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CASE SUMMARIES

MISSOURI

State ex rel. Laidlaw Waste Sys. v. City of Kansas City, 1993 WL 69482 (Mo.App. W.D.)

Laidlaw Waste Systems, Inc. ("Laidlaw") applied for a landfill use permit with the Kansas City Board of Zoning Administration ("BZA"). The BZA denied Laidlaw's application on May 24, 1991 and Laidlaw, following the BZA's rules, applied for a rehearing within thirty days on June 21, 1991. The BZA granted Laidlaw a rehearing on July 9, 1991 and again denied BZA a permit on December 7, 1991. Laidlaw then appealed to the Clay County Circuit Court which denied the appeal as untimely.

The Missouri Western District Court of Appeals affirmed the circuit court. The Court of Appeals held that the statutory provision which allowed for the creation of the BZA required that all appeals be filed with the circuit court within thirty days of the BZA's final decision. Laidlaw filed for appeal more than six months after the BZA's final decision in May 1991, and thus was untimely.

The court further held that the BZA only has authority over a decision within the thirty period. Assuming without deciding that zoning boards may hold rehearings, the court held all BZA decisions to be final unless a rehearing is applied for **and granted** within the thirty day period. The BZA did not grant Laidlaw a rehearing until fifteen days after the thirty day period expired, thereby losing its jurisdiction.

The court's decision effectively nullified the BZA's rule provision allowing the BZA up to thirty days to grant or deny the rehearing after the application for a rehearing.

—Tom Ray

Hulshof v. Noranda Aluminum, Inc., 835 S.W. 2d 411 (Mo.App. 1992)

Robert and Stella Hulshof brought suit against Noranda Aluminum, Inc. ("Noranda"), Associated Electric Cooperative, Inc. ("AECI") and the City of New Madrid, Missouri, seeking damages for the discharge of polluted

drainage waters into a public drainage ditch which overflowed onto their farmland. Stella Hulshof sought damages for the decrease in fair market value of her farmland. Both plaintiffs additionally sued for damages for the destruction of crops as well as actual and punitive damages for the impairment of their "right to use and enjoy their farmland." They also sought a permanent injunction against Noranda and AECI to prevent future overflow.

Plaintiffs voluntarily dismissed their actions against AECI and New Madrid. The trial court found in Noranda's favor on the plaintiffs' claims for damages, but found for plaintiffs on their request for a permanent injunction. Plaintiffs appealed from the judgment with respect to the damages while defendant cross-appealed with respect to the injunction.

Plaintiffs alleged that the trial court erred in denying their motion for a new trial because the jury allegedly rendered a written statement to the court which was inconsistent with the verdict rendered in favor of Noranda. The written statement proposed that Noranda, in lieu of punitive damages, expend funds to divert the polluted water from the drainage ditch into the Mississippi River. Noranda contended that the written statement was "mere surplusage" rather than part of the verdict and should be ignored. Noranda additionally argued that plaintiffs did not object in the trial court to the inconsistency between the general verdict and the written statement and consequently, plaintiffs should not be allowed to raise the issue on appeal.

The court agreed with Noranda that a claim that the verdict is inconsistent must be presented to the trial court before the jury is dismissed and found plaintiffs' point on appeal without merit.

Noranda's appeal alleged that the trial court erred in permanently enjoining Noranda from continuing to discharge polluted waters into the public drainage ditch. This argument was premised on Noranda's claim that the jury verdict was against the weight of the evidence. The appellate court found that substantial evidence had been presented to the trial court to support the permanent



injunction.

Noranda also argued that the trial court erred in issuing the injunction because the threat of substantial future harm was not proven. To prove this, the plaintiffs had to show not only anticipation, but rather an actual threat of future harm. Plaintiffs also had to show that Noranda's use of its property was "unreasonable, unusual, or unnatural" and "substantially impair[ed] the right of [plaintiffs] to peacefully enjoy [their] property." (quoting *Frank v. Environmental Sanitation Mgmt.*, 687 S.W. 2d 876, 880 (Mo. banc 1985)). The appellate court found that the plaintiff had adequately proven that Noranda used its property unreasonably and unnaturally and such use would continue to harm the property in the future.

Noranda also asserted that the trial court issued the injunction in error because the jury verdicts were rendered in Noranda's favor. Noranda argued that *res judicata* precluded the trial court from ordering the injunction. The court noted that even if actual damages for past acts have not been awarded, injunctive relief directed to future actions may still be granted. The court acknowledged that injunctive relief is only appropriate where the resulting injury is continuous and irreparable. The court found that the trial court properly concluded that the continued operation of Noranda's facilities would result in recurrent harm. As a result, the court denied Noranda's claim and also found *res judicata* to be inapplicable.

Boatmen's Bank of Pulaski County v. Wilson, 833 S.W.2d 879 (Mo.App. 1992)

Appellant mortgagors defaulted in the payment of two notes payable to and held by respondent bank. Respondent then foreclosed on two deeds of trust securing the

payment of those notes. Appellants then asserted a counterclaim or offset for amount of deficiency. Appellants contended that the trustee — the chief executive officer of respondent bank — committed a breach of trust when he followed respondent bank's general policy and ordered independent appraisals of the property to be foreclosed; when he ordered an environmental assessment concerning potential environmental hazards the appellants had created on one of the tracts of property; or when he participated in respondent's decision not to bid on the property that was found to be such an environmental hazard.

Appellants also claimed that respondent acted inequitably when it bid eighty percent of the appraised value of property subject to foreclosure. The Circuit Court of Pulaski County, Missouri, found in favor of the respondent bank on both counts. Appellant mortgagors appealed in the Missouri Court of Appeals for the Southern District, which held that there was no impropriety in conduct of sales that would warrant relief requested by appellant mortgagors.

The respondent bank obtained an independent appraisal of the value of the property prior to the foreclosure sale. One of the two tracts was valued at \$65,000, subject to a disclaimer of consideration of environmental problems with the property. The bank then halted the foreclosure proceeds and ordered a preliminary environmental assessment of the property in question. The assessment revealed that the land had potentially been impacted from boat manufacturing activities and waste dumping. To determine the degree of impact would cost between fifty and eighty thousand additional dollars. The assessor also concluded that the condition of the property could require "remedial cleanup activities that could range in cost from \$100,000 to an excess of \$1,000,000."

The respondent bank determined that it would not bid on the tract in question at the foreclosure sale. That tract sold to another boat manufacturer for \$2,500 at the sale. The bank bought the second tract of property for eighty percent of its appraised value, a common practice of the bank. With regard to the potentially contaminated property, the appellate court found that the appellant

did not offer any evidence to minimize the possibility of the existence of an environmental hazard it he had created. The court then found that the purchase of the property at \$2,500 was reasonable, if not high, considering the potential liability of the property. The court also found that the trustee, who was also a director of the bank, breached no duty in following normal bank policy.

FEDERAL DISTRICT COURT

East Prairie R-2 School Dist. v. U.S. Gypsum Co., 813 F.Supp. 1396 (E.D.Mo. 1993).

East Prairie R-2 Schools sued manufacturers of asbestos products used in school construction. The case was before the court on a motion for partial summary judgment filed by defendant W.R. Grace & Co. ("Grace"), which maintained it was not in the asbestos business in 1957 and, therefore, cannot be liable for the presence of the substance in a high school built in that year. In 1963, however, Grace "absorbed" Zonolite Co., which had been an asbestos manufacturer at the time the East Prairie high school was built. As part of the asset purchase Grace executed an assumption of "all debts and liabilities of Zonolite existing on the Closing whether absolute, contingent or otherwise." East Prairie Schools contended its claims filed in 1990 constitute "contingent liabilities."

The case presented the question of whether an asset purchaser which assumed an asbestos manufacturer's "contingent liabilities" can be held liable in tort for the actions of its predecessor when the cause of action did not accrue until after the assets changed hands.

The district court ruled that the purchaser cannot be held liable and granted partial summary judgment based on an analysis of applicable choice of laws rules.

After first determining that Grace was not liable as a successor corporation under the "mere continuation" or the "de facto merger" theories of successor liability, the court turned to Grace's assumption of Zonolite's liabilities.

The alleged tort occurred in Missouri, but the assumption agreement was executed in New York and provided that it was to be governed by New York law. The district court ruled that Missouri law would apply to determine if Grace was a successor corporation, but New York law would determine the effect of the assumption agreement. The court said this comported with Missouri's contract choice of law rule that the law of the place intended by the parties shall govern the interpretation of a contract.

Given that New York law says a tort cause of action does not accrue until an injury occurs, an uninjured party cannot be considered a "contingent liability." "Granted that 'contingency' invokes uncertain events, the uncertainty should be restricted to the success of asserting an existing claim, rather than expanding it to include the altogether unpredictable event that an injury will occur." Partial summary judgment was proper since Grace cannot be liable for the liabilities of Zonolite in this matter, and since Grace was not making the asbestos acoustical plaster at the time the high school was built.

Board of Managers, Bottineau County Water Resource Dist. v. Bornhoft, 812 F.Supp. 1012 (D.N.D. 1993)

This is an action for declaratory and injunctive relief against the Corps of Engineers ("Corps") concerning the construction of two projects designed to provide relief for flooding problems in North Dakota. The Plaintiff, Board of Managers ("Board") is the governing body of the Bottineau County Water Resource District. Platte Valley Construction was awarded the contract for the construction of the two projects.

The Board applied to the Corps for a § 404 permit pursuant to the Clean Water Act ("CWA") because of plans to discharge dredged or fill materials in wetlands. While this application was pending, work which did not require the permit was started on the projects.

After discovering that Platte Valley Construction had deposited spoil material in a

wetland on one of the projects, the Corps issued a "cease and desist" letter to the Board, ordering the unauthorized work to be discontinued and stating that the consideration of the § 404 permit was suspended until the dispute was resolved.

Two years after the cease and desist letter was issued, the conflict had not been resolved. The Board brought this lawsuit, requesting the court to determine that the Board was not responsible for the unauthorized discharge and to compel the Corps to make a decision on the Board's § 404 application. The Corps filed a motion to dismiss for lack of subject matter jurisdiction, taking the position that "a landowner may not seek judicial review of agency action pursuant to CWA until the agency assesses civil penalties or brings its own enforcement action."

The Board opposed the motion to dismiss by:

1. filing a motion for summary judgment, arguing that the unauthorized discharge was a result of Platte Valley failing to comply with § 404 of the CWA;

2. arguing that the letters ordering the Board to "cease and desist" constitute final agency action and are reviewable by this court; and

3. arguing that the Corps' granting of the permit after the filing of the motion for summary judgment constitutes final agency action and is reviewable by the court.

The Eighth Circuit followed the Fourth and Seventh Circuits' determination that Congress intended to preclude judicial review of compliance orders issued under the CWA prior to enforcement action or imposition of penalties.

The court dismissed the action pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction. The court specifically determined that the Corps action of sending a cease and desist letter did not constitute an enforcement action or an assessment of any penalties and therefore is not a final agency action which is reviewable by the court.

— Brian S. Franciskato

May v. AC & S Inc., 812 F.Supp. 934 (E.D.Mo. 1993)

In 1983, four school districts on behalf of all public school districts and private schools in the United States brought an action to recover the costs incurred to abate asbestos contamination. Defendants are primary producers and suppliers of asbestos construction and insulation products used in schools. Plaintiffs opted out of the class action suit in 1988 and filed an action against defendants on theories of strict liability, negligence, implied warranty, express warranty, fraudulent misrepresentation and civil conspiracy. Plaintiffs sought to recover from defendants the cost of abating the hazards posed by materials present in plaintiffs' buildings which contained asbestos.

Defendants requested summary judgment on all of the claims on the theory that the applicable statutes of limitations had expired. The court addressed only whether the limitations periods had expired for all claims. It found that the limitation periods did not bar the claims and denied the defendants' motions for summary judgment.

Defendants alleged that the plaintiffs' suit is barred by the applicable Missouri statute of limitations. Plaintiffs argued that the plaintiffs' membership in the class action suit in 1983 tolled the applicable statutes of limitation, and that even if the class action suit did not toll the running of the statutes of limitation, several issues of material fact preclude the granting of summary judgment based upon the expiration of the appropriate time to file suit. The court found that plaintiffs' membership in the earlier class action suit did in fact toll the statute of limitations until the time the plaintiffs opted out of the class.

Whether plaintiffs' claims are barred depends upon the time at which the claims accrued. Under Missouri law, a cause of action accrues when the damage is sustained and ascertainable. Defendants argued that plaintiffs' claims accrued when they learned about the potential dangers of asbestos and that such information was made known to the public between 1979 and 1982. Further, plaintiffs had their buildings inspected for asbestos and consulted with experts during that time. Plaintiffs argue that because their

action was for asbestos contamination, the cause of action did not accrue until the contamination occurred and plaintiffs ascertained the risk of harm from such contamination.

As for the strict liability, negligence and conspiracy claims, the court found the applicable Missouri statute of limitations to be five years from the accrual of the cause of action. Plaintiffs stated that they could not ascertain that their buildings were contaminated until 1983 because the plethora of information available at the time did not recognize whether and to what extent asbestos posed an unreasonable contamination.

The court found that in the late 1970s and early 1980s, the exact nature of the health risks and level at which exposure became dangerous was speculative. The court refused to grant summary judgment because the accrual times were disputed. The court did note that if the tort claims arose on or after January 16, 1978, then they were timely filed. Any claims that arose before that date were barred.

Whether plaintiffs' warranty deed claims were barred depended upon whether the claims accrued prior to or after July 1, 1965. Under Missouri law, any warranty claims arising before July 1, 1965 are subject to a five year limitation statute. Claims arising after that date have a four year statute of limitations. If the warranty extends to future performance, then the limitations period is five years. The date of delivery starts the running of the statute. A breach of warranty occurs when tender of delivery is made. If, however, the product has a warranty for future performance, the limitations period begins from that date on which the defect was or should have been discovered.

Because implied warranties do not warrant future performance of a product, the court found that plaintiffs implied warranty claims had expired at the latest in 1976. As for the express warranty claims, plaintiffs contended that representations made by defendants as to the quality of their asbestos-containing products act as warranties for future performance in which case the limitations period begins when the defect was discovered. The court rejected this argument, however, focusing on the fact that

warranties for future performance must specify a particular period of time. Defendants' representations did not contain a time period. The court consequently granted summary judgment for defendants as to the warranty claims.

The parties also disputed when the cause of action for the fraud claim accrued. Missouri law provides ten years for the discovery of fraud. A fraud action must be commenced within five years of discovery. Defendants contended that due to information publicly available, plaintiffs knew or should have known by 1983 that the alleged fraud had occurred. Since the last asbestos-containing materials were installed in 1972, the fifteen year limit on filing suit expired in 1987. The court found however, that due to the tolling of the plaintiffs' suit between 1983 and 1988, the claim was not barred. As a result, the court refused to grant summary judgment on the fraud claim.

Ashland Oil, Inc. v. Sonford Products Corp., 810 F.Supp. 1057 (D.Minn. 1993)

Industry Capital, Inc. loaned money to Sonford Products Corporation some years ago, taking a security interest in its assets, including inventory and equipment. Industry Financial Corporation (IFC) is the successor to Industry Capital. Sonford manufactured wood preservatives on land leased from Ashland Oil, Inc. Sonford declared bankruptcy in 1982. To facilitate a transfer of the bankrupt's assets to another corporation, IFC foreclosed its security interest and briefly held title to the property. It then sold the assets to Park Penta Corporation. IFC financed the purchase and again took a security interest in the assets. One year later, Park Penta filed for bankruptcy. When no buyers could be found, IFC abandoned its security interest.

Ashland alleges that Sonford's operations left the property contaminated with hazardous waste and brought this action against IFC and others for cleanup costs under

CERCLA and state law theories.¹ Ashland claims IFC, as a one-time owner of the Sonford assets, qualifies as an "owner or operator" under 42 U.S.C. § 9607(a)(2), or as "arranger" under 42 U.S.C. § 9607(a)(3).

Ashland used three separate CERCLA theories in attempting to attach liability to IFC: that IFC held title to the assets and therefore qualifies as an owner/operator; that IFC "participated in the management" of Sonford and Park Penta; and that IFC "arranged for disposal or treatment...of hazardous substances." The court rejected all three theories.

A) Owner/operator. The court noted that the CERCLA definition of "owner or operator" is broad, but not unlimited. The statute expressly provides a safe harbor for any person who "without participating in ... management ... holds indicia of ownership primarily to protect his security interest." 42 U.S.C. § 9601(20)(A). The court looked to the lender liability rule codified at 40 C.F.R. § 300.1100. The rule, promulgated by EPA to eliminate the confusion over lender liability and the scope of the safe harbor provision, defines "indicia of ownership" as title acquired "incident to foreclosure and its equivalents." 40 C.F.R. § 300.1100(a).

IFC's foreclosure on the collateral meant it held title to Sonford's allegedly leaking assets for three weeks, while it put together the deal to transfer ownership to Park Penta. The court held that such ownership falls squarely within the safe harbor provisions for secured parties.

B) Participant in Management. Ashland maintained that IFC should be held liable under the CERCLA provision which removes the safe harbor protection from a lender who actually participates in management and operation of the facility. 42 U.S.C. § 9601(20)(A). But, as IFC's involvement with Sonford and Park Penta was restricted to policing its security interest by reviewing the debtors' finances, the court held it had not participated in management. See, 40 C.F.R. § 300.1100(c)(2)(ii) (policing security

agreements does not constitute participation in management). The court said that the primary authority of the EPA in CERCLA matters entitles its regulation to deference, and therefore, the court would follow the rule clarifying the scope of the lender safe harbor.

C) Arranger of Disposal or Treatment. Ashland argued that as IFC arranged the transfer of assets between Sonford and Park Penta, it had "arranged" for the disposal of allegedly hazardous materials and was liable under 42 U.S.C. § 9607(a)(3). The court ruled that liability in such circumstances can attach only when the "arranger" has taken some affirmative action. The mere sale of property is not sufficient to impose arranger liability on the seller.

Lundgren v. United States, 810 F.Supp. 256 (D.Minn. 1992)

Property owners filed suit under Federal Tort Claims Act ("FTCA") alleging that the Environmental Protection Agency ("EPA") was negligent in failing to warn them of their exposure to contaminated water. The property owners lived near the Arrowhead Refinery Superfund Site, where ground water was contaminated. In 1987 the EPA sampled the water well which supplied the properties of the plaintiffs and found that it contained elevated levels of tetrachloroethene, and the presence of toluene, methylene chloride and 1, 1, 1-trichloroethane. Despite requests for the results, however, the EPA did not reveal them to the plaintiffs until 1989. At that time the EPA also advised plaintiffs to ventilate their home during heavy water use and to use bottled water for drinking and cooking - activities for which they had previously used well water.

In February 1991 plaintiffs filed a standard Form 95 "Claim for Damage, Injury, or Death" with the EPA for \$540,000. Two later supplements were sent authorizing legal representation by Grant Merritt. In October 1991 the EPA sent a letter to Merritt stating that there had not been a claim

¹ See also Comment, New EPA Rule Clarifies Lender Liability for Response Costs Under CERCLA. But Is It Enough?, 1 Mo. ENV'T. L. & POL'Y REV. 25 (1993).

submitted for purposes of FTCA because the purported claim did not state a sum certain amount for each claimant. The EPA also refused to consider the claims of two minor plaintiffs because there was inadequate proof of authorized representation of them. Plaintiffs amended the claim in December 1991 by itemizing damages for each individual and including an affidavit of legal representation of the minors.

In March 1992 the EPA denied the amended claim as untimely because the sum certain was not stated for each individual until two years after the claim accrued. Plaintiffs then filed the FTCA action. The United States moved to dismiss for lack of subject matter jurisdiction or for summary judgment.

The district court held that the requirement that a sum certain be stated was met by plaintiffs when they stated the sum to cover the group of claimants and expressly identified all claimants. The district court also found that the claim met the administrative exhaustion requirements before the two amendments to the claim were filed and, hence, before the two year limitation period. Therefore, the government's motion for summary judgment was denied.

Slagle v. Baldwin, 809 F.Supp. 704 (D.Minn. 1992)

Slagle, the owner of property in Cass County, Minnesota, sought to develop his property as residential property. The County Zoning Board of Adjustment approved "fill applications" for Slagle's development. Subsequently, within four years, Slagle discharged approximately 18,500 cubic yards of dredged or fill material on 5.33 acres of wetland within a cedar swamp. The United States Army Corps of Engineers ("Corps") ordered Slagle to stop performing work on the site until an after-the-fact ("AFT") permit had been filed and approved.

Slagle filed an application for an AFT permit, seeking permission to retain the filling work already completed. In addition, he sought permission to (1) fill an additional half acre of wetland; (2) dredge a new ditch for the purpose of draining the site at a faster rate than the existing ditch; and (3) place the

material dredged for the ditch on top of the existing fill.

The Corps issued public notice of the application for a permit and reviewed and responded to letters from those concerned with Slagle's development. After a twenty day public review period, the Corps denied Slagle's application. The Corps concluded that the issuance of a fill permit would be contrary to the public interest and that restoration was needed to restore the areas already adversely impacted through the unauthorized placement of fill material. The Corps ordered Slagle to restore the wetland to its previous condition.

Slagle filed suit, claiming that (1) the Corps was without jurisdiction to regulate his property, (2) the Corps was estopped from claiming jurisdiction because it failed to respond to public notice issued in conjunction with his Cass County permit application, (3) the Corps was estopped from claiming jurisdiction because he relied on the Corps' maps indicating where the navigable waters are located, (4) the Corps deprived him of all economically beneficial uses of the property constituting a 5th Amendment taking, and (5) the Corps violated the Administrative Procedure Act. Slagle sought injunctive relief, enjoining the Corps from enforcing its restoration order.

Jurisdiction. The court, referring to the Supreme Court's recognition of Congress' intent to give "waters of the United States" the broadest possible meaning, concluded that adjacent wetlands may be defined as waters under the Clean Water Act ("CWA"). The court specifically concluded that Slagle's wetland was adjacent to a lake which was a tributary of waters used in interstate commerce in that it was hydrologically connected to a river which fed into a second lake, from which a second river emptied into the Mississippi River.

The court further concluded that the Corps was not estopped from asserting jurisdiction by publishing maps of navigable waters nor by failing to respond to public notices in conjunction with the Cass County permit applications. To prove estoppel against the government, it must be shown that there was affirmative misconduct by an agent of the

United States upon which the other party reasonably relied to his detriment. Slagle could not have reasonably relied on the Corps' maps because the maps contained the notation "All Other Waters and Wetlands Not Shown on This Map Should Be Considered To Be Covered By Section 404 of the 1972 Act." Additionally, the Corps was not under any legal duty to attend every public hearing, or respond to every public notice concerning matters within its jurisdiction.

Taking. The court also denied Slagle's claim that the Corps' actions constituted a 5th Amendment taking of his property. The court pointed out that Slagle's assertion of a 5th Amendment taking as a defense to jurisdiction was improper and that the proper action required Slagle to initiate a suit for compensation in the Claims Court.

Administrative Procedure Act. The court set forth the general rule that the APA allows courts to set aside agency actions, findings, and conclusion if found to be "arbitrary, capricious, and an abuse of discretion, or otherwise not in accordance with law...." 5 U.S.C. § 706(2)(A). The court further noted that it should give deference to the agency's determination and may not substitute its judgment for that of the agency, but must look only to whether the agency has considered the relevant factors or made a clear error of judgment.

The court concluded that the Corps' denial of Slagle's permit was not arbitrary and capricious in that the Corps made findings with respect to noise levels, aesthetic values, recreation, transportation, public health, safety, community growth, land use, property values, public facilities, employment, business activity, flooding, energy, mineral needs, air quality, terrestrial habitat, aquatic habitat, water quality, and water supply. Furthermore, because Slagle's proposed residential development was not strictly water dependent, practicable alternatives are presumed to be available and Slagle failed to demonstrate that alternatives were not available.

— Brian S. Franciskate

BANKRUPTCY COURT

In re Campbell Sixty Six Express v. Central Transport, 147 B.R. 200 (Bankr.W.D.Mo. 1992).

Campbell 66 took Chapter 11. After confirmation of their plan they sold a trucking terminal in Irving, Texas, to Central Transport. The sale price was \$1.3 million dollars. As part of the sale, Campbell 66 placed \$475,000 of the sale price in escrow to pay for any necessary environmental cleanup at the terminal. Great Southern Savings Bank had a validly perfected lien on the property and retained a lien on the sale proceeds.

After the cleanup was virtually completed, Campbell 66 argued that it was unnecessary to keep the remaining \$290,000 in escrow, as the only remaining task was an inexpensive monitoring procedure. Central said the full amount should be kept in escrow, since the exact cost of the remaining cleanup was unknown.

Noting that the estimated costs of the remaining cleanup and monitoring were just \$5,000, the bankruptcy judge ordered all but \$20,000 of the escrowed funds to be released, with the monies being paid to Campbell 66 and Great Southern to reduce Campbell's indebtedness.

Interco, Inc. v. Converse, Inc., 146 B.R. 447 (Bankr.E.D.Mo. 1992)

General Electric Company ("Claimant") filed a motion requesting that the court order that a deposition of Goldberg-Zoino and Associates, Inc. ("GZA"), an environmental consulting firm, not take place. Claimant also requested the court to order the Debtor, seeking to depose GZA, to pay Claimant's reasonable fees and expenses in connection with the motion. It requested, in the alternative, that the Debtor be ordered to pay GZA for its time in preparing for and giving its deposition and to pay Claimant one half of

the fees paid by Claimant to obtain facts and opinions of GZA on the matter.

Claimant had hired GZA to perform a preliminary site investigation of a contaminated site Claimant had leased to Debtor. Debtor asserted that GZA had been employed to perform the preliminary investigation as part of a response action in compliance with the Massachusetts Superfund Act and its implementing regulations, the Massachusetts Contingency Plan. Claimant, however, contends that it hired GZA in anticipation of litigation with Debtor overpaying the cleanup costs of the contamination.

The primary issue before the



court was whether Debtor was entitled to depose GZA when GZA was not expected to testify and when Claimant made available a copy of the reports issued by GZA, in addition to the report issued by the testifying expert. Also in issue was whether Debtor must pay Claimant reasonable fees for time spent responding to discovery, as well as a fair portion of Claimant's fees in obtaining the expert's (GZA) opinions.

The court held that Debtor was entitled to depose GZA as to data and methodology relied upon by Claimant's testifying expert since such information was not available from the reports or other sources, thus finding the existence of "exceptional circumstances" under Fed.R.Civ.P. 26(b)(4)(B). The court also found that the testifying expert of Claimant made its findings in reliance on the methodology developed by GZA under con-

ditions at the site which "certainly have undergone some changes since GZA's report," making it "impracticable, if not impossible for Debtor's expert to recreate those conditions." Debtor then was permitted by the court to depose GZA as to those physical conditions observed or tested by GZA.

The court held that, pursuant to Fed.R.Civ.P. 26(b)(4)(A,B,C), Debtor must pay GZA a reasonable fee incurred in responding to discovery, as well as pay Claimant a "fair portion of the fees and expenses reasonably incurred by Claimant in obtaining facts and opinions from GZA." The court, however, deferred ruling on those amounts until the conclusion of the deposition.

— Pamela J. Johnson

EIGHTH CIRCUIT COURT OF APPEALS

Farmland Indus., Inc. v. Morrison-Quirk Grain Corp., 987 F.2d 1335 (8th Cir. 1993)

The FAR-MOR-CO Site near Hastings, Nebraska was placed on the National Priorities List by the Environmental Protection Agency ("EPA") in 1986. It was designated as a Superfund site due to soil and groundwater contamination found at the Site. The EPA brought a CERCLA action for response costs against Morrison Enterprises ("Morrison"). The district court found that Morrison owned the Site at the time of release, and thus, was a responsible party under CERCLA. The court noted that its holding was not based on a determination that Morrison had caused the contamination at the site.

Farmland Industries ("Farmland") had purchased the Site from Morrison in 1975, which had owned the property since 1954. Farmland brought a declaratory judgment action against Morrison, seeking a ruling that Morrison would be liable for any response costs incurred by Farmland. Morrison filed a counterclaim against Farmland seeking contribution and indemnity for costs incurred in connection with cleanup of the Site.

While Morrison owned the Site, it operated a grain storage and handling business in which it used chemicals containing carbon tetrachloride and ethylene dibromide; hazardous substances as defined by 42 U.S.C. § 9601(14). In 1959 an explosion occurred at the Site and 940 gallons of the chemicals were lost. At the time Farmland acquired the Site there were still 2500 gallons of the chemicals in a storage tank. Some time between 1982 and 1983, Farmland discovered that the tank was empty.

A jury found for Morrison on Farmland's claim and for Farmland on Morrison's counterclaim. The district court denied both parties' motions for judgment notwithstanding the verdict or, in the alternative, a new trial. The parties appealed.

Farmland contended that Morrison should be liable for all response costs because the court had found it to be a responsible party in the previous case and the court therefore should have applied collateral estoppel. The Eighth Circuit Court of Appeals found that the district court properly refused to give collateral estoppel effect to the prior case because Farmland failed to meet its burden in proving that collateral estoppel should be applied given that causation was not decided in the previous case and that causation was an essential elementary of Farmland's claim.

With respect to Morrison's counterclaim, the Court of Appeals found that because the district court's jury instructions regarding causation, the nature of CERCLA liability, and the standards for liability to the government and to third parties were confusing they could have resulted in prejudice to Morrison. Accordingly, the court of appeals reversed and remanded for a new trial.

— Pamela J. Johnson

City of Ames, Iowa v. Reilly, 86 F.2d 253 (8th Cir. 1993)

The City of Ames, Iowa received a new National Pollutant Discharge Elimination System ("NPDES") permit in early 1993 from the State of Iowa, which then submitted it for EPA approval pursuant to the federal Clean Water Act ("Act"). The EPA objected to the permit as inconsistent with the Act by failing to comply with Iowa's ammonia nitrogen discharge standards. The State then informed the EPA it would not amend the permit. The EPA held an evidentiary hearing concerning its objections.

The City of Ames filed a petition with the 8th Circuit Court of Appeals for review of the EPA's veto of the permit.

By a regulation promulgated pursuant to the Act, the EPA Regional Administrator is required to announce whether the objections will be continued, withdrawn or changed. Because the Regional Administrator had not announced such a decision, the court held the petition for review was premature as the court lacked jurisdiction until the Regional Administrator makes a decision.

— Tom Ray

Waste Sys. Corp. v. County of Martin, 985 F.2d 1381 (8th Cir. 1993)

Martin and Faribault Counties ("Counties") appealed from an order of the United States District Court for Minnesota enjoining ordinances enacted by the Counties mandating that all compostable waste generated within the Counties be delivered to the Counties' solid waste composting facility ("Plant").

Before the Plant was constructed, approximately two-thirds of the solid waste generated by the Counties was transported to a landfill located across state lines and operated by Waste Systems Corp. While the Plant was in its planning stages, the Counties prepared plans which considered the adoption of ordinances that would designate that

all compostable solid waste generated within the Counties be sent to the Plant. The need for such ordinances centered upon economic reasons, and would require the designation for its financial support both initially and for continued operation. The Counties also considered whether methods less restrictive than designation could ensure the economic stability of the Plant and concluded that they could not.

Designation ordinances were approved by the Counties with a two part exemption which stated that the county "shall grant the [exemption] petition if it determines that: a) the materials will in fact be processed ... and b) the inclusion can be implemented **without impairing the financial viability of the Facility ...**"

The district court found that the ordinances discriminated against interstate commerce and were enacted as protectionist measures. Based upon this finding, the court granted Waste Systems' motion for summary judgment and permanently enjoined enforcement of the ordinances.

On appeal, the Eighth Circuit Court of Appeals noted that the crucial determination is whether the ordinance is "basically a protectionist measure or whether it can be viewed as a law directed to legitimate local concerns, with effects upon interstate commerce that are only incidental." Unlike other cases concerning the interstate movement of solid waste, this case prohibits the *exportation* rather than the importation of solid waste. The court noted that this difference is merely superficial and that regulations that restrict the transportation of waste out of a state also are subject to the limitations of the Commerce Clause.

The Counties argued that the ordinances are evenhanded because of the availability of the exemption. The court found the provision illusory because the likelihood that a facility could apply successfully for an exemption was virtually nonexistent given that there are no other facilities within hauling distance of the Plant and the price of con

struction is astronomical.

The court also found that the ordinances had a substantial effect on interstate commerce despite the fact that the residents of the Counties were paying for the Plant because the ordinances removed the compostable solid waste from the interstate market. By mandating that all compostable solid waste be delivered to the Plant, the ordinances insulated the Plant from competition with cheaper waste facilities. Therefore, the court characterized the ordinances as protectionist.

Finally, the court noted that regulations enacted for health and safety reasons which affect interstate commerce can be justified. While the purpose for the Plant may have included legitimate environmental concerns, however, the purposes behind these ordinances are purely economic.

Tioga Public Sch. Dist. # 15 v. U.S. Gypsum Co., 984 F.2d 915 (8th Cir. 1993).

The Tioga School District ("Tioga") sued U.S. Gypsum ("USG"), the manufacturer of an acoustical plaster containing asbestos. Tioga used the plaster during school construction projects in the late 1950's and early 1960's. The lawsuit sought to recover the relatively low costs of encapsulating the plaster to prevent the release of friable asbestos fibers, as well as the much larger sums needed to remove the asbestos. Tioga brought suit in North Dakota state court; USG removed to federal court.

The jury returned a general verdict in favor of Tioga and awarded more than \$825,000 in compensatory and punitive damages. After the court denied USG's motion for JNOV or for a new trial, USG appealed.

USG cited five errors by the district court, the most telling being the submission of Tioga's nuisance claim to the jury. USG also claimed error in the court's rejection of the argument that compliance with Government Services Administration specifications in effect at the time of the school construction constituted a state-of-the-art defense. Other issues on appeal involved the propriety of

the jury charges on punitive damages and implied warranty claims and allowing Tioga to recover in tort for purely economic loss. The Eighth Circuit remanded for a new trial on the ground that the case should not have been submitted on a claim of nuisance.

North Dakota recognizes both a common law and a statutory action for nuisance. Tioga's nuisance claim was based on the state statute which proscribes an act or omission which "annoys, injures, or endangers the comfort, repose, health, or safety of others," or which "in any way renders other persons insecure in life or in the use of property." N.D.Cent.Code § 42-01-01.

The Eighth Circuit first decided that common law nuisance would not lie in an action against an asbestos manufacturer under the facts of this case. It then noted that North Dakota's hundred-year-old statutory action appears limited to the classic context of a landowner conducting an activity which interferes with the rights of her neighbors. It cited North Dakota Supreme Court decisions which held the statutory provision is in concordance with the common law.

Therefore, the court of appeals ruled this case could not have been submitted on a nuisance claim. Since the jury's general verdict left no room for interpretation, the court remanded for a new trial.

Southeast Ark. Landfill, Inc. v. Arkansas, 981 F.2d 372 (8th Cir. 1992)

Southeast Arkansas Landfill, Inc. brought this action against Arkansas Department of Pollution Control & Ecology ("PC & E") seeking an injunction to prevent PC & E from enforcing Arkansas statutes restricting the importation of solid waste. The U.S. District Court for the Eastern District of Arkansas denied Southeast Arkansas Landfill's request for an injunction. Southeast Arkansas Landfill appealed challenging the validity of Acts 870 and 319 of the Arkansas General Assembly under the Commerce Clause.

Act 870 establishes a planning and management process for solid waste on a regional basis. Act 870 divides the state into eight regions, each to be managed by a

Regional Solid Waste Planning Board. As originally passed, the statute prohibited landfills for two years from accepting solid waste from outside the boundaries of the Solid Waste Planning District in which they are located. An exception to the ban provided that landfills already serving areas outside their districts could continue to do so, but the total amount of waste received from outside the district may not exceed twenty percent of the total solid waste received at the landfill.

Act 319 provides that the restrictions shall apply until the later of a specified date or until the landfills in both the districts and the state reach a ten year capacity.

The State argued that the statutes do not discriminate against out-of-state waste and that they operate even-handedly between in-state and out-of-state waste. Waste that comes from within the state, but outside a given district is treated the same as out-of-state waste.

The State also argued that the statutes should be upheld because they were an attempt to comply with Federal policy as expressed in the Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901, *et seq.* ("RCRA"). RCRA mandates a system of regional planning by the states; Acts 870 and 319 were responses to that mandate.

The Eighth Circuit Court of Appeals held that the Supreme Court's decision in *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dept. of Natural Resources*, ___ U.S. ___, 112 S.Ct. 2019 (1992) compelled a reversal of this case. The Court in *Fort Gratiot* held that states may not indirectly restrict interstate commerce through political subdivisions of the state. The court noted however, that both acts contained severability clauses and did not require the invalidation of the sections of the acts that did not discriminate against out-of-state waste.

United States v. Mexico Feed and Seed Co., 980 F.2d 478 (8th Cir. 1992)

In the mid-1960's, Pierce Waste Oil Service, Inc. ("PWOS"), a waste oil hauling company, leased a small plot of land near Mexico, Missouri, from its owner, James Covington, and his business, Mexico Feed

and Seed. PWOS used the site as a storage and transfer facility through 1976, at which time it stopped using tanks on the property and allowed them to fall into disrepair. The tanks began to leak and fill with rainwater, and oil residue oozed from them. In 1983, the assets of PWOS were sold to Moreco Energy, Inc., a pre-existing corporation in the re-refining business. To avoid buying any hidden liabilities, Moreco had the owner of PWOS, Jack Pierce, compile an asset list. The asset list did not include the Mexico tank storage site, but in an attempt to insure the sale included goodwill and other intangibles, the list included a statement that it was not exclusive. Moreco never knew of the storage tanks.

In 1985, the EPA inspected the tanks and discovered PCB's and a ring of PCB contamination around the tanks extending for about 100 feet in all directions. Such a ring indicated the initial contamination occurred about 20 years earlier. After cleanup, EPA brought suit under CERCLA to recover costs, suing the land owners, Pierce, PWOS, and Moreco. The EPA claimed Moreco was liable as the successor corporation to PWOS.

The Eighth Circuit Court of Appeals first focused on PWOS' argument that it did not own or operate the tanks at the time of contamination. The evidence clearly showed that PWOS hauled waste oil from several clients who generated PCB-contaminated oil, that the oil was stored in the tanks, that PWOS was the exclusive user of the storage facility, and that the tanks and surrounding area were contaminated with high concentrations of PCBs. Pierce, who was the president of the company and an active manager, was held to be a responsible party under CERCLA. While Pierce and PWOS argued they were ignorant of PCB contamination, the court said even if that were true, it is irrelevant under CERCLA's strict liability standard.

The Eighth Circuit then turned to Moreco's liability, noting that the issue depended on a three-part analysis: whether corporate successors are covered persons under CERCLA; what elements establish a "corporate successor;" and whether Moreco meets the test of "corporate successor" under the facts of this case.

Looking at the intent of Congress and the language of CERCLA the court held that corporate successors are covered persons under the statute. The definition of "person" in CERCLA contains the words "corporation [and] association." The general Code definitions of "company" and "association," found at 1 U.S.C. § 5, indicate that when used in referring to a corporation these terms include successors and assigns. By inference, therefore, the court found that a successor corporation is a "covered person" for the purposes of CERCLA.

The purpose of successor corporation liability is to prevent corporations from evading their liabilities by changing ownership. While asset purchasers generally are not liable for the wrongs of asset sellers, courts have extended liability to them so corporations cannot escape debt through transactional technicalities. The asset purchaser will be considered a corporate successor when: (1) the purchaser expressly or impliedly assumes the liability; (2) the transaction is a "de facto" merger or consolidation; (3) the purchaser is merely a continuation of the seller corporation; or (4) the transaction was a sham entered into to escape liability.

The third element, "mere continuation," was modified by the district court, which found Moreco liable under a theory of "substantial continuation." While "mere continuation" presupposes an enduring sameness of officers, directors, or stockholders, "substantial continuation" allows liability to follow the assets whenever the purchaser knows of pending wrongs committed by the selling corporation. After analyzing the cases which have applied "substantial continuity" in other contexts, the Eighth Circuit said the application of any test which would hold an asset purchaser liable must further CERCLA's essential purpose of making responsible parties pay.

Because Moreco purchased without notice of the storage tanks, the Eighth Circuit held it did not meet the "substantial continuation" test. The court noted that the EPA had dismissed Moreco from an earlier proceeding under the Toxic Substances Control Act, 15 U.S.C. § 2605 (e), because "Moreco never knew of or purchased" the storage

tanks in question.

— Chuck McPheeters

Friends of the Boundary Waters Wilderness v. Robertson, 978 F.2d 1484 (8th Cir. 1993)

This action was brought by several non-profit organizations seeking to prohibit the use of motorized transportation of boats across portages in the Boundary Waters Canoe Area. The Boundary Waters Canoe Wilderness Area Act ("Act") provides that the use of motorized transportation shall be terminated January 1, 1994, unless the Forest Service determines there is no feasible non-motorized means of transporting boats across the portages. The United States Forest Service allowed the use of motorized transport because no "feasible" alternative existed.

The district court upheld the Forest Service's determination that no feasible alternative was available and held that the term "feasible" within the meaning of the Act meant "reasonably possible" or "practicable," and not "physically possible." 770 F.Supp. 1385 (D. Minn. 1991).

Reversing the lower court, the Eighth Circuit Court of Appeals noted that one of the purposes of the Act is to "restore natural conditions to existing temporary roads in the wilderness." The court concluded that prohibiting motorized transport between portages is consistent with the Act unless it is not physically possible to accomplish the same end by non-motorized means. Based upon a study by the Service in which 26 out of 34 attempts were unsuccessful in crossing the portages without motorized assistance, the court found that it was physically possible to cross the portages without motorized transport, and therefore, according to the Act, motorized transport must be prohibited.

— Tim Bickham

Audubon Soc'y of Central Arkansas v. Dailey, 977 F.2d 428 (8th Cir. 1992)

The voters in Little Rock, Arkansas ap-

proved a capital improvement bond issue to improve streets. Pursuant to § 10 of the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. § 403, and § 404 of the Clean Water Act, 33 U.S.C. § 1344, (1988), the City submitted an application to the United States Army Corps of Engineers ("Corps") for a permit to put fill in along a creek for a new proposed road that was to be extended through Rebsamen Park.

Under the National Environmental Policy Act ("NEPA"), federal agencies must prepare an Environmental Impact Statement ("EIS") before approving major federal actions significantly affecting the quality of the human environment. 42 U.S.C. § 4332(2)(C) (1988). In determining whether an EIS was necessary for this project, the Corps decided that NEPA required the Corps to consider the environmental impact on the entire area of the proposed road extension plus the existing Rebsamen Park Road from gateway to gateway by conducting an Environmental Assessment ("EA"). In connection with its review, the Corps gave notice to various state and federal agencies and gave public notice of the permit application. The Corps received responses from the Transportation Department, the Corps' resident engineer, and the Mayor of Little Rock. All of the responses included various projections of how the new road would increase traffic in the Park because individuals commuting to downtown would use the new road rather than the old road.

The Corps then hired consulting engineers to study the effect of the road extension. The engineers issued a report concluding that the traffic volumes anticipated by the City would pose a threat to the recreational use of the areas along the Arkansas River. The engineers made some remedial suggestions, including: separate bridges over the creek, one for automobiles and another for bicycles and pedestrians; and "curvilinear alignment" and use of stop signs on Rebsamen

Park Road. The City rejected the proposal.

Because of the unresolved opposition, the Corps held a public hearing on the permit application. Those in favor of the proposed road were primarily people from nearby neighborhoods who saw the proposal as a way to relieve their own streets of excessive traffic. Those opposed to the new road were concerned about the increase in commuter traffic into the park, which would ruin the recreational value of the park. Additionally, they were concerned with the risks to bicycle riders, joggers and pedestrians. They argued that the City did not enforce the posted 45 mph speed limit on the present road and that motorists drove as fast as 60 mph.

In its final draft of the EA, the Corps concluded that the proposed road would have "no significant impact on the quality of the human environment." Therefore, it found no need to prepare an EIS and granted the permit. The Audubon Society and several others sued the City and the Corps to enjoin the project. The district court reviewed the Corps' decision under the "arbitrary and capricious" standard of review and concluded that the traffic problem resulting from the project would "significantly affect the quality of the human environment" and that the Corps was required to prepare an EIS. The court entered an order suspending the grant of the permit and enjoining construction until an EIS was completed. The City appealed the district court's order, arguing that the Corps considered the effect of the traffic and that the court cannot require the Corps to do anything further.

Standard of Review

The Eighth Circuit Court of Appeals held that the arbitrary and capricious standard, rather than a *de novo* standard, applied to the review of the decision by the Corps that a bridge over the creek would not significantly affect the quality of the environment because the Corps' determination involved

mixed questions of fact and law. Under the arbitrary and capricious standard, the reviewing court is limited to determining whether the Corps considered relevant factors in concluding that an EIS was not required for a bridge over the creek. The court of appeals must reverse if there has been a "clear error of judgment." Under this standard, the court has the responsibility to verify that the agency's conclusion follows from the premises the agency relies on.

Corps' Decision

The Eighth Circuit Court of Appeals noted there is no dispute that if the road extension were made without special regulation of its use, the effect would be a large increase in traffic causing a significant impact on the quality of the human environment. The Corps concluded that due to the City's traffic control measures, however, the adverse impact on the environment would be minimized. Based on the evidence, however, the Eighth Circuit ruled the Corps acted arbitrarily in determining that the project would have no significant impact on the human environment.

An agency may certainly make its decision of "no significant impact" on mitigating measures to be undertaken by third parties; however, the mitigating measures must be "more than mere vague statements of good intentions." In this case, the evidence gave every indication that the City would not and could not enforce the speed limit on the new extension. Furthermore, even at the 35 mph speed limit, an estimated traffic volume of 8,000 to 9,000 vehicles per day ("vpd") would have an adverse effect on park users. Even with 7,550 vpd, the vehicles would not be able to get on and off the road safely and many people would be discouraged from using the recreational facilities. Based on this evidence, the court of appeals concluded that the judgment of the district court requiring an EIS was not in error.

— Brian S. Franciskato