SUE OVER PA. GAS WELL RELEASE

Maryland notified natural gas driller Chesapeake Energy Corp. April 29 that the state intends to sue over the release of thousands of gallons of hydraulic fracturing fluids from a gas well into a tributary of the Susquehanna River. The incident occurred April 19 at a company well in Bradford County, Pa., when fluids from a wellhead failure overflowed a containment berm and entered Towanda Creek and then the Susquehanna. The river supplies 45 percent of the fresh water in the Chesapeake Bay and provides drinking water for about 6.2 million people, Maryland Attorney General Douglas Gansler said in a May 2 statement. Gansler said he will bring suit under the Resource Conservation and Recovery Act and the Clean Water Act for injunctive relief and civil penalties.

### STUDY LINKS METHANE CONTAMINATION TO GAS DRILLING

A Duke University research team has found methane in 51 of 60 drinking wells tested in three areas in the Northeast, according to a study published May 9 in the Proceedings of the National Academy of Sciences. The water wells are in northeastern Pennsylvania and upstate in New York above the Marcellus Shale formation, where numerous companies are drilling for natural gas. Methane concentrations were 17 times higher in shallow wells near active drilling and extraction areas than in wells from non-active areas, the researchers said. However, the team found no evidence of contamination of the drinking water with hydraulic fracturing fluids. Hydraulic fracturing, or fracking, is used by gas drilling companies to easily access the gas contained in the shale. Fluids containing chemical additives are used in the fracturing process. "Based on our groundwater results and the litigious nature of shale-gas extraction, we believe that long-term, coordinated sampling and monitoring of industry and private homeowners is needed," the study said.

### TEXAS HOUSE PASSES FRACKING DISCLOSURE BILL

Legislation that would require natural gas drillers to disclose the composition of their hydraulic fracturing fluids to state regulators passed the Texas House of Representatives May 11. The Sierra Club said in a May 11 statement that the group was able to get an amendment to the bill, HB 3328, that would require the data to be listed on a public website. The group said that, since Texas is a leader in the natural gas industry, a disclosure bill passed there has the chance of bolstering disclosure in other states. However, the bill in its present form allows companies to claim a trade secret exemption and avoid disclosure, it added. Hydraulic fracturing, or fracking, fluids can contain toxic chemicals that contaminate drinking water. The federal government is being urged by environmental groups to mandate the disclosure of the chemicals used in gas drilling.

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