Texas A&M Journal of Property Law

Volume 8
Number 3 *Oil & Gas Survey*

Article 1

4-20-2022

Alabama, Florida, Georgia, and Tennessee

Brandt P. Hill
BHill@maynardcooper.com

Hugh Gainer
HGainer@maynardcooper.com

ALABAMA, FLORIDA, GEORGIA, AND TENNESSEE

Brandt P. Hill & Hugh Gainer[†]

I. STATUTORY AND ADMINISTRATIVE DEVELOPMENTS 236
II. CASE LAW 240
A. *Introduction* 240
B. *United States Supreme Court* 240
1. *Florida v. Georgia* 240
2. *Mississippi v. Tennessee* 243
C. *Lower Federal Courts* 245
1. *In re Deepwater Horizon Belo* Cases 245
2. *Johnson v. 3M* 249
3. *Delozier v. Jacobs Engineering Group* 250

DOI: https://doi.org/10.37419/JPL.V8.I3.1

[†] Brandt P. Hill is a litigation attorney at Maynard Cooper & Gale in Birmingham. Much of Mr. Hill's litigation practice involves representing clients in interstate disputes over water rights in the southeastern United States.
Hugh Gainer is an attorney practicing in the Insurance & Financial Service Litigation group at Maynard Cooper & Gale in Birmingham. His practice focuses on bad faith and coverage litigation. A large part of his practice involves coverage disputes between insurance companies and oil and gas operators.

I. STATUTORY AND ADMINISTRATIVE DEVELOPMENTS

By all accounts, one of the most important oil-and-gas-related developments that transpired over the last year affecting the southeastern United States, including specifically Alabama, was the Biden Administration's decision to initially suspend sales of new leases for drilling in the Gulf of Mexico, but later, following an adverse court ruling, proceed with the lease sales. To put that decision into context, some background is in order.

In late 2020, with former President Trump still in office, the United States Department of Interior ("DOI") announced plans to conduct Lease Sale 257.[1] The proposal involved the sale of 14,594 unleased blocks, covering over 78.2 million acres in the western and central Gulf of Mexico, for oil and natural gas drilling.[2] DOI scheduled Lease Sale 257 for March 2021.[3]

In January 2021, however, newly elected President Biden halted those plans.[4] In one of the first executive orders he signed in office, President Biden instructed DOI to suspend all new oil and natural gas leases on public lands and offshore waters pending a "comprehensive review" of "potential climate and other impacts associated with oil and gas activities."[5] Observing that the United States and the world "face a profound climate crisis," President Biden urged DOI and other federal agencies to take action to avoid the "most catastrophic impact of that crisis."[6] Soon after President Biden signed the executive order, the DOI canceled Lease Sale 257.[7]

In exercising his authority to impose the moratorium on new oil and gas lease sales, President Biden appeared to be following through on a promise he made during his presidential campaign. As part of his broader plan to transition the nation away from its reliance on fossil fuels, Mr. Biden told the public that as president, he would end new oil and gas leases on federal lands and offshore waters. "No more

1. *BOEM Proposes First Gulf Oil and Gas Lease Sale for 2021*, U.S. DEP'T OF THE INTERIOR, BUREAU OF OCEAN ENERGY MGMT. (Nov. 17, 2020) https://www.boem.gov/boem-proposes-first-gulf-oil-and-gas-lease-sale-2021 [https://perma.cc/XM4P-P9W2].

2. *Id.*

3. *Id.*

4. Ella Nilsen, *Federal Judge Cites Climate Crisis in Decision to Cancel Oil and Gas Leases in Gulf of Mexico*, CNN (Jan. 28, 2022, 8:46 AM), https://www.cnn.com/2022/01/27/politics/judge-cancels-oil-gas-leases-gulf-of-mexico-climate/index.html [https://perma.cc/C949-UUDA].

5. Exec. Order No. 14008, 86 Fed. Reg. 7619, 7624–25 (Jan. 27, 2021).

6. *Id.* at 7619.

7. Notice to Rescind, 86 Fed. Reg. 10132 (Feb. 18, 2021).

subsidies for [the] fossil fuel industry," Biden said during a presidential debate. "No more drilling on federal lands. No more drilling, including offshore. No ability for the oil industry to continue to drill, period. Ends."[8]

Not long after President Biden issued the January 2021 Executive Order, several states—including Alabama and other Gulf Coast states that would earn revenue from Lease Sale 257—sued him and various DOI officials, claiming that they unlawfully rescinded the proposed sale in violation of, among other laws, the Outer Continental Shelf Lands Act ("OCSLA").[9]

The OSCLA declares the "outer Continental Shelf" ("Shelf")—submerged offshore lands that include the blocks at issue in Lease Sale 257—to be a "vital national resource held by the Federal Government for the public."[10] To maximize the benefit of that resource, Congress in the OCSLA directed the DOI to make the Shelf available for "expeditious and orderly development."[11] OSCLA specifically facilitates the Shelf's expeditious development by requiring the DOI to "administer a leasing program to sell exploration interests in portions of the Shelf to the highest bidder."[12] That leasing program must adhere to a strict schedule and comply with "stringent administrative requirements."[13]

In June 2021, the United States District Court for the Western District of Louisiana granted the States' motion for a preliminary injunction to "enjoin and restrain" the DOI from "implementing the Pause of new oil and natural gas leases on public lands or in offshore waters," including Lease Sale 257.[14] According to the district court, the OCSLA's mandatory timing and administrative requirements barred the government's attempt to indefinitely pause lease sales simply so that it could review the leases' potential impact on the climate.[15] It reasoned that:

8. Chris D'Angelo, *Biden Administration Plans Massive Auction of Oil and Gas Leases*, MOTHER JONES (Nov. 15, 2021), https://www.motherjones.com/environment/2021/11/biden-administration-interior-department-auction-oil-gas-drilling-leases-gulf-mexico-cop26-un-climate-conference/ [https://perma.cc/8ZT6-LVHQ].

9. *See* Louisiana v. Biden, 338 F.R.D. 219 (W.D.La. 2021).

10. 43 U.S.C. § 1332(3).

11. Louisiana v. Biden, 543 F. Supp. 3d 388, 398–99 (W.D. La. 2021) (quoting Ensco Offshore Co. v. Salazar, 781 F. Supp. 2d 332, 339 (E.D. La. 2011)).

12. *Id.* at 399 (citing 43 U.S.C. § 1334(a)).

13. *Id.*

14. *Id.* at 419.

15. *Id.* at 410.

> [t]he agencies could cancel or suspend a lease sale due to problems with that specific lease, but not as to eligible lands for no reason other than to do a comprehensive review pursuant to Executive Order 14008. Although there is certainly nothing wrong with performing a comprehensive review, there is a problem in ignoring acts of Congress while the review is being completed.[16]

The federal government subsequently appealed the injunction.[17] But in a surprise to some in the industry, the Biden Administration did not seek to extend the moratorium on new lease sales through other mechanisms.[18] For example, the government did not request a stay of the injunction pending its appeal. Nor did the government attempt to declare Lease Sale 257 illegal on the basis that its environmental impacts would be too damaging, an option at least theoretically available to the DOI under the National Environmental Policy Act.[19] Instead, on August 31, 2021, the DOI announced that it would proceed forward and hold Lease Sale 257 later that fall.[20]

The DOI's decision angered environmental advocacy groups. Many felt not only that President Biden reneged on his promise to limit—if not outright ban—new leases for offshore drilling, but that his Administration should have sought to keep the moratorium in place, notwithstanding the injunction.[21] Some of those advocacy groups have since sued the federal government over the decision.[22] In response to these criticisms, the Biden Administration said that it did not agree with the court's injunction but claimed that its hands were

16. *Id.*

17. *See* Louisiana v. Biden, 543 F. Supp. 3d 388 (W.D. La. 2021), *appellants' br. filed*, No. 21-30505 (5th Cir. Nov. 16, 2021).

18. Heather Richards & Emma Dumain, *3 Things Are Clear About Biden's Latest Move on Oil Leasing*, E&E NEWS (Aug. 17, 2021, 1:02 PM), https://www.eenews.net/articles/3-things-are-clear-about-bidens-latest-move-on-oil-leasing/ [https://perma.cc/ML99-3TV9].

19. *See* 42 U.S.C. §§ 4321–4347.

20. *See BOEM Updates Gulf of Mexico Lease Sale 257 Record of Decision*, U.S. DEP'T OF THE INTERIOR, BUREAU OF OCEAN ENERGY MGMT. (Aug. 31, 2021), https://www.boem.gov/boem-updates-gulf-mexico-lease-sale-257-record-decision [https://perma.cc/AAJ6-E5US]. What is more, BOEM planned to auction 15,135 blocks, spread over 80 million acres, which was more than what it had originally proposed to sell. *See id.*

21. Heather Richards & Emma Dumain, *3 Things Are Clear about Biden's Latest Move on Oil Leasing*, E&E NEWS (Aug. 17, 2021, 1:02 PM), https://www.eenews.net/articles/3-things-are-clear-about-bidens-latest-move-on-oil-leasing/ [https://perma.cc/ML99-3TV9].

22. *See, e.g.*, Friends of the Earth v. Haaland, No. 21-2317(RC), 2021 WL 5865386, at *1 (D.D.C. Dec. 11, 2021).

tied.[23] The White House press secretary told reporters that "it's important for advocates and other people out there who are following this to understand that it's not aligned with our view, the president's policies, or the executive order that he signed."[24]

Lease Sale 257 would eventually take place on November 17, 2021.[25] The sale generated over $191 million for 308 tracts covering 1.7 million acres.[26] Industry groups applauded the decision and highlighted that (1) oil produced in the Gulf emits less carbon than foreign oil due to stricter standards and (2) that Gulf producers are taking additional steps to generate cleaner, lower carbon-emitting energy.[27] Commenting on the sale, National Ocean Industries Association stated that:

> Lease Sale 257 reflects the US Gulf of Mexico's record as a low carbon energy basin. Energy companies are increasingly making decisions that incorporate climate and ESG factors and want to produce oil from regions with a low carbon intensity. With its world class infrastructure and prospective resources, the Gulf of Mexico provides an incredible value proposition in society's efforts to tackle climate change while preserving jobs and economic growth and mitigating against inflationary energy prices.[28]

Lease Sale 257 is important for a number of reasons and, depending on one's politics, could reflect either a positive or negative step for the country. Politics aside, however, Lease Sale 257 is a prime example of the separation-of-powers doctrine at work. The legislative branch enacted a law requiring the executive branch to take certain actions while complying with certain protocols, effectively limiting the extent of the executive branch's discretion to depart from those protocols. When the head of the executive branch told an agency

23. Maxine Joselow, *U.S. to Hold Historic Oil and Gas Lease Sale Days After COP26*, THE WASHINGTON POST (Nov. 17, 2021 at 8:15 a.m. EST), https://www.washingtonpost.com/politics/2021/11/17/us-hold-historic-oil-gas-lease-sale-days-after-cop26/ [https://perma.cc/C5ZW-U23V].

24. *Id.*

25. *Gulf of Mexico Lease Sale Results Announced*, U.S. DEP'T OF INTERIOR, BUREAU OF OCEAN ENERGY MGMT. (Nov. 17, 2021), https://www.boem.gov/newsroom/press-releases/gulf-mexico-lease-sale-results-announced [https://perma.cc/5XG7-B432].

26. *Id.*

27. *Gulf of Mexico Lease Sale Garners More than $191 Million in High Bids*, OFFSHORE (Nov. 17, 2021), https://www.offshore-mag.com/regional-reports/us-gulf-of-mexico/article/14214204/gulf-of-mexico-lease-sale-257-garners-more-than-191-million-in-high-bids [https://perma.cc/9984-SF4N].

28. *Id.*

within the executive branch that it could set aside those protocols, even if temporarily, the judicial branch stepped in and told the executive branch that the legislative branch said that it did not have discretion to ignore those protocols.

II. CASE LAW

A. *Introduction*

There were no decisions by federal or state courts in Alabama, Florida, Georgia, or Tennessee between fall 2020 and fall 2021 directly relevant to oil and gas companies or operations. However, there were several decisions that may nonetheless be of interest to the industry, including two opinions by the United States Supreme Court in water-rights cases. We discuss these opinions below.

B. *United States Supreme Court*

1. *Florida v. Georgia*

The first of two State-versus-State water-rights cases decided by the Supreme Court in 2021 involved a dispute over the surface waters of the Apalachicola-Chattahoochee-Flint River Basin ("ACF Basin").[29]

The ACF Basin consists of the Apalachicola, Chattahoochee, and Flint Rivers and their tributaries and drainage areas.[30] The Basin originates in northern Georgia with the Chattahoochee River, which flows southwest through metro Atlanta and eventually forms the southern half of the Alabama-Georgia border before emptying into Lake Seminole on the Florida panhandle.[31] The Flint River originates in central Georgia and also empties into Lake Seminole.[32] From Lake Seminole, the Apalachicola River flows south until reaching the Apalachicola Bay, home to world-famous oyster fisheries.[33]

In 2012, following a third severe drought in just over ten years, Apalachicola Bay's oyster fisheries collapsed.[34] The next year the State of Florida filed an original action against the State of Georgia in the Supreme Court seeking an equitable apportionment of the ACF

29. Florida v. Georgia, 141 S. Ct. 1175, 1176 (2021).
30. *Id.* at 1178–79.
31. *Id.*
32. *Id.* at 1178.
33. *Id.* at 1178–79.
34. *Id.* at 1179–80.

Basin's surface waters.[35] Florida's lawsuit claimed that Georgia had overconsumed waters from the upstream Flint River for agricultural purposes, and that Georgia's consumption caused lower downstream flows in the Apalachicola River.[36] Because Apalachicola Bay's oyster fisheries require a steady stream of fresh water to reproduce, Florida's theory was that low flows caused salinity levels in the Bay to rise, attracting saltwater oyster predators and disease that ultimately decimated the oyster population.[37]

The Supreme Court began by revisiting the standards in an equitable apportionment action. "[A]s part of the Constitution's grant of original jurisdiction," the Supreme Court explained that it has the authority "to equitably apportion interstate streams between States."[38] The "guiding principle" of the equitable apportionment doctrine is that States have "an equal right to make reasonable use" of a shared water resource.[39] The Court clarified that Florida, as the party seeking an equitable apportionment, bore the burden of proving by "clear and convincing evidence" that Georgia's overconsumption caused its injuries.[40] The Court also stated that "Florida must show that 'the benefits of the [apportionment] substantially outweigh the harm that might result.'"[41] Moreover, "[b]ecause Florida and Georgia are both riparian States," the Court stated that the "'guiding principle' of [its] analysis is that both States have 'an equal right to make a reasonable use' of the Basin waters."[42]

In a unanimous opinion written by its newest member, Justice Amy Coney Barrett, the Supreme Court held that Florida had not overcome its heavy burden for a number of reasons. Perhaps most significantly, the Court found compelling Georgia's argument that one possible reason for the oyster fisheries' collapse was Florida's own "mismanagement."[43] For example, the Court pointed to evidence showing that in the years prior to 2012, Florida had allowed overharvesting of its fisheries at record rates, while at the same time it had been "reshelling" oyster bars at historically low rates.[44]

35. *Id.* at 1179.
36. *Id.* at 1178–79.
37. *Id.* at 1180.
38. *Id.*
39. *Id.*
40. *Id.* at 1180.
41. *Id.*
42. *Id.*
43. *Id.* at 1180–81.
44. *Id.* "Reshelling is a century-old oyster-management practice that involves replacing harvested oyster shells with clean shells, which can serve as habitat for

The Court pointed to other potential causes for the fisheries' collapse. One was the fact that the United States Army Corps of Engineers operated several upstream dam-and-reservoir projects in the ACF Basin that affected the amount and timing of downstream flows into Lake Seminole and the Apalachicola River and Bay.[45] Other potential causes included the "unprecedented series of multiyear droughts" and "changes in seasonal rainfall patterns" in the region.[46]

While Florida did offer evidence that increased salinity and saltwater predators "contributed" to the collapse of its fisheries, that evidence did not by itself establish that Georgia's overconsumption caused their collapse.[47] "The fundamental problem" with Florida's evidence, Justice Barrett observed, was that "it establishes at most that increased salinity and predation contributed to the collapse, not that *Georgia's overconsumption* caused the increased salinity and predation."[48] Accordingly, the Court held that "Florida has not shown that it is 'highly probable' that Georgia's alleged overconsumption played more than a trivial role in the collapse of Florida's oyster fisheries."[49]

Among other reasons, this decision is important because it underscores the heavy burden that downstream states face when seeking an apportionment of water that first travels through an upstream, neighboring state. Although Florida had proffered substantial evidence that Georgia had consumed an excessive amount of water from the Flint River over the years, Florida still failed to connect Georgia's overconsumption to the harm borne by its oyster fisheries.[50] Perhaps if Florida had rebutted the evidence showing that it had mismanaged its own fisheries, the Court may have been willing to find a causal relationship between Georgia's consumption and the fisheries' collapse. In the end, this case should serve as a cautionary tale for downstream states who might want to think twice about seeking to vindicate their rights—whether regarding water or other types of natural resources—in the Supreme Court rather than another venue or through other means.

young oysters."

45. *Id.* at 1179.
46. *Id.* at 1182.
47. *Id.*
48. *Id.*
49. *Id.* (citing Colorado v. New Mexico, 467 U.S. 310, 316 (1984)).
50. *Id.* at 1181–82.

2. *Mississippi v. Tennessee*

The other case decided by the Supreme Court in 2021 pitting two states against each other in the pursuit of water was Mississippi's lawsuit against Tennessee.[51] Unlike the surface water at issue in the Florida-Georgia case, this dispute involved competing claims to groundwater—*i.e.*, water that exists strictly underground.[52]

Beneath the surface of the Earth are layers of rock, clay, silt, sand, and gravel. Groundwater meanders in and around these materials, forming underground reservoirs known as aquifers.[53] "To extract water from an aquifer, people drill wells and pump the water to the surface."[54] "Some aquifers are small, while others span tens of thousands of square miles."[55]

Sitting beneath several states, including both Tennessee and Mississippi, is one of the largest aquifers in the country—the Middle Claiborne Aquifer. In the late nineteenth century, a driller in Memphis, Tennessee—which sits on the Mississippi border—discovered the existence of the Middle Claiborne Aquifer.[56] Ever since then, the City of Memphis has relied on the Aquifer for drinking water.[57] The City currently pumps around "120 million gallons of groundwater" every day from over 160 wells connected to it.[58]

In 2014, the State of Mississippi sued the State of Tennessee, the City of Memphis, and the local public utility, Memphis Light, Gas and Water Division ("MLGW") in an original action in the Supreme Court.[59] Mississippi claimed that MLGW had pumped so much water from so many wells connected to the Middle Claiborne Aquifer that, over time, it had "altered the historic flow of groundwater" within the aquifer, away from Mississippi and into Tennessee.[60] Mississippi claimed that when water is pumped from a well, the water pressure around the well drops, naturally drawing nearby water to the well.[61]

Significantly, unlike Florida's case against Georgia, Mississippi's case against Tennessee did not seek an equitable apportionment of the

51. Mississippi v. Tennessee, 142 S. Ct. 31, 36 (2021).
52. *Id.* at 33.
53. *Id.* at 36.
54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.* at 37.
59. *Id.* at 38.
60. *Id.* at 37.
61. *Id.* 36–37.

Middle Claiborne Aquifer's groundwater. Mississippi claimed that the "fundamental premise of . . . equitable apportionment jurisprudence—that each of the opposing States has an equality of right to use the waters at issue—does not apply to this dispute."[62] Mississippi instead asserted a "sovereign ownership" right to *exclusive* control and use of all groundwater beneath its surface.[63] On that theory, Mississippi's complaint alleged that Tennessee's pumping amounted to a "tortious taking of property," for which it sought $615 million in damages.[64]

The Supreme Court rejected Mississippi's theory in full and held that equitable apportionment was an appropriate remedy in the case and, accordingly, that Mississippi did not have sovereign ownership of the groundwater beneath its surface.[65]

As to the first issue, the Supreme Court found that the states' dispute over the Middle Claiborne Aquifer's groundwater presented all the hallmarks of a case for which equitable apportionment is the appropriate remedy.[66] First, "transboundary resources were at issue," since the Middle Claiborne Aquifer was a "single hydrogeological unit" that spanned multiple states.[67] Second, the Aquifer "contain[ed] water that flows naturally between the States," and all of the Court's equitable apportionment jurisprudence "have concerned such water."[68] Moreover, the fact that such water traveled "extremely slow" between the states was not dispositive.[69] Third, activities in Tennessee "affect[ed] the portion of the aquifer that underlies Mississippi," further making equitable apportionment applicable.[70] Thus, although the Court acknowledged that it had never previously applied equitable apportionment in cases involving a dispute over the right to *groundwater*, it ultimately found that equitable apportionment of the Middle Claiborne Aquifer would be "sufficiently similar" to past applications of the doctrine to warrant the same treatment.[71]

The Court went on to reject Mississippi's theory that it had sovereign ownership of groundwater beneath its surface.[72] While it was true that every state has "full jurisdiction over the lands within its

62. *Id.* at 38.
63. *Id.* at 40.
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.* at 39–40.
68. *Id.* at 40 (citing Kansas v. Colorado, 206 U.S. 46, 98 (1907)).
69. *Id.*
70. *Id.*
71. *Id.* at 39.
72. *Id.* at 40.

borders, including the beds of streams and other waters," the Court said that it was also true that "such jurisdiction does not confer unfettered ownership or control of flowing interstate waters themselves."[73] "[W]e have 'consistently denied' the proposition that a State may exercise exclusive ownership or control of interstate 'waters flowing within her boundaries.'"[74] The Court also explained that "[w]hen a water resource is shared between several States, each one 'has an interest which should be respected by the other,'" and that "Mississippi's ownership approach would allow an upstream State to completely cut off flow to a downstream one."[75]

Accordingly, the Supreme Court rejected Mississippi's tort claims.[76] And because Mississippi had never sought leave to amend its complaint against Tennessee to assert an equitable apportionment claim—and because the assertion of such a claim would likely require the Court to "consider a broader range of evidence" as well as the "joinder of additional parties," including other States that rely on the Middle Claiborne Aquifer for groundwater—the Supreme Court dismissed the case.[77]

The opinion is significant because it signals that the Court prefers to address State-versus-State disputes over water using the equitable apportionment framework, which allows it to consider and balance a variety of factors rather than confer a state with ownership rights to interstate resources. While the Court's equitable apportionment jurisprudence has so far been limited to cases involving the flow of water across state lines, it would not be surprising if a case involving a state's request for equitable apportionment of other types of natural resources—such as oil or gas—within interstate reservoirs makes its way before the Court in the future.

C. *Lower Federal Courts*

1. *In re Deepwater Horizon Belo* Cases

Plaintiffs in this class action "consist of cleanup workers and coastal residents from North Florida who claim to suffer various

73. *Id.* (first quoting Kansas v. Colorado, 206 U.S. 46, 93 (1907); then quoting Wyoming v. Colorado, 259 U.S. 419, 464 (1922)).

74. *Id.* (quoting Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 102 (1938)).

75. *Id.* at 41 (quoting *Wyoming*, 259 U.S. at 466).

76. *Id.*

77. *Id.* at 41–42.

chronic medical conditions as a result of exposure to crude oil and other chemicals following the 'Deepwater Horizon' oil spill in the Gulf of Mexico."[78] All claims against the defendants, BP Exploration & Production, Inc. and BP America Production Company ("BP"), were originally consolidated as a part of a multidistrict litigation in federal court in Louisiana.[79] The court approved a comprehensive Medical Benefits Class Action Settlement for these plaintiffs.[80] The settlement agreement outlined a claims process for plaintiffs injured before April 16, 2012.[81] However, plaintiffs diagnosed with conditions after April 16, 2012 could file separate individual tort suits against BP through a Back-End Litigation Option ("BELO") suit.[82]

Over 500 of these BELO cases have been transferred to the Northern District of Florida for trial.[83] "The cases have been stayed with the exception of a randomly selected First Trial Pool, consisting of two groups of bellwether cases."[84] The individual bellwether plaintiffs "each worked or resided on beaches in Florida following the spill."[85] One group of plaintiffs "claim to suffer from chronic conjunctivitis and chronic dry eye syndrome, and another group of plaintiffs assert medical conditions of chronic conjunctivitis, chronic dermatitis, chronic rhinitis, chronic sinusitis, and/or chronic rhinosinusitis."[86] "Plaintiffs maintain these chronic conditions were caused by their exposure to oil . . . released during the Deepwater Horizon oil spill and cleanup efforts."[87]

On summary judgment, BP argued "that the general causation opinions of the bellwether [p]laintiffs' expert toxicologist . . . [were] unreliable and unhelpful, and therefore inadmissible under Federal Rule of Evidence 702 and *Daubert*."[88] The court agreed with BP's analysis by excluding the expert's general causation testimony and ruling for BP on summary judgment.[89]

78. *In re Deepwater Horizon Belo Cases*, No. 3:19-cv-963, 2020 WL 6689212, at *1 (N.D. Fla. Nov. 4, 2020).
79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.* at *6.
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.* at *1.
89. *Id.*

The court concluded that plaintiffs' expert toxicologist opinions fell "woefully short of the *Daubert* and Rule 702 standards based on her failure to identify *relevant* statistically significant associations in the epidemiologic literature and her failure to provide anything more than a conclusory analysis of the Bradford Hill factors to explain her opinions."[90] The court noted that "[t]hese flaws stem[med] from [the expert's] overarching failure to provide anything more than conclusory analysis of the Bradford Hill factors to explain her opinions."[91] The court also noted that the expert's opinions were also not helpful because "she refused to consider the actual exposure data for the relevant geographical area and chose to instead rely on exposure data from locations far from the Gulf Coast of Florida."[92]

The court began by analyzing the "reliability" of the expert's opinions. The court noted important distinctions and limitations in the studies cited by the expert toxicologist.[93] For example, the expert cited exposure scenarios occurring close to shore and involving fresh crude oil, whereas the Deepwater Horizon spill occurred 125 miles offshore and involved weathered oil.[94] Additionally, the court noted that the other studies relied on by the expert,

> involved workers coming into 'direct contact with oil or its vapors' and workers being exposed to 'high' concentrations of VOCs, PAHs, naphthalene, benzene, toluene, xylenes, and mercury, ECF No. 68-2 at 37-42, whereas here there is no evidence of direct contact with fresh MC252 crude oil or similarly high concentrations of the substances identified in the studies.[95]

The court also pointed to "distinctions and limitations in the studies of air pollution/PM and arsenic [the expert] relied on."[96] For example, the air pollution studies used by the expert "documented statistically significant increases in complaints of eye and respiratory symptoms with increasing levels of air pollution in urban and industrial populations."[97] However, the court concluded "these studies have limited value to [the plaintiffs'] cases because they referenced *chronic exposure*, in contrast with the *[plaintiffs'] limited exposures* here, and,

90. *Id.* at *12.
91. *Id.*
92. *Id.*
93. *Id.* at *13.
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.*

notably, did not reference the chronic medical conditions" that the plaintiffs alleged in the complaints.[98]

The court also noted that the expert's opinion was "unreliable given her reliance on several studies showing an association between arsenic in drinking water and skin lesions, neither of which is at issue" in this case.[99] The court noted that "the mine tailings study cited by [the expert] included long-term, not short-term, exposure and also included not only arsenic but also lead, mercury, and cadmium."[100] The expert "never explained how exposure to mine tailings is comparable to the alleged pathway of exposure here . . . or how she could validly isolate arsenic as causal considering the multiple metals present in that study."[101] The court concluded that the expert's "unwillingness to consider the glaring exposure distinctions between the studies she relied on and the facts of these cases, and her failure to explain how the statistical associations she identified [were] relevant, despite those distinctions, doom[ed] the reliability of her opinions."[102]

The court next analyzed whether the expert's opinions met the "helpfulness" prong of Rule 702.[103] The court noted that the expert.

> relied on the NAAQS standards for PM exposure and the EPA and WHO limit for arsenic exposure in drinking water as the relevant generally hazardous exposure levels, but she did not present evidence that the air and water in the general areas where the [p]laintiffs worked and lived exceeded those benchmarks, much less evidence of a health benchmark for the chronic medical conditions at issue.[104]

Additionally, the expert "relied heavily on two Deep Water Horizon spill studies that [bore] no geographical relationship to the areas where the [p]laintiffs in these cases worked and lived."[105] For example, the expert "relied on a USGS study of sediment collected during the Deepwater Horizon spill that documented arsenic in sediment samples taken in *Louisiana and Texas*, *not Florida*."[106] As such, the court concluded that the expert opinions also failed the helpfulness prong of Rule 702.[107]

98. *Id.*
99. *Id.* at *14.
100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.* at *15.
104. *Id.*
105. *Id.*
106. *Id.* (emphasis added).
107. *Id.*

As a result, the court held that the testimony must exclude the plaintiffs' expert toxicologist opinions.[108] The court concluded that since plaintiffs did not create material questions of disputable fact on general causation, BP was entitled to summary judgment.[109]

2. *Johnson v. 3M*

In September 2021, the United States District Court for the Northern District of Georgia ruled that the primary suppliers of per-and polyfluoroalkyl substances ("PFAS") chemicals to carpet manufacturers are not liable under Georgia's law of negligence for PFAS releases that are discharged solely as a result of the carpet manufacturer's operations.[110]

The case involves a class action lawsuit in which plaintiffs allege that carpet manufacturers located in Dalton, Georgia and their chemical suppliers caused PFAS contamination in surrounding waterways and potable aquifers.[111] Plaintiffs allege that the PFAS chemicals discharged by the defendants "have contaminated water supplies downstream of Dalton, specifically the water supplies for the City of Rome and Floyd County, [Georgia]."[112]

Plaintiffs are "water subscribers and ratepayers with the Rome Water and Sewer Division and/or the Floyd County Sewer division" who have allegedly suffered harm as a result of the contamination of their drinking water with PFAS chemicals.[113] Plaintiffs' claims arose under the Clean Water Act and state common law theories of negligence, negligence per se, and nuisance.[114] The court issued an opinion in response to the defendants' motion to dismiss the claims, which the court denied on all counts, except with respect to the negligence claims brought against the PFAS supplier defendants.[115]

The "[s]upplier [d]efendants are companies that manufacture and supply PFAS to the carpet manufacturers."[116] The plaintiffs did not accuse the supplier defendants of having discharged wastewater from

108. *Id.* at *1.
109. *Id.*
110. Johnson v. 3M, No. 4:20-cv-8-AT, 2021 WL 4745421, at *49 (N.D. Ga. Sept. 20, 2021).
111. *Id.* at *1.
112. *Id.*
113. *Id.* at *4.
114. *Id.* at *7.
115. *Id.* at *76.
116. *Id.* at *4.

manufacturing operations around Dalton, Georgia.[117] Rather, they allegedly supplied the chemicals that the manufacturing defendants used and disposed of in a manner that polluted the plaintiffs' water with PFAS chemicals.[118] The plaintiffs sought to hold the supplier "[d]efendants liable as mere sellers of the PFAS-containing products to the carpet manufacturers."[119] Plaintiffs contended that "the suppliers had a general duty to the public to prevent the discharge of toxic PFAS into the waters of the United States, including the City of Rome's watershed."[120]

The court disagreed with the plaintiffs and dismissed the negligence claims against the supplier defendants.[121] The court concluded that the plaintiffs "failed to point to any authority from Georgia establishing a duty on the part of a chemical supplier to protect an unknown third-party, rather than its consumer, from harm resulting from the negligent use or disposal of chemicals."[122]

The federal court's ruling potentially stands to shift the burden of PFAS-related liabilities from primary suppliers onto the broader group of secondary manufacturers and downstream processors.

3. *Delozier v. Jacobs Engineering Group*

In December 2008, an ash waste containment structure owned and operated by defendant, Tennessee Valley Authority ("TVA"), near Kingston, Tennessee, "failed and released more than one billion gallons of sludge and water into the nearby environment."[123] Plaintiff alleges that this toxic sludge released from containment structure,

> created a tidal wave of water, toxic ash sludge, and fly ash that destroyed several homes, covered local roads and a railroad spur, contaminated drinking wells and municipal water intakes, damaged water lines, killed fish and other flora and fauna, and ruptured a major gas line in a neighborhood adjacent to the plant.[124]

117. *Id.* at *49.
118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.* ("Plaintiffs rely on authority outside of Georgia to support their position. However, Plaintiff must point to 'a duty imposed by a recognized common law principle declared in the reported decisions of [Georgia] appellate courts.'").
123. Delozier v. Jacobs Eng'g Grp., Inc., No. 3:19-cv-451-TAV-HBG, 2021 WL 1538787, at *1 (E.D. Tenn. Feb. 19, 2021).
124. *Id.* (internal quotations omitted).

TVA hired defendant, Jacobs Engineering Group, Inc., to be responsible for "safety oversight for TVA and the EPA."[125]

Plaintiff filed a complaint against the defendants asserting "claims for personal injury, property damage, trespass, nuisance, and medical monitoring."[126] The defendants moved to dismiss plaintiff's claim, stating that the plaintiff could not establish standing under Article III and that the plaintiff's claims were time-barred under different statutes of limitation in Tennessee.[127]

The court first considered whether plaintiff had standing to assert a claim under Article III.[128] The defendants argued that "mere exposure to coal ash is insufficient to establish an injury in fact" under Article III and that the complaint "should be dismissed for lack of standing because it does not plausibly allege that plaintiff suffered an injury in fact."[129] The court disagreed, finding that the plaintiff had "adequately pled an injury in fact that is fairly traceable to the conduct of [d]efendants" as required under Article III.[130] The court noted that:

> [a]ccepting the factual allegations in the Complaint, [p]laintiff has alleged that her property, along with the property of the members of the proposed putative class, was damaged by toxic ash sludge from the spill, which either remains on the property or is damaged by its proximity to the spill. Moreover, [p]aintiff has alleged that her real property was damaged by its proximity to the spill, as well as that her health and well-being has been severely damaged and threatened by the ash spill. In addition, [p]laintiff alleges that 'the asset recovery occurred and continues to occur to the present day, due in part to hidden, ongoing, and new current leaks of fly ash constituents on or about 2017–2019.' Plaintiff also claims that 'she and her family have ingested, inhaled, and had direct dermal contact with coal ash through the air and/or in the surface and subsurface soil and water.' Lastly, [p]laintiff has cited economic damages, the risk of continued exposure, and incurred healthcare costs.[131]

The court concluded "based on the allegations in the Complaint" that the plaintiff had alleged sufficient facts to allow the Court to find that the plaintiff has "Article III standing to pursue her claims."[132]

125. *Id.*
126. *Id.*
127. *Id.* at *2.
128. *Id.* at *6.
129. *Id.*
130. *Id.* at *8.
131. *Id.*
132. *Id.* at *9.

However, the court determined that, with the exception of the plaintiff's nuisance claim, all of the plaintiff's claims were time-barred under Tennessee statutes of limitation for personal injury and property damage claims.[133] A one-year statute of limitations limits the plaintiff's personal injury claims and a three-year statute of limitations limits her property damage claims under Tennessee law.[134] The defendants claimed that the plaintiff's complaint should have been dismissed because the complaint was filed "over ten years after the 2008 Kingston ash spill," which was outside of both statutes of limitations in Tennessee.[135]

Ultimately, the court found "that, with the exception of her nuisance claim, [p]laintiff's claims [were] time-barred on the face of the allegations set forth in the Complaint, and that no tolling exceptions [were] applicable."[136] The court noted that "[u]nder the discovery rule, a cause of action accrues and the statute of limitations begins to run when the" injury occurs or is discovered, or when in the exercise of reasonable care and diligence, it should have been discovered.[137] The court held that based on the allegations in the plaintiff's complaint, the plaintiff "should have discovered the alleged injuries . . . prior to the expiration of the statute of limitations."[138]

The court concluded that the plaintiff did not demonstrate that she "exercised reasonable care and diligence in pursuing [her] claim," and the record was sufficient for the court to determine that the statute of limitations barred the plaintiff's claims.[139] Plaintiff had constructive knowledge of her claims prior to the expiration of the statute of limitations by November 2016 (for the property claims with the exception of her nuisance claim) and November 2018 (for the personal-injury claims).[140] The court held that "[i]n addition to the widespread media coverage of both the 2008 ash spill, the dangers of coal ash, the related litigation, and the allegations of [p]laintiff's Complaint detail[ed] how she should have been aware of her claims prior to the expiration of the statute of limitations."[141]

133. *Id.* at *16.
134. *Id.* at *11.
135. *Id.* at *9.
136. *Id.* at *11.
137. *Id.*
138. *Id.*
139. *Id.* at *13.
140. *Id.*
141. *Id.*

Further, the court held that the statutes of limitations on the plaintiff's claims were not tolled under the fraudulent concealment doctrine.[142] "Under the fraudulent concealment doctrine, the statute of limitations is tolled when the defendant has taken steps to prevent the plaintiff from discovering he [or she] was injured."[143] However, the court held that the plaintiff incorrectly asserted that "[t]he exercise of reasonable due diligence is not required of plaintiffs when the injuries claimed have been fraudulently concealed by defendants."[144] The court noted that this assertion "was in direct contrast to the Tennessee Supreme Court's finding in *Redwing* that '[p]laintiffs asserting the doctrine of fraudulent concealment to toll the running of a statute of limitations must demonstrate that they exercised reasonable care and diligence in pursuing their claim.'"[145] Ultimately, the court found that the plaintiff failed to "demonstrate[] that she 'exercised reasonable care and diligence in pursuing [her] claim,' and the record is sufficient for the Court to determine that [p]laintiff's claims were time-barred."[146] As such, the court held that the fraudulent concealment exception did not apply to toll the statutes of limitation.[147]

142. *Id.*
143. *Id.* (internal quotations omitted).
144. *Id.*
145. *Id.* (quoting Redwing v. Cath. Bishop for Diocese of Memphis, 363 S.W.3d 436, 463 (Tenn. 2012)).
146. *Id.*
147. *Id.* at *14.