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## Case Summaries

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# CASE SUMMARIES

## CERCLA

**Kerr-McGee Chem. Corp. v. Lefton Iron & Metal Co.**, 14 F.3d 321 (7th Cir. 1994)

Lefton Iron purchased a 40 acre industrial site from Kerr-McGee's predecessor in interest, Moss-American, in 1972. Lefton Iron transferred ownership to Lefton Land in 1984. Moss-American and other prior owners used the site from 1927 to 1969 to manufacture wood products with processes that used creosote and other preservatives. Significant quantities of preservatives were left at the site after Moss-American stopped operations. In 1988, the State of Illinois filed suit against Kerr-McGee, Lefton Iron, and Lefton Land in order to enforce cleanup of the site. Kerr-McGee entered into a consent decree with the state which required it to undertake the remediation at its expense. Kerr-McGee subsequently incurred \$1.5 million in remediation expenses in a cleanup estimated to cost \$5 million.

Kerr-McGee then filed a CERCLA suit against Lefton Iron and Lefton Land (collectively Lefton) which contained three claims. The first sought a declaration that Lefton was liable under § 107(a) of CERCLA and that Kerr-McGee's response costs were necessary and consistent with the National Contingency Plan (NCP). Second, Kerr-McGee sought contribution from Lefton for its response costs under § 113(f)(1) of CERCLA. Third, Kerr-McGee claimed that Lefton was liable for all cleanup costs based on an indemnification clause in the 1972 contract. The district court ruled against Kerr-McGee on all counts. Kerr-McGee appealed to the United States Court of Appeals, Seventh Circuit.

The Seventh Circuit reversed the district court's ruling on the first count, stating simply that Kerr-McGee had established the elements of CERCLA liability and that Lefton was unable to establish a statutory defense. The only contested element was whether Lefton was a "responsible person" under § 107(a). The court found that Lefton Land

was responsible as the current owner, while Lefton Iron was responsible as a prior owner of the site at the time of an actual or a threatened release. The court found Lefton Land's attempt to make out an "innocent landowner" defense under CERCLA § 107(b) without merit. The Seventh Circuit ordered the district court to enter judgment for Kerr-McGee on count one, and further ordered it to make a determination as to whether Kerr-McGee's response costs were consistent with the NCP, and whether future response costs were appropriate.

The Seventh Circuit turned next to the issue of contribution. The court ruled that the district court erred in not considering the indemnity agreement in the equitable balancing it applied to the cleanup costs. The Court of Appeals noted that Lefton had knowledge of the preservatives on the site when it purchased the property, and that Lefton bought the site "as is" and agreed to assume all future liabilities stemming from the chemical pollutants. The court felt that this was a significant circumstance that should have been considered, however it stated that a reallocation of contribution would probably be unnecessary on remand given its ruling on Kerr-McGee's third count.

The Seventh Circuit overruled the district court's holding on the third count of Kerr-McGee's petition. The district court held that the indemnity provision of the 1972 contract between Moss-American and Lefton was unclear and refused to enforce it. The Court of Appeals disagreed, finding the provision sufficiently clear. The court noted that the provision covered all pollution and nuisance claims, and that the response costs incurred by Kerr-McGee were definitely within its scope. The court found that Lefton was responsible for Kerr-McGee's \$1.5 million in already-incurred cleanup costs, as well as any future cleanup expenditures. The Seventh Circuit chided the district court for considering the irrelevant fact that the parties entered into the contract prior to CERCLA's enactment. Furthermore, it pointed out that Illinois' Environmental Pro-

tection Act was law two years prior to the contract. The Seventh Circuit interpreted the indemnity clause as an agreement by Lefton to assume the future costs resulting from the chemicals at the site. The court pointed out that while Lefton probably paid a reduced price for the property, a poor bargain in hindsight was not a reason to invalidate the indemnity agreement. The Seventh Circuit remanded this count to the district court and ordered it to provide Kerr-McGee with indemnification for all proven present and future cleanup costs and expenses.

— by Theodore A. Kardis

**GNB, Inc. v. Gould, Inc.**, No. 90 C 2413, 1994 WL 110210 (N.D.Ill. Mar. 25, 1994)

In 1982, Gould, Inc. (Gould), a large publicly held conglomerate, set out to divest itself of its division in the battery business. Gould created a wholly-owned subsidiary, GNB Batteries, Inc. (GNB Batteries), to facilitate a sale. Gould transferred all of the assets and liabilities of its battery division to GNB Batteries. In 1983 Gould put GNB Batteries up for sale. The buying group, formed as GNB Acquisition Corp (GNB Acquisition), consisted of three Gould executives in its battery business together with Allen and Company, Inc. and one of its principals. Upon the sale, GNB Acquisition was merged into GNB Batteries and the name of the new company was changed to GNB, Inc. (GNB).

The main issue in this suit was to what extent the new company, GNB, acquired the liabilities of Gould under the assumption agreement between Gould and GNB Batteries. This issue mainly arose upon discovery of serious environmental problems that arose several years later at certain Gould facilities now defunct, some old Gould facilities still in operation under the GNB name, and other facilities at various common storage or waste sites never owned by Gould or used by GNB. The United States Environmental Protection Agency (EPA) investigated the potential liability of these sites pursuant to the Resource Conservation and Recovery Act (RCRA) and Comprehensive Environmental Response, Compensation, and Liability Act

(CERCLA). Although CERCLA mandates that each person responsible for the environmental problems is strictly liable, a party may enter into an agreement to indemnify another party for CERCLA liability if the language of their agreement indicates this intent.

Gould argued that the 1983 assumption agreement made between it and GNB Batteries expressly transferred all of its absolute, accrued, and contingent liabilities to GNB Batteries. GNB conceded that it alone bore the responsibility for cleanup at the sites acquired from Gould that GNB itself was still operating. However, GNB claimed that it had not agreed to indemnify Gould for the cleanup at closed Gould plants or common dump sites used only prior to the sale.

The court began its discussion by noting that the primary goal of contract interpretation "is to give effect to the reasonable expectation of the parties." Illinois law requires that where the contract is clear on its face, the court must not resort to the rules of construction, but rather should give the contract its plain meaning effect. The intent of the parties becomes important only when the terms of the agreement are reasonably susceptible of more than one meaning. The determination of whether or not the contract is ambiguous can be made with reference to parol and extrinsic evidence.

The assumption agreement between Gould and GNB Batteries purported to transfer all of Gould's obligations and liabilities "of any nature relating to the businesses and operations of its battery division that had been incurred prior to its sale to GNB Acquisition," but failed to discuss environmental problems caused by former Gould manufacturing and operations. The court stated that both Gould and GNB Acquisition personnel, because of their previous association with Gould, knew of all of the potential environmental liability. Thus, the parties had at least implicitly considered this factor.

The court applied the facts to the contract and held that the affected sites constituted liabilities and obligations of Gould, contingent on the date of closing such that

they were potential liabilities to GNB, which related to Gould's business and operations. The court also held impermissible GNB's construction of the term "incurred" to mean fixed liabilities prior to closing date. GNB's proposed construction would render much of the language of the assumption agreement meaningless, specifically the provision in which GNB Batteries assumes Gould's contingent liabilities.

The court commented that other portions of the assumption agreement substantiated its conclusion that all of Gould's environmental liabilities were assumed by GNB Batteries. First, because GNB Acquisition bargained for Gould to retain certain liabilities, including existing litigation and all product liability claims in which the injury predated closing, GNB could not now successfully argue that it did not assume other liabilities. Further, the language of the assumption agreement makes clear that Gould intended to rid itself of its battery business entirely because it retained very little liability and that only after hard bargaining. Thus, GNB's liability was not limited to that attached to the specific assets it had acquired. Instead, GNB's liability included all liability not expressly excluded by agreement which related "to the businesses and operations" of Gould's battery divisions. The court would not read any implied terms into the contract. The court held that the language of the assumption agreement was unambiguous and that it effectively transferred all of Gould's environmental liabilities connected to its battery divisions to GNB Batteries and its successor GNB.

The court stated that even if the language of the agreement were ambiguous, the parol evidence indicated that the parties intended to transfer all of Gould's environmental liability. Important in this determination was Gould's expressed intent that it wanted to divest itself of the good and bad aspects of the battery business, a memorandum to GNB Acquisition and other potential buyers detailing this intent, the intimate familiarity of principals in GNB Acquisition with Gould's operations, including its dis-

posal of toxic waste, and an opinion letter by GNB Acquisition's attorney stating that GNB acquisitions was acquiring all known and unknown environmental liabilities.

— by Thad Mulholland

#### **Employers Ins. of Wausau v. Browner, 848 F.Supp. 1369 (N.D.Ill. 1994)**

Fire destroyed a building owned by an Employers Insurance of Wausau (Wausau) policyholder. Wausau settled with the policyholder and agreed to remove debris from the destroyed building, including several electrical transformers. Wausau drained seven hundred gallons of fluid from the transformers and transported it to an oil recycling facility. The recycling facility was subsequently found to be contaminated with polychlorinated biphenyls (PCBs) and volatile organic compounds (VOCs) that originated in the transformer fluids.

The Environmental Protection Agency (EPA) named Wausau as a potentially responsible party and demanded cleanup assistance under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) as amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA). When Wausau did not respond the EPA issued an administrative order to compel Wausau to begin emergency cleanup measures. Wausau objected, denying that it was a potentially responsible party. The EPA filed an administrative action pursuant to the Toxic Substance Control Act (TSCA) to force compliance. Wausau then submitted an Emergency Response Action Plan (ERAP), subsequently approved by the EPA, which stated how Wausau would comply with the administrative order but did not admit any liability. Wausau began cleanup but refused to remove any substance not covered by the order or the ERAP. The EPA maintained that both the order and the ERAP were broadly worded and that cleanup was not limited to just PCB contamination.

The District Court stated that when such an environmental hazard is discovered, CERCLA gives the EPA authority to either

take direct cleanup action and seek reimbursement later or to require the responsible parties to conduct the cleanup themselves. If the EPA has to issue an administrative order to compel cleanup assistance, as it did in this case, the court said the potentially responsible party (PRP) has one of two choices. It can ignore the order and wait for the EPA to bring an enforcement action, whereupon the PRP has a right to a judicial hearing. Under this alternative, the PRP may be subject to fines for failure to comply with the administrative order absent sufficient cause. Alternatively, the PRP may comply with the cleanup order and petition the EPA for reimbursement later.

Wausau claimed that CERCLA violates the constitutional right to procedural due process, both in the pre-enforcement and post-enforcement stages. The court denied this claim and stated that even if Wausau did not have an opportunity to a meaningful hearing before it began its forced cleanup, no hearing was required under *Matthews v. Eldridge*, 424 U.S. 319 (1976), which weighed the interests of the private party, the government, and the risk of erroneous deprivation of the private party's interest and the value of additional procedural safeguards in determining whether a "meaningful hearing" was provided. Under the *Matthews* balancing test, Wausau failed to prove that its economic interests outweighed the EPA's interests in enforcing its orders, or that additional procedural safeguards would provide any additional protection to Wausau's constitutional rights. The court held that Wausau's procedural due process rights remained intact because Wausau had proper notice of the order and what it required, and then failed to exercise its option to request a judicial hearing.

The court also denied Wausau's claim that the EPA violated its substantive due process rights. The court followed the Seventh Circuit test which requires the plaintiff to show that the lower court's decision was arbitrary and irrational, and a separate constitutional violation or inadequacy of state law remedies. Since the court rejected

Wausau's procedural due process argument, it could not prevail on its substantive due process claim even if the lower court's decision was arbitrary and irrational.

The court denied Wausau's equal protection claim because it failed to allege that it was a member of a cognizable group accorded different treatment because of its membership in that group. Wausau attempted to define its class as "potentially liable parties which are financially able to incur response costs." Even if Wausau alleged disparate treatment based on this membership, dicta in the opinion suggests the court would probably not have accepted Wausau's definition of the class.

Wausau also claimed that it was denied a review under the Administrative Procedure Act. The court stated that the APA is not applicable when a relevant statute precludes judicial review, as CERCLA did in this case. In conclusion, the court granted the defendants' motion for judgment on the pleadings.

— by Don Willoh

**Thomas v. FAG Bearings Corp.**, 846 F.Supp. 1382 (W.D.Mo. 1994)

Residents of Silver Creek and Saginaw Village filed a class action lawsuit against FAG Bearings alleging that it had released the chemical TCE into the groundwater, which in turn contaminated their well water. FAG Bearings brought in a number of other corporations in the surrounding area as third-party defendants. The third-party defendants moved for summary judgment on the grounds that FAG Bearings could not show a causal link between them and the contamination alleged by the residents of the two towns.

FAG Bearings' suit against the third-party defendants was brought under CERCLA § 113, seeking indemnity or contribution towards its liability to the town residents, and § 107, alleging that the third-party defendants contaminated the FAG Bearings site. The U.S. District Court for the Western District of Missouri consolidated its discussion of these claims, explaining that the

elements for each were the same. The third-party defendants argued that FAG Bearings was unable to prove a "release" of a hazardous substance at their sites, and furthermore that FAG Bearings could not demonstrate that such a release caused the Silver Creek/Saginaw Village contamination.

The court first addressed the role of causation under § 107. It noted that the element of causation had received little attention by the courts to date since the "release" at issue in most lawsuits was at the contaminated site instead of elsewhere. The court distinguished the instant case, calling it a "two-site" case — one in which the release occurred at a site other than the contaminated site. It refused to apply the strict liability provisions of CERCLA to this "two-site" scenario, stating that to do so would bring about an absurd result. The court then looked to two cases that had dealt with multiple-site causation: *Dedham Water Co. v. Cumberland Farms* (Dedham I, 689 F.Supp. 1223 (D.Mass. 1988); *Dedham II*, 889 F.2d 1146 (1st Cir. 1989); *Dedham III*, 770 F.Supp. 41 (D.Mass. 1991); *Dedham IV*, 972 F.2d 453 (1st Cir. 1992)) and *Artesian Water Co. v. New Castle*, 659 F.Supp. 1269 (D. Del. 1987), *aff'd*, 851 F.2d 643 (3rd Cir. 1988). The District Court distilled a framework for analyzing causation under CERCLA from these two cases. It identified two potential scenarios and the test for each. In the first scenario, where the plaintiff can prove that the release by the defendant, but not the actual contamination, caused it to incur response costs, "fingerprinting" to prove the actual contamination caused by that defendant is unnecessary. In the other scenario, where the plaintiff incurs response costs solely due to the actual contamination, it must prove that a release by the defendant actually caused the contamination at its site. The court determined that the case before it fell into the latter category.

The court then turned to the sufficiency of FAG Bearings' evidence on the issue of whether the third-party defendants had released TCE that caused contamination at the FAG site. The court noted that the testimony

of FAG's expert was the sole evidence presented by FAG on the causation issue. After a thorough analysis of the testimony, the court concluded that the expert's opinions were unsupported by any factual basis and that his testimony was inadmissible since it did not establish a causal link between any third-party defendant and the contamination. The court determined that FAG Bearings was without sufficient evidence on the issue of causation, and the third-party defendants' motion for summary judgment was granted independently on this basis. However, the court went on to address the "release" issue as well.

There were numerous third-party defendants, and the court addressed the release issue as to each one of them. For some, the court found that there was absolutely no evidence of a release, and that these defendants were entitled to summary judgment on this additional basis. For others, the court stated that while enough evidence may exist to raise a question of material fact, summary judgment was still warranted on the causation issue. Thus, the motion for summary judgment was granted as to all third-party defendants, and FAG Bearings' third-party complaint was dismissed without prejudice. Finally, the court also denied FAG Bearings' request for additional discovery, but it did allow FAG to inspect the property of the third-party defendants pursuant to Fed.R.Civ.P. 34 and 45.

— by Theodore A. Kardis

**Thomas v. FAG Bearings Corp.**, 846 F.Supp. 1400 (W.D.Mo. 1994)

This decision of the United States District Court for the Western District of Missouri is another in the ongoing toxic tort litigation between the residents of Silver Creek and Saginaw Village and the FAG Bearings Corporation. The court considered plaintiffs' amended motion for class certification and FAG Bearings' motion for partial summary judgment on plaintiffs' claims of mental anguish, fear of cancer, increased risk of cancer, and medical monitoring.

The court first addressed the motion for class certification. Plaintiffs claimed that they had satisfied Fed.R.Civ.P. 23(b)(2) which provides for a class action, most notably where injunctive or declaratory relief is appropriate, but in no case where the relief sought relates primarily to money damages. The court denied plaintiffs' attempt to utilize their CERCLA response costs as a springboard to class certification, stating that regardless of the equitable nature of these response costs, the relief sought by plaintiffs was primarily monetary. Furthermore, the court noted that the claims of plaintiffs' class representative would not be representative of other class members, since many plaintiffs incurred no response costs. The court also denied plaintiffs' attempt to use their request for injunctive relief under RCRA as a justification for class certification on the same grounds. The plaintiffs also maintained that a class action was appropriate because of their claim for future medical monitoring, but the court denied certification on this basis as well, explaining that the claim was merely another element of tort damages, not a claim for injunctive relief.

The court concluded its denial of the motion for class certification by noting that the multiplicity of individual causation and damage issues made a class action unjustified. The court predicted that a class action would have more detriments than benefits in the case before it in light of the thousands of mini-trials that class certification would necessitate.

The court turned next to an extensive discussion of FAG Bearings' motion for partial summary judgment on several of plaintiffs' tort law claims. In all cases, the court found that plaintiffs' lack of presently apparent physical injuries barred their recovery at the present time. However, the court made it clear that while plaintiffs were presently foreclosed from recovering under Missouri law on the four theories they presented, they were not precluded from future recovery if they developed physical injuries resulting from TCE contamination. Thus, the court granted the motion for partial

summary judgment and dismissed the four claims without prejudice.

— by Theodore A. Kardis

## MISSOURI STATE COURTS

**Missouri Hosp. Ass'n v. Air Conservation Comm'n**, 874 S.W.2d 380 (Mo. Ct. App. 1994)

The Air Conservation Commission of Missouri (Commission) was created by Chapter 643 of the Missouri Revised Statutes. The Commission has rulemaking authority and receives technical support from the Missouri Department of Natural Resources (DNR). The Commission promulgated Rule 160, which regulates medical waste and solid waste incinerators, and Rule 190, regulating sewage sludge and industrial waste incinerators. The Missouri Hospital Association and Associated Industries of Missouri (collectively, the Associations) filed a petition in the Circuit Court of Cole County challenging the validity of these rules which sought declaratory and permanent injunctive relief. Thereafter, the Associations filed a motion for summary judgment on these counts which was granted by the Circuit Court on two separate grounds. The Commission and DNR (collectively, the State) appealed to the Missouri Court of Appeals, Western District.

The Western District first addressed the circuit court's ruling on the grounds that the State failed to comply with Mo. REV. STAT. §§ 536.200 and 536.205 when it promulgated and adopted the rules, thus making them void. Section 536.200 requires that a "fiscal note" for public funds expenditures be filed with the Secretary of State when the notice of proposed rulemaking is filed. The statute further provides that failure to do this renders the rule void. Section 536.205 has analogous requirements for a fiscal note concerning the expenditure of funds by private persons or entities. The Court of Appeals noted that while a fiscal note had been filed when Rule 160 was originally promulgated, the rule had been withdrawn. Since a new fiscal note had not been filed

when the new Rule 160 was promulgated, the court ruled that this constituted a violation of § 536.200. Furthermore, the "private entity cost" estimates filed by the Commission with both versions of Rule 160 were found by the court to be inadequate to constitute a fiscal note within the meaning of § 536.205. Thus, the court found that Rule 160 was void for failure to meet either of these statutory requirements.

The Western District next looked to Rule 190, and found that the Commission had failed to comply with either § 536.200 or § 536.205 in that it had not made a comprehensive attempt to consider the effect of the rule in terms of compliance costs incurred by the various state agencies, political subdivisions, and private entities affected by the rule. Thus, the Court of Appeals affirmed the circuit court's holding that the two rules were void under both statutory provisions.

At the state's behest, the Court considered the other issue presented: whether the trial court erred in granting summary judgment on the grounds that Mo. REV. STAT. § 643.055 limits the Commission's rulemaking authority and that the Commission was thus without authority to promulgate Rule 160 and 190. The State claimed that the Commission had authority to promulgate the rules under § 643.050, however the Court ruled that the more specific and more recent § 643.055 placed a limitation on the general rulemaking authority granted by § 643.050. The Court stated that § 643.055.1 provides that Missouri can make no rule stricter than required by federal law, and that it shall not enforce any rule earlier than the date required by federal law. Thus, the Court explained, the Missouri legislature chose to allow the federal Clean Air Act to preempt the Commission's rulemaking authority. Since the U.S. Congress instructed the EPA to promulgate rules concerning incinerators and had set compliance dates, the Court concluded that any Missouri rule concerning incinerators adopted prior to the promulgation of the EPA rules would necessarily be stricter than federal law and prior to

federal compliance dates, a dual violation of § 643.055. Thus, the Court of Appeals affirmed the circuit court's order granting summary judgment on the separate ground that the Commission had exceeded its rulemaking authority in promulgating Rules 160 and 190.

— by Theodore A. Kardis

***Greene County Concerned Citizens v. Board of Zoning Adjustment of Greene County*, 873 S.W.2d 246 (Mo. Ct. App. 1994)**

Plaintiffs, a Missouri not-for-profit corporation, brought an action in circuit court for judicial review of a zoning decision pursuant to Mo. REV. STAT. § 64.281.4. The plaintiffs contested an order issued by the Board of Zoning Adjustment of Greene County (Board) that allowed the City of Springfield to construct a materials recovery facility (MRF) in an area zoned "A-1 Agriculture District". The Board's conclusions of law indicated that the proposed MRF site was a conditional use permitted in an "A-1 Agriculture Zone" by Article V, §3(K) of the Greene County Zoning Regulations (Regulations). Article V, § 3 of the Regulations permitted sixteen different non-agricultural or commercial uses which could be made of land zoned "A-1 Agriculture" upon Board review and approval. One of these conditional uses included the "[d]isposal of garbage or refuse by the County, a ... municipality, or agent thereof, subject to the provision of the Missouri State Statutes." The circuit court affirmed the Board's order stating that competent and substantial evidence supported the Board's finding of fact, conclusions of law, and order. In making its ruling, the court excluded substantive evidence offered by the Plaintiffs regarding the hazards of the proposed MRF which was not previously presented to the Board. The Plaintiffs appealed.

The Missouri Court of Appeals for the Southern District held that the circuit court properly excluded the new substantive evidence offered by the plaintiff. When a county

court reviews a zoning decision made pursuant to the discretionary power of a zoning board, it can only hear additional evidence if offered for the purpose of showing what evidence was before the circuit court or if it concerned the legality of the hearing. Here, the Board clearly exercised discretion by imposing several conditions on the project and the new evidence offered by the Plaintiffs fit into neither permissible category. If the result reached by the Board was one that could have reasonably been reached, the court could overturn it only if it was clearly contrary to the overwhelming weight of evidence. Accordingly the court set out to determine the reasonableness of the decision.

Because the Regulations did not define "disposal," the court was left to determine the meaning of that term. The Plaintiffs argued that the MRF was a "complex, industrial operation" and not a site for the disposal of garbage and refuse and that industrial uses are not permitted in "A-1 Agriculture Zones". In addition, the Plaintiffs claimed that because waste was brought in and processed with the intention of shipping it elsewhere, the MRF could not be a "disposal" facility under the Regulations. The court held that since the Regulations leave the term "disposal" undefined, it should be given its plain, ordinary, and natural meaning. Material brought to the MRF would be sorted as recyclable or non-recyclable, with the latter being shipped to landfills and the former either being composted on site or shipped to recycling centers. The court reasoned that these steps were "constituent parts" of the waste disposal process and thus consistent with the ordinary meaning of disposal.

The court held that great weight should be given to the construction of a zoning regulation by the entity charged with its enactment and application. The court also noted that where terms in zoning regulations are susceptible to different interpretations, the interpretation that least restricts the right of land owners to use their land should be given weight. On these facts and laws, the court held that competent and substantial

evidence supported the Board's decision to issue the order. Accordingly, the court could not hear any new evidence offered by the Plaintiffs, no matter how substantial. The decision was not arbitrary and capricious and the order withstands judicial scrutiny.

The Plaintiffs also argued that the Board erred when it refused to consider new evidence proffered by the Plaintiffs after an earlier Board order, which granted the conditional use permit, was overturned by the circuit court because the Board failed to enter findings of fact and conclusions of law. The circuit court remanded the case back to the Board. When the Board reconvened, it adopted its finding of facts and conclusions of law based on the record of the earlier meeting and did not hear the additional evidence. The court held that Board's refusal to reopen the record was permissible in light of the expansive evidence offered at the prior meeting and because the Board members, in re-issuing the order, relied on the evidence presented at the earlier hearings.

— by *Thad Mulholland*

***State of Missouri v. Seier*, 871 S.W.2d 611 (Mo. Ct. App. 1994)**

Defendant Jones Chemicals, Inc. (Jones) filed a petition for a Writ of Prohibition stemming from a denial of its motion for summary judgement on a failure to warn case against Jones (*Clifton v. Clifton Farms and Jones Chem. Co., Inc.*). The underlying cause of action against Jones arose out of Eugene Clifton's (Clifton) use of a brand of hydrochloric acid manufactured by Jones. Clifton used the acid to unclog pipes located at the bottom of a water well, and was fatally overcome by the acid fumes. Plaintiff, on behalf of Clifton, first alleged that Jones failed to properly warn Clifton of the acid's dangerous propensities when used in a well. Plaintiff further alleged that Jones did not adequately warn Clifton of the danger associated with using the acid in a well.

Jones' motion for summary judgement claimed that the Federal Hazardous Substances Act (FHSA) preempts Plaintiff's com-

mon law failure to warn claim, and that Jones fully complied with the labeling requirements set forth in the FHSA. The circuit court judge denied Jones' motion.

The appellate court first examined the Congressional intent behind the enactment of the FHSA and stated that the basis for determining whether the state common law is preempted can be found in the purpose behind the FHSA. This purpose is to alleviate the impracticability of allowing every state to impose its own labeling requirements by only permitting state labeling requirements which are identical to those implemented by the FHSA. Although both sides agreed that the FHSA preempts state legislative regulation pertaining to warning labels on hazardous substances, the question remained as to whether the FHSA preempted state common law tort action based on failure to warn as well.

The court held that the FHSA did preempt state common law tort claims which are founded upon the adequacy of hazardous substance labeling, but only to the extent that such claims would result in state labeling requirements which are different from those imposed by the FHSA. In reaching this conclusion, the court looked to FHSA's preemption provision which provides that states may not establish any cautionary labeling requirement unless they are identical to those requirements under the FHSA. The court determined that this provision encompassed not only positive enactments by a state but also state common law. Therefore, the court found that the Writ of Prohibition was the proper remedy in this case.

— by *V. Alyse Hakami*

***Cantrell v. Farm Bureau Town and Country Ins. Co. of Mo.*, 876 S.W.2d 660 (Mo. Ct. App. 1994)**

On December 17, 1989, a fire burned down a portion of the home of the Cantrell family. The fire burned a room containing a pool filter and a heat pump for the family's indoor pool. Within the room was thirty pounds of chlorine tablets, two gallons of

muriatic acid, and a certain type of PVC piping and polyurethane foam. These chemicals burned, which released toxic smoke and assorted fumes throughout the house along with freon gas from the air conditioning unit. Farm Bureau Insurance Company insured the family home with an "all risk, type three" policy. The Cantrells submitted a claim for total loss, the value of which being \$458,000. Farm Bureau rejected the claim and the lawsuit resulted.

The applicable language of the policy stated: "We cover direct loss not otherwise excluded in this policy that follows caused by fire, smoke (but not smoke from agricultural smudging or industrial operations) . . ." A section in the policy excluded coverage for, among other things, "wear and tear, . . . contamination, . . . bulging or expansion of pavement, floors, etc. . .". The Cantrell's offered evidence that the house was uninhabitable. For several days after the fire, the family members suffered headaches, nausea, burning eyes, stomach cramps, and diarrhea. The phenomena subsided only when the family left the house for extended periods. The trees and plants within the home died, the pet cats vomited, the family found dead mice, and a "black, sooty, oily substance" appeared on the surface of the walls, refrigerator and counters.

The parties conducted tests on dust particles from within the home. A chemical engineer and certified industrial hygienist testified that the tests disclosed toluene, xylene, ethyl methyl benzene, dioxins, and chloride. Several experts testified that the fire caused the presence of these and other unidentifiable chemicals, and that all were detrimental to human health. The experts estimated a fifty to one hundred year period before the chemicals to dissipate, and as the house was uninhabitable it needed to be destroyed and rebuilt.

The court rejected Farm Bureau's contention that the fire and damage from burning chemicals was not covered by the policy. The exclusion section within the policy did not clearly exclude contamination resulting from a covered event. The court elaborated



on four types of contamination: (1) gradual contamination from natural sources; (2) contamination from external events not occurring on the insured's property; (3) contamination from an uncovered event on the insured's property; and (4) contamination directly resulting from a covered event occurring on the insured's premises. The court reasoned that smoke damage to unburned parts of the house falls within the fourth category, and that such type four contamination is not excluded under the policy.

The court then applied a reasonableness standard to the terms of the policy. The court analogized to a situation where heat from a fire in a house caused bulging and cracking to the floor. A reasonable person would not think the bulging to the floor as separate from the fire; it is reasonable to think the whole event is covered. However, if the bulging or cracking occurred as a result of natural settling, the terms of the policy exclude coverage. In the present case, the smoke that caused the damage was laden with toxic chemicals which, according to the jury, rendered the house uninhabitable. As a matter of law, the word "contamination" as it appeared in the exclusion section of the policy did not exclude such damage.

— by Jason Johnson

**Green Hills Solid Waste Management Auth. v. Madison Township Planning and Zoning Comm'n**, No. WD 47510, 1994 WL 16538 (Mo. Ct. App. Jan. 25, 1994)

Thirteen municipalities created Green Hills Solid Waste Management Authority (Green Hills) pursuant to Chapter 70 of the Missouri Revised Statutes for the purpose of procuring land to use as a nonhazardous solid waste landfill. In August 1989, Green Hills purchased land at a site in rural unincorporated Mercer County. Since the land was within Madison Township, Green Hills submitted its proposal for a landfill at the Mercer County site to the Madison Township Planning and Zoning Commission (Commission) on May 3, 1991, as required by Mo. REV.

STAT. § 65.665 and the Township Zoning Regulations. Green Hills also applied for a special use permit to operate the landfill at that time. The Commission denied Green Hills' application on July 25, 1991. Green Hills filed a request for rehearing and a notice of appeal, but later withdrew them. Subsequently, Green Hills' Board of Directors voted to overrule the Commission's denial, and the Board informed the Commission of its decision. On August 27, 1991 Green Hills applied to the Missouri Department of Natural Resources' (DNR) Solid Waste Management Program for an operating permit pursuant to Mo. REV. STAT. §§ 260.200-260.345. DNR returned the application because it lacked evidence that Green Hills had complied with local zoning requirements.

Green Hills filed a declaratory judgment action with the circuit court, seeking a ruling that it had satisfied the requirements for overruling the Commission's denial of its landfill proposal stated in § 65.665. The Commission's motion to dismiss for lack of jurisdiction was sustained by the trial court, and Green Hills appealed to the Missouri Court of Appeals, Western District.

The Court of Appeals characterized the sole question presented for appeal as whether the trial court erred in granting the Commission's motion to dismiss on the basis that Green Hills failed to exhaust its administrative remedies. The Commission argued that Green Hills failed to exhaust its administrative remedies in that it did not appeal to the Madison Township Board of Zoning Adjustment (BZA) as required by Mo. REV. STAT. § 65.690. However, the Court of Appeals held that the various subsections of § 65.690 were not applicable. Furthermore, the court noted that the action before it was a petition for declaratory judgment, not an appeal of the Commission's decision, and thus it ruled that Green Hills was not required to appeal to the BZA in order to exhaust its administrative remedies.

The Commission also contended that Green Hills failed to exhaust its administrative remedies in that it did not appeal the

DNR's denial of its state permit, as required by Mo. REV. STAT. § 260.235. The court looked to its prior decision in *City of St. Peters v. Dep't of Natural Resources*, 797 S.W.2d 514 (Mo. Ct. App. 1990), where it held that the return of an application as incomplete was a "decision of the agency" which warranted administrative review under Mo. REV. STAT. § 260.235. However, identification of the controlling law was not sufficient for the Court of Appeals to decide the case before it. The court indicated that insufficient evidence prevented it from making a determination of whether Green Hills had complied with § 260.235 by appealing the denial of its state permit application. Thus, the Court of Appeals remanded the cause to the circuit court with specific instructions contingent on the results of further proceedings. The trial court was directed to consider the merits of Green Hills' claim for declaratory relief if it found that Green Hills had requested a hearing with DNR within thirty days of the denial, since Green Hills would have exhausted its administrative remedies. Conversely, the trial court was directed to dismiss the action for lack of jurisdiction if it found that Green Hills had not requested a hearing within the thirty day period, since Green Hills would not have exhausted its administrative remedies.

— by Theodore A. Kardis

## U.S. COURT OF APPEALS, EIGHTH CIRCUIT

**MDU Resources Group v. W.R. Grace and Co.**, 14 F.3d 1274 (8th Cir. 1994)

MDU Resources Group (MDU) sued W.R. Grace and Company (Grace) two years after learning that Grace installed fireproofing in a building owned by MDU which contained asbestos fibers. Grace installed the fireproofing in 1968 and at that time knew it contained asbestos. MDU did not know the fireproofing material contained asbestos until it learned of a Health Department study in 1980 which concluded that while the fireproofing posed no immediate



health risks, it recommended that MDU remove the asbestos before the fireproofing disintegrated. In 1988, additional tests were performed and showed the building asbestos-contaminated. The level was high enough that MDU began cleanup immediately to protect the health of MDU workers. MDU brought suit in 1990 to recover cleanup costs.

MDU alleged negligence, strict liability, failure to warn, and breach of warranty claims. Grace defended on the grounds that the six-year statute of limitations defeated MDU's claims and that MDU suffered no harm from the asbestos. The District Court denied MDU's claims and found for Grace.

On appeal, MDU challenged the validity of Grace's instruction concerning its statute of limitations defense. The court found the statute of limitations jury instruction faulty because it did not make clear that the statute of limitations is not tolled until an injury is discovered, as required by North Dakota law. The court ruled that MDU could prove injury by showing the building was contaminated with asbestos and did not have to prove an economic loss, and further explained that the injury suffered is the contamination of the building by asbestos and not the presence of asbestos. The court ruled that MDU's discovery of the presence of asbestos in 1980 did not constitute a reasonable awareness of contamination.

MDU also alleged that the District Court improperly excluded evidence offered to prove that Grace knew that asbestos posed health risks and that Grace knew there was an alternative fireproofing method. The court said the availability of alternatives was relevant and the District Court erred in refusing this evidence. In addition, MDU presented a document at trial from Grace's insurer that discussed asbestos health hazards. The District Court refused to admit the document on the grounds that there was no proof Grace received the document before it installed the fireproofing. The Court of

Appeals called this error, saying that MDU offered proof of Grace's receipt of the document and that the District Court had thereby invaded the province of the jury to evaluate the evidence. Because of these errors, the Court reversed and remanded.

— by Don Willoh

**Dravo Corp. v. Zuber**, 13 F.3d 1222 (8th Cir. 1994)

Dravo Corporation (Dravo), a nonsettling potentially responsible party (PRP), filed suit seeking contribution under Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) from settling parties for the EPA's imposition of cleanup costs. The Eighth Circuit affirmed the lower court's summary judgment in favor of the defendants, holding that a de minimis agreement settling future claims protects settling parties from contribution actions, and that a nonsettling party could not invoke judicial power to invalidate the agreement on the ground that settling parties were ineligible to enter into a de minimis settlement agreement.

Dravo owned and operated a manufacturing plant in Hastings, Nebraska from 1968 through 1983, when it sold it. After testing confirmed Dravo's responsibility for contaminating well water approximately one-half mile away, the Environmental Protection Agency (EPA) filed a Unilateral Administrative Order in 1990 directing Dravo to decontaminate the subsite. In 1991, the EPA and adjoining property owners entered into settlement agreements containing specific language precluding additional liability under CERCLA §122(g)(5), 42 U.S.C. §9622(g)(5), and §107(a), 42 U.S.C. §9607(a).

Dravo filed suit after the proposed agreement was made but before it was entered into, seeking a declaration that the defendants were legally responsible and liable for a portion of the contamination and remedial

costs. The district court granted the defendants motion for summary judgment, and Dravo appealed. Dravo's two claims on appeal are that the district court erred (1) by entering summary judgment because material facts were in dispute, and (2) by denying Dravo an opportunity to conduct discovery prior to ruling on the summary judgment motion.

With respect to the first claim, Dravo argued that the defendants are not protected from contribution claims until after they fulfill the obligations under the agreement. The Eighth Circuit recognized that whenever practicable and in the public interest, settlement shall be entered into as promptly as possible for either de minimis generators under 42 U.S.C. §9622(g)(1)(A), or de minimis owners under 42 U.S.C. §9622(g)(1)(B). Because section 9622 permits, and in fact encourages, the expeditious resolution of claims against PRP's who are determined to be de minimis, the court held that defendants are immediately vested with the protection against contribution claims upon entering into a de minimis agreement, which is then subject to later divestment if they fail to "carry out" their part of the agreement. The court, therefore, concluded that no issue of material fact existed, and affirmed the summary judgment.

Dravo's second claim was that the district court erred by failing to timely rule on the defendants motion to stay discovery, which effectively denied Dravo the right to discover information relevant to two issues: (1) whether defendants in fact contributed to the contamination, which may prevent qualification for a de minimis settlement, and (2) whether defendants completely performed their obligations under the agreement.

Facts relating to the defendants' eligibility for a de minimis agreement would only be relevant if a nonsettling party were entitled to challenge the validity of a de minimis agreement. The Eighth Circuit stated that in light of the explicit language of §9622(a) (which

specifically precludes judicial review), the structure of §9622 (which generously gives the President discretion to use settlement mechanisms), and the objective of CERCLA's settlement provisions (which is to allow expedient and efficient settlements of potential liability), a nonsettling party may not invoke the judicial power to invalidate a de minimis agreement embodied in an administrative order on eligibility grounds.

The court noted that parties such as Dravo are not completely without recourse. Nonsettling parties may participate in the formation of administrative de minimis agreements by filing objections during a notice-and-comment period, which Dravo did. These proceedings are nonsettling parties' sole opportunity to block de minimis agreements.

Dravo additionally sought to discover whether the defendants performed their obligations under the de minimis agreement. The court, however, stated that only the EPA may rescind de minimis agreements, and thus any information Dravo seeks regarding Zuber's performance of its obligations was irrelevant.

— by Mark Meyer

**Kane v. United States**, 15 F.3d 87 (8th Cir. 1994)

Bradley and Cynthia Kane brought an action against the United States to recover damages when they discovered asbestos in their house they purchased from the Veterans Administration (VA). The Eighth Circuit Court of Appeals denied petitioners' claims, holding that the discretionary function exception to waiver of sovereign immunity shielded the United States from liability for the VA's failure to inspect for asbestos, and in addition that the house is excepted under CERCLA as a consumer product in consumer use.

The Kanes purchased the residence in June 1989 pursuant to a VA newspaper

advertisement selling the foreclosed property in "as is" condition. Relying on the inspections of two appraisers from the Kanes' lender, as well as on the sales broker, the Kanes purchased the residence. In January 1990, hazardous asbestos was discovered in their house, and the Kanes subsequently pursued an effort to recover damages under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 2674, 2680(a), and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601-9657.

Under the former claim, the FTCA provides that sovereign immunity is waived for tort claims relating to acts or omissions of government employees while exercising due care in executing a statute or regulation, or while performing a discretionary function or duty on the part of a federal agency. Here, there is no statute or regulation prescribing a duty for agency employees to include asbestos supervision or inspection in their judgments. In addition, the actions and decisions must be based on public policy considerations. The court concluded that under the housing loan program, the VA's policy is to sell acquired property quickly and at the best price, with no requirements relating to asbestos removal. Thus, the court affirmed that district courts dismissal of the FTCA claim.

The Kanes additionally sought damages under CERCLA, which confers liability upon owners or operators of the facility where the hazardous disposal occurred, or upon those who arranged for disposal or treatment of hazardous substances at a facility. The definition of facility specifically excludes "any consumer product in consumer use." 42 U.S.C. § 9601(9). The Eighth Circuit adopted the Fifth Circuit's reasoning of *Dayton Independent School v. United States Mineral Products Co.*, 906 F.2d 1059, 1065 & n. 4 (5th Cir. 1990), which stated that Congress intended to provide recovery from inactive and abandoned waste releases, not from consumer products

in use. The Kane court therefore concluded that the VA's holding the property for sale did not change the consumer product in consumer use to another character, affirming the district court which dismissed the CERCLA claim.

— by Mark Meyer

## HAZARDOUS SUBSTANCES

**Westling v. County of Mille Lacs**, 512 N.W.2d 863 (Minn. 1994)

The Minnesota Pollution Control Agency (MPCA) conducted a Phase I Environmental Survey of an 8.06 acre parcel leased to the Westling Manufacturing Company (WMC) by the company president, John Westling. The MPCA found the property was contaminated by tetrachloroethylene, an auto part degreaser. In 1990, the MPCA placed the property on the Comprehensive Environmental Response Compensation and Liability Information System (CERCLIS) and state Superfund lists. The MPCA named Westling as a responsible party because he owned the property and because he knew WMC used hazardous substances on the site.

In a subsequent property tax valuation proceeding of the contaminated property and a contiguous property owned by Westling and his wife, the Westlings presented testimony that they or WMC spent approximately \$250,000 from 1989 to August of 1992 to investigate and monitor hazardous substances on the property. An employee of the company hired by Westling to do the investigating and monitoring testified that Westling's costs to continue the investigation and cleanup would amount to \$60,000 for each of the next ten years. Finally, the Westlings produced an expert witness who testified that polluted properties were difficult to sell and that commercial real estate values in the area were generally depressed, making the Westlings property essentially

worthless for tax valuation purposes.

The County of Mille Lacs' case consisted primarily of the expert testimony of a licensed real estate appraiser. This witness conducted an appraisal of the property, using three different accounting methods, on request by the County. The witness testified that the property was worth \$880,000 using the best method, income capitalization, after discounting the present value of the monitoring and cleanup costs.

The tax court found the property unmarketable because of the costs and unknown extent of the contamination, and subsequently placed the property's value at \$100. The Minnesota Supreme Court reversed and remanded the tax court decision as clearly erroneous because it was not reasonably supported by the weight of the evidence. The Court said the tax court must regard a licensed assessor's valuation as *prima facie* valid, shifting the burden of proof to the other party to show the assessor's valuation as inaccurate. If the tax court is to rule against the assessor's valuation, it must identify and analyze the mistakes in the assessor's methods. The Supreme Court reversed the Tax Court's finding because it failed to analyze the assessor's methods in its opinion. The Supreme Court also found that the tax court ignored evidence that the Westlings knew the land was contaminated when they purchased it, that banks continued to make loans based on the property's value, and that the Westlings made no effort to sell the property.

— by Don Willoh

**Independent Petrochemical Corp., et al., v. Aetna Casualty and Surety Co., et al.**, 842 F.Supp. 575 (D.D.C. 1994)

Independent Petrochemical Corporation (IPC) paid Russell Bliss to remove dioxin waste materials from one of IPC's customers, Northeastern Pharmaceutical and Chemical Company (NEPACCO). Bliss did so, later

mixing it with waste oil and spraying the mixture as a dust suppressant at several Missouri locations. Over 57 civil actions were filed against IPC and others, alleging bodily injury and property damage resulting from exposure to dioxin contamination. As IPC had 23 insurers, IPC agreed to help NEPACCO dispose of the waste material between 1971 and 1983. In 1983, IPC filed suit seeking a declaratory judgment that IPC's insurers were obligated to defend and indemnify plaintiffs for all settlements and judgments in the dioxin-related claims arising out of the spraying of the hazardous waste material.

The insurance policies generally excluded compensation for personal or property injury arising out of discharge, dispersal, release or escape of toxic chemicals, waste materials or other contaminants. However, the insurers would pay if the discharge, dispersal, release or escape was "sudden" or "accidental." On defendants' motion for summary judgment, the District Court held that the contaminations were not sudden or accidental, and therefore were not covered by the policies.

The court stated that although Missouri had not answered the question as to this pollution exclusion clause, the Eighth Circuit interpreted Missouri law regarding the "sudden and accidental" language and found the phrase unambiguous and synonymous with "abrupt" and "unexpected." Finding that IPC's claim was without merit, the court first rejected IPC's argument that the term "sudden" in the pollution exclusion clause was a redundant term that should not be given meaning, stating that Missouri recognizes an "anti-redundancy rule" and gives meaning to all terms of an insurance contract. Next, the court held that the sprayings were not sudden because IPC failed to show that the Bliss sprayings were isolated, discrete events. Because the sprayings were performed as part of Bliss' regular course of business for over two years, they did not meet this court's

test. Finally, the court found that the incident was not accidental. IPC argued that the sprayings were accidental because Bliss did not know of the contaminating effects of the discharge. The court decided these facts were irrelevant to its determination of IPC's liability. The pollution exclusion clauses did not ask if the damage inflicted was intended. It was enough that Bliss knew he was discharging the waste material itself. The Court cited New York case law for its conclusion that IPC was responsible even though the cause of the contamination was Bliss but did not discuss the reasoning behind the New York authorities.

— by Don Willoh

**3M Co. v. Browner**, 17 F.3d 1453 (D.C. Cir. 1994)

The 3M Company (3M) unknowingly committed several violations of the Toxic Substances Control Act (TSCA), 15 U.S.C. §§ 2601-2629 between August 1980 and July 1986. In 1986, 3M notified the Environmental Protection Agency (EPA) that one of its chemicals, which it believed to be from a domestic manufacturer, had in fact originated in Canada and did not appear on the EPA inventory of existing chemicals. This was a clear violation of TSCA which requires that prior to the importation of a new chemical the importer give a Premanufacture Notice to EPA. In a further review of its inventory of chemicals, 3M noticed that a second chemical imported numerous times between July 15, 1983 and August 4, 1986 was mistakenly classified as non-new and that no Premanufacture Notice had been filed. 3M notified the EPA of this violation on September 16, 1986.

On September 2, 1988, the EPA filed an administrative complaint against 3M pursuant to § 16(a)(2)(A) of TSCA for not filing Premanufacture Notices and for 3M's use of inaccurate Customs certifications with respect to the two chemicals. The complaint

## AIR

sought \$1.3 million in civil penalties. In answer to the complaint, 3M alleged that the statute of limitations, 28 U.S.C. § 2462, generally applicable to civil fines and penalties, barred the EPA's complaint.

Since TSCA itself fails to provide for a time limit within which TSCA actions must be brought, the EPA administrative law judge (ALJ) reasoned that no statute of limitations applied to § 16(a)(2)(A) proceedings because 28 U.S.C. § 2462 applied only to judicial proceedings. The ALJ based his decision on the predecessor of § 2462 which barred a "suit or prosecution" after the statutory period claiming that the later substitution of "action, suit or proceeding" for "suit or prosecution" effected no substantive change, and that an agency adjudication did not constitute a prosecution. The ALJ imposed a \$130,650 penalty on 3M. 3M filed petition for review in the D.C. Court of Appeals pursuant to 15 U.S.C. § 2615(a)(3).

The Court of Appeals rejected the ALJ's construction of § 2462. The court held that § 2462 prohibited all actions, suits or proceedings from being brought after the five-year limitation period had expired. The court stated that an administrative adjudication fit easily within this description citing the Administrative Procedure Act, 5 U.S.C. § 554(b), which TSCA explicitly incorporates and which denominates agency adjudications as "proceedings." Further, the court ruled that agency adjudications were analogous to prosecutions because of their typically "accusatory flavor."

For the § 2462 statutory period to bar an action, the "action, suit or proceeding" must be "for the enforcement of any civil fine, penalty, or forfeiture." The EPA asserted that the term enforcement connoted an action to collect an already existing penalty whereas a § 16(a)(2) proceeding merely imposes a penalty. 3M argued that "enforce" was the semantic equivalent of "impose" and that a contrary ruling would render § 2462 inapplicable to TSCA actions.

The court primarily relied on the history of § 2462 in rejecting EPA's statutory interpretation. The predecessor to § 2462 did not use the word "enforcement." The revisers noted that the addition of "enforcement" was a change in phraseology only. Accordingly, the court utilized traditional canons of construction to interpret the revised statute as substantively identical to the pre-revision statute. The court held that the pre-1948 statute was not solely applicable to actions seeking to collect already imposed penalties. Therefore, assessment proceedings under TSCA are proceedings for enforcement of penalties thus subjecting such actions to the time limitations of § 2462.

Because § 2462 bars actions, suits or proceedings that are not "commenced within five years from the date when the claim first accrued," determination of when the claim "first accrued" is important. The EPA, in an attempt to equate its situation with that of plaintiffs in personal injury actions suffering from latent injuries, contended that the claim first accrued upon discovery of the violation. The court held that because the imposition of a civil penalty under TSCA was punishment and not remedial, the claim accrued on the date of violation, not when EPA discovered the violation. Additionally, the court refused to consider special enforcement difficulties encountered by EPA stating that § 2462 applies to all civil penalty cases instigated by the federal government and not just to EPA enforcement of TSCA. The EPA could not initiate a proceeding under TSCA against 3M for violations that allegedly predate the five-year window imposed by § 2462.

— by Thad Mulholland

### ***Monsanto Co. v. Environmental Protection Agency***, 19 F.3d 1201 (7th Cir. 1994)

Monsanto filed a petition to review an Environmental Protection Agency (EPA) decision denying Monsanto's request for additional time to comply with certain hazardous air emissions standards under the Clean Air Act (CAA). The specific emission limit in question was for benzene pursuant to 40 C.F.R. § 61.271 (1990). The standard became effective for new or modified sources on September 14, 1989, but did not apply to existing sources until ninety days after the effective date. Monsanto fit into the latter category. The CAA also gave the EPA Administrator authority to grant a waiver to existing sources for up to two years if such an extension is necessary. Monsanto was not prepared to comply with the new benzene standard in December of 1989 and requested a waiver until August 15, 1990, to allow the company to install water scrubbing equipment designed to satisfy the standard. The EPA granted the request. After installation, however, Monsanto discovered that the equipment did not perform as anticipated and asked the EPA for another extension to install additional equipment. This time the EPA denied the request which led to the instant case.

The issue was whether the Administrator acted arbitrarily and capriciously in deciding that two years was not necessary for Monsanto to comply with the benzene standard. The EPA asserted that Monsanto's request did not provide sufficient information to show that an additional waiver of compliance was necessary. Although the court found many of the concerns to be valid, it also recognized that Monsanto submitted a thorough response to each of the concerns. The company explained that its original scrubber technology was designed to recap-

ture and reuse benzene, when in reality carbon absorption resulted which created a hazardous waste that would require special treatment or disposal.

Monsanto makes no claim that it could not have installed carbon absorption system under its initial waiver, but asserts that disposing of waste generated by such technology involved considerable expense and environmental concern. The court found that the EPA's explanation that the company was experimenting with various technology grossly mischaracterized Monsanto's approach. Rather, the court found that Monsanto had made a scientifically and environmentally sound decision to proceed with its initial scrubber system, and had every reason to believe it would perform as expected. The EPA also ignored the fact that the initial scrubber system chosen by Monsanto complied with EPA's own pollution prevention policy. The EPA appeared to say that if a "quick fix" solution is available, pollution sources are required to employ the "quick fix" without regard to adverse environmental ramifications. The court found this view short-sighted and bad environmental policy. The court also found that other reasons given by the EPA for the denial had no foundation in the record. Thus the court found that the EPA acted arbitrarily and capriciously in denying Monsanto's request.

— by Jason Johnson

**United States v. B & W Inv. Properties, Inc.**, No. 91 C 5886, 1994 WL 53781 (N.D.Ill. Feb. 18, 1994)

The United States obtained a summary judgment against Defendants Louis Wolf (Wolf) and B & W Investment Properties, Inc. (B & W) on the issue of liability for asbestos contamination of their property in violation of the Clean Air Act 42 U.S.C. §§ 7412 and 7414. The court subsequently referred the case to a magistrate judge to assess the amount of fine to be imposed.

The magistrate recommended the maximum fine of \$25,000 per day for the period of October 15, 1990 through January 21, 1990 for the defendants failure to keep friable asbestos materials wetted pursuant to C.F.R. § 61.147(c). The total fine equalled \$1,675,000, for which the defendants were to be jointly and severally liable. However, the magistrate noted that because Wolf's personal net worth was only \$2,000,000, his individual liability was limited to \$1,500,000. Additionally, the magistrate imposed no separate fine for the defendants failure to notify the Environmental Protection Agency (EPA) because the fine already imposed would deplete 75% of Wolf's assets.

On hearing by the United States District Court for the Northern District of Illinois, the Government argued that the court should adopt the magistrate's recommendations but contested the magistrate's findings concerning the commencement date of the fine and Wolf's net worth. Wolf and B & W objected to the magistrate's recommendation that the maximum daily fine be imposed and to her computation of the number of days used to calculate the fines.

The applicable standard of review of a magistrate judge's recommendations, as set forth by 28 U.S.C. § 636(b)(1), is *de novo* where a dispositive motion has been made. Thus, where a party has made an objection, the district court judge must make a *de novo* determination as to those specific portions of the magistrate's recommendations to which the party objects.

The court began its discussion by finding that Wolf had culpable knowledge of the asbestos violations no later than October 15, 1990. This finding precipitated a determination of what time the fines accrued from. The court concurred with the magistrate's recommendation that the fines begin 30 days after Wolf learned of the problem because of the permissive nature of § 7413(e)(2) and because it found that 30 days was a "reasonable length of time" to initiate remediation.

The court also adopted that magistrate's recommendations that the daily fines end upon the commencement of clean-up work despite language in the Clean Air Act (Act) which provides for penalties to continue until the violator proves continual compliance with the Act. Again, the court cited the permissiveness of § 7413(e)(2) to make its holding.

In setting the daily amount of the fine, the court considered a number of factors mandated by statute. First, it noted that because the Act and the accompanying regulations were amended in November 1990, the court held that pre-amendment law should apply because the acts predated the amendment. The pre-amendment law, set forth in 42 U.S.C. § 7413(b) (1988), requires that in setting the amount of the penalty courts consider the size of the business, the economic impact of the penalty on the business, and the seriousness of the violation as well as "other factors". The court apparently considered the factors listed by the amendment, § 7413(e), as the "other factors" contemplated by the pre-amendment law. The § 7413(e) criteria which do not overlap with the pre-amendment law include the duration of the violation and the violator's compliance history and good faith efforts to comply.

The court recognized that though adjusting the violator's fine based on the duration of the violation may be perceived as rewarding long-term violators, it should nevertheless be a factor in setting the daily fine. However, the court noted, the daily fine must be high enough to be an effective deterrent to clean-up delay by violators. The court also considered that Wolf did not previously violate the Act. The court held that a clean record would not decrease the fine but that previous violations would increase the fine.

In evaluating the seriousness of the violation, the court held that all asbestos violations are serious. It further noted as exacerbating factors the defendants' failure to warn those coming into contact with the

premises, and an EPA inspector's declaration that the violations were the most serious ones he had encountered. These circumstances warranted a daily fine at or near the maximum.

The court held that Wolf's ability to pay, as evidenced by the magistrate's finding that he had a \$2,000,000 net worth, had not been properly challenged by the government because it failed to introduce competent evidence indicating a higher net worth. Thus, the magistrate's recommendation that Wolf's fine be limited to \$1,500,000 was appropriate.

The court held that because the amount of the fine for the wetting violation was substantial, no separate fine for failure to give notice under 40 C.F.R. § 61.146 was necessary. Finally, the court held the defendants jointly and severally liable for the penalties as "owners" and "operators" under 42 U.S.C. § 7413(b).

— by Thad Mulholland

## ENDANGERED SPECIES ACT

***Sweet Home Chapter of Communities for a Great Oregon, et al., v. Babbitt, et al.***, 17 F.3d 1463 (D.C. Cir. 1994)

A group comprised of non-profit organizations and other associations (Sweet Home) brought an action against the Secretary of the Interior challenging the validity of certain regulations promulgated by the Fish and Wildlife Service (FWS) under the direction of the Endangered Species Act (ESA). At issue was the interpretation and scope of the terms "harm" and "take" under the ESA. The ESA prohibits any person from taking any fish or animal listed as an endangered species, and further defines "take" to include harming or attempting to harm an endangered species. In addition, the FWS has defined the term "harm" to encompass any significant habitat modification as a type of

harm that would result in a prohibited taking of an endangered species. 50 C.F.R. § 17.3. Sweet Home argued that the FWS's definition of harm was in violation of the ESA because there was no showing that Congress intended to include habitat modification within the context of the taking of an endangered species. The court agreed with Sweet Home and found that the FWS's definition of harm was not authorized by Congress and was not a reasonable interpretation of the ESA.

In reaching this conclusion the court first looked to the other terms in the ESA's definition of "take," which include "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect," and found that all of them contemplate a direct and physical injury to an identifiable member of an endangered species as opposed to mere habitat modification. In utilizing the maxim *nosciitur a sociis*, which means that a word is defined by the surrounding terms, the court acknowledged that this maxim is useful to define words that are capable of more than one meaning to prevent an "unintended breadth" to an act of Congress.

The court next addressed the structure and history of the ESA to support its determination that "take" should not include habitat modification. In 1973, a bill was introduced before the Senate Commerce Committee and the Subcommittee on Environment that specifically included habitat modification within the definition of "take." As this bill was ultimately rejected, the court offered this as proof that the intentional deletion of habitat modification from the definition of take bolstered its conclusion.

In addition, the court looked to the 1982 ESA amendments as a basis for its finding. First, the government argued that the amendment which allows the FWS to issue permits for "incidental" takings implies that habitat modification is a reasonable interpretation of harm. The court rejected this theory and stated that the other terms included in the ESA's definition of take contemplate such incidental takings without

the inclusion of habitat modification. Instead, the court found that the addition of the FWS's ability to issue permits for incidental takings reflected the Environmental Protection Agency's (EPA) viewpoint that there is no intent requirement for taking an endangered species, and also that any taking will result in violation of the ESA no matter how slight. Therefore, the permit plan amendment did not support any assumptions to justify the FWS's inclusion of habitat modification.

Second, the government argued that the mere process of amending the ESA, including conference reports mentioning habitat conservation, notice of the habitat modification regulation, and the withdrawal of an amendment to include habitat modification, ratified the FWS's interpretation. Again, the court rejected this theory. The court first stated that although the conference report addressing the ESA amendment used the term habitat conservation, this could not be interpreted to allow the FWS to assume that habitat modification should be included in the definition of harm. Next, the government argued that because a House subcommittee had notice of the FWS regulation and a 9th Circuit case which upheld such an interpretation, there was an implied ratification of the regulation. The court dismissed this argument because ultimately there was no proof that either House was aware of either the regulation or the case. Finally, the court addressed the relation between a senator's decision to withdraw an amendment to change the definition of "take" and the congressional opinion on how this term should be defined. The court stated that this withdrawal was not an indication as to the extent of congressional focus on the issue and did not in any way reflect how Congress viewed the matter. In addition, the court identified the pattern of precedents that generally refuse to infer ratification of a regulation from amendments to related clauses. Therefore, the court held that the FWS regulation was invalid in light of the ESA's definition of "take."

— by V. Alyse Hakami