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## Case Summaries

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# Case Summaries

## CERCLA

*Bituminous Casualty Corp. v. Vacuum Tanks, Inc.*, 75 F.3d 1048 (5th Cir. 1996)

This case involved a waste transporter seeking indemnification from its insurer for three lawsuits stemming from pollution damage and cleanup of its dumping activities. The insurer of Vacuum Tanks, Inc. (VTI), a transporter of liquid waste, was Bituminous Casualty Corp. (Bituminous). Seeking a declaratory judgment that would release it from any duty to pay for either a defense or indemnification, Bituminous filed suit against VTI. VTI counterclaimed, charging that Bituminous had a duty to defend and reimburse VTI for defense costs, and asked the court to grant punitive damages for bad faith in denial of coverage. VTI also sought a declaratory judgment.

The issue between the parties was that neither VTI nor Bituminous could find a copy of the annual policies that VTI had purchased, though Bituminous was able to locate a "specimen policy" for the 1959-1965 period of coverage. The trial court ruled in favor of VTI but found Bituminous not liable for bad faith. On appeal, the court found VTI did not present sufficient evidence to prove the terms of the policies involving coverage of the claims. The case was remanded for further trial proceedings in which VTI was again awarded defense costs, plus pre-judgment interest and attorney's fees.

In the instant appeal, Bituminous again contended that VTI presented insufficient evidence of the terms of the policies. VTI's evidence included the specimen policy of the period in question as well as testimony, internal memos and records. The appellate court rejected Bituminous' argument and held that the trial court did not err in finding that the policy terms of VTI's coverage matched those of the specimen policy based on the

evidence presented.

On Bituminous' contention that it had no duty to defend, the appellate court referred to the fact that the specimen policy provided liability coverage for damages caused by destruction or injury to property incurred in an accident. Bituminous first charged that there was no property damage because Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) claims do not constitute property damage for insurance coverage. In applying Texas insurance law on the duty to defend, which is biased toward the insured in policy interpretation, the appellate court found that duty to be present in all three claims against VTI.

In the alternative, Bituminous argued that it had no duty to provide coverage because no accident occurred since VTI's transportation of waste was a voluntary and intentional activity. The court disagreed, holding Texas law focused on whether the damages and injuries incurred were accidental, not whether the conduct or actions were accidental.

The appellate court did, however, modify the trial court's award of attorney's fees to VTI. Bituminous proved on remand that it was exempt from the payment of attorney's fees because it was a stock property casualty company. The court of appeals held that the Texas Code exempted contracts issued by insurers subject to the Unfair Claim Settlement Practices Act, which includes stock and casualty companies.

- by Wendy Hickey

## CLEAN AIR ACT

*Environmental Defense Fund, Inc. v. Environmental Protection Agency*, Nos. 94-1044, 94-1062, 1996 WL 184480 (D.C. Cir. Apr. 19, 1996)

In November 1993, the

Environmental Protection Agency (EPA) published two rules designed to help federal agencies determine whether "Metropolitan Planning Organizations" were in compliance with Section 176 of the Clean Air Act. Six environmental groups (Environmental Defense Fund) sought review of these regulations, claiming that several inconsistencies existed between the EPA regulations and the provisions of the Clean Air Act.

The first challenge presented by the Environmental Defense Fund was aimed at a grandfather clause in the EPA regulations. The EPA regulations required a determination that a metropolitan project complied with the Clean Air Act before a federal agency could become involved in the project. The grandfather clause, however, exempted non-transportation projects that had been analyzed under the National Environmental Policy Act (NEPA) within the preceding five years and transportation projects that had undergone such analysis within the preceding three years.

The Environmental Defense Fund argued that this grandfather provision was in conflict with Sections 176(c)(1) and (c)(2) of the Clean Air Act. The court rejected this argument, stating that the Clean Air Act "vests the Agency with discretion" to establish the frequency with which project conformity will be determined as long as determinations for transportation plans are not less frequent than every three years. Because the grandfather clause only exempted projects which had undergone NEPA review within the previous three years, the court upheld the grandfather clause as a reasonable exercise of agency discretion.

The Environmental Defense Fund next challenged the validity of EPA regulations allowing for the approval of a state transportation improvement program (TIP) although the program's transportation control measures (TCMs) were behind the schedule set out in the state's implementation plan (SIP). They argued that the Clean Air Act required the schedules to be consistent. The court rejected this

challenge, holding that the Clean Air Act did not require exact correspondence between the schedules of the TIP, the TCM and the SIP, but only required that the schedules be compatible. The court stated that a contrary conclusion would require reading the Clean Air Act's consistency requirement too narrowly. The court also rejected the Environmental Defense Fund's argument that the TCMs would not be eligible for federal funding without a timely implementation schedule, since the court found the statute to be ambiguous and subject to reasonable interpretation by EPA.

Alternatively, the Environmental Defense Fund argued that the EPA regulations were in violation of Section 176(c) of the Clean Water Act, which states that SIPs are in conformity with the Act only if they "contribute to annual emissions reductions." They argued that the EPA regulations were contrary to this section of the Clean Water Act because, under the regulations, it was possible for a transportation plan or improvement plan to conform with the Clean Air Act even if it did not produce demonstrable emissions reductions, as long as they were part of an over-arching plan that would result in a reduction of emissions. The court held that the "contribute to" language in Section 176(c) was ambiguous. Once again the court stated that if the EPA's statutory interpretation was reasonable, the court had to give it deference.

The next challenge by the Environmental Defense Fund was aimed at EPA's definition of "transportation projects," which included only highway or transit projects, arguing that Congress intended to include all manner of transportation. The court also rejected this argument based on the fact that metropolitan planning organizations did not have the ability to control air, rail, or water transportation. Because Section 176(c)(2) focuses on metropolitan planning organizations, the court found that it was reasonable to conclude that its rules applied only to transportation modes over which they have control.

The Environmental Defense Fund then took issue with EPA's definition of "indirect" emissions, arguing that under the definition, emissions that were a foreseeable result of federal action would be exempt. The court was not persuaded by this argument and held that EPA's definition was consistent with the requirement that "federally supported activities" must not contribute to a violation of the Clean Air Act.

The Environmental Defense Fund also challenged the language in the EPA regulations indicating that only "major" sources of emissions would be required to conform, and that certain categories of government actions would be exempt. The court, relying on common law, held that exceptions from statutory requirements could be made "as an exercise of agency power . . . [if] considered de minimis." The court determined that the exceptions in the EPA regulations could be considered de minimis, and therefore, were not in violation of the Clean Air Act.

Based on the above analysis, the court denied the petitions for review.

- by Erick Roeder

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***Commonwealth of Virginia v. Browner***, No. 95-1052, 1996 WL 138507 (4th Cir. Mar. 26, 1996)

The Environmental Protection Agency (EPA) found that Virginia had failed to comply with Title V of the 1990 Amendments to the Clean Air Act (CAA). The EPA stated that Virginia's proposed program for issuing air pollution permits did not comply with Title V because the program did not provide for adequate judicial review of its permitting decisions. Virginia challenged the EPA's finding and petitioned for review before the U.S. Court of Appeals for the Fourth Circuit.

Virginia advanced three main arguments. First, it claimed that EPA misinterpreted the judicial review provisions of Title V, and that Virginia had corrected any defects in its proposal that would violate the amended CAA. Second, it

argued that the EPA's original rejection of its State Implementation Plan (SIP) was arbitrary and capricious. Lastly, Virginia alleged that sections of Title V, including its sanctioning provisions, were unconstitutional in that they wrongfully appropriate the state's legislative processes in violation of the Tenth Amendment and the Spending Clause of Article I, § 8.

The Eighth Circuit Court of Appeals rejected each of Virginia's arguments. First, the court denied Virginia's request that the dispute be remanded to the EPA for review, despite Virginia's assertion that it had corrected all but one of the alleged violations in its SIP. The court held that the EPA could reject an entire SIP based on just one defect. In addition, the court stated that the EPA had not signed off on Virginia's newly-submitted SIP as required by the CAA.

In denying Virginia's next claim, the court stated that it must uphold EPA's conclusion that Virginia's proposed SIP judicial review provisions were inadequate unless the EPA's finding was "arbitrary, capricious . . . or otherwise not in accordance with law." The court stated that the EPA's ruling withstood this standard of review because Virginia's SIP did not provide judicial review of permitting decisions to all persons who would have standing under Article III of the U.S. Constitution. Virginia's SIP granted judicial review only to "any owner aggrieved by" a permitting decision but did not provide the same review to members of the public. The court noted that Article III standing was broader than the review Virginia provided. The CAA required that standing be extended beyond aggrieved owners with a pecuniary interest to anyone who could show: 1) actual or imminent injury, 2) a causal connection between the challenged conduct and the injury, and 3) likelihood the injury would be redressed by favorable judicial action.

In its final argument, Virginia claimed that Title V and its sanctions section invaded a state's right to determine its own rules of standing for judicial review. The

appellate court, however, held that Title V was not unconstitutional because federal law may induce state action in areas that otherwise are beyond the regulatory reach of Congress. In short, the court stated, Virginia was blurring the lines between a federal statute designed merely to induce state action as opposed to one that actually coerced a state into exercising its sovereign power. The court held that while CAA sanctions for non-compliance with judicial review provisions may burden states such as Virginia, those sanctions amount to inducement, not outright coercion.

Furthermore, the court stated that the Commerce and Spending clauses of the U.S. Constitution gave Congress the power to withhold state highway funds for non-compliance with the CAA, because Congressional efforts to eliminate air pollution promoted the general welfare and also involved the regulation of potentially-hazardous activities that could cause air and water pollution across state boundaries. In a final policy argument, the court stated that the CAA sanctions maintained "unity between regulation and political accountability" because they hold the federal government accountable for its decisions in full view of the general public.

- by Douglas Cohen

## NEPA

*Seattle Audubon Society v. Moseley*, Nos. 95-35052, 95-34214, 95-35215, 1996 WL 165069 (9th Cir. Apr. 10, 1996)

This decision consolidated three appeals, resulting from challenges to a decision by the Secretaries of Agriculture and Interior (federal defendants) on April 13, 1994, that approved a plan to manage federal lands containing spotted owl habitat in the Pacific Northwest.

The Ninth Circuit Court of Appeals first addressed appeals by the Native Forest Council, Forest Conservation Council and Save the West (the environmental

plaintiffs). The environmental plaintiff's challenge concerned the district court's grant of summary judgment affirming the Record of Decision for Amendments to Forest Service and Bureau of Land Management Planning Documents Within Range of the Northern Spotted Owl.

In 1993, President Clinton established the Forest Ecosystem Management Team (FEMAT) to assist the Secretaries of Agriculture and Interior in the formation of forest management plans for federal lands in the Pacific Northwest. Pursuant to that end, FEMAT narrowed the field of possible strategies to ten, and the Forest Service and the Bureau of Land Management prepared an Environmental Impact Statement (EIS) which covered all of these options. The Secretaries of Agriculture and Interior adopted alternative number nine, spawning this litigation.

The environmental plaintiffs argued that the federal defendants failed to consider a "no action" alternative, thus violating the National Environmental Policy Act (NEPA), which requires that agencies consider a reasonable range of alternatives. The Court of Appeals for Fifth Circuit stated that the federal defendants were under no obligation to consider every conceivable alternative, such as those alternatives that were inconsistent with overall policy objectives or those alternatives that were unlikely to be implemented. The court noted that the federal defendants had considered a "no harvest" option originally but abandoned it early as inconsistent with the policy of balancing competing land uses.

The instant court also addressed the environmental plaintiffs' argument that the selected alternative violated a mandate of the National Forest Management Act (NFMA), that species remain viable. Once again, the court looked to overall goals of the relevant acts and found that compromise for multiple use was acceptable. The court noted the lower court's explanation that an alternative offering a higher likelihood of viability would preclude any multiple use. The court concluded that because there was no

evidence that the federal defendants overlooked relevant factors or made any clear errors of judgment, they reasonably complied with the NFMA's viability mandate.

The court of appeals then addressed the environmental plaintiffs' final argument regarding the first two appeals. In essence, the environmental plaintiffs' contended that the preparation of the EIS did not adequately consider the cumulative environmental impacts associated with the chosen alternative. Upon review, the court stated that the Endangered Species Act protected endangered species from harm caused by habitat modification or destruction, and that it was reasonable to assume that non-federal land will be managed to avoid harm to the threatened species. The court affirmed the district court's judgment.

The court went on to decide a related appeal, filed by the Northwest Forest Resource Council (Council). The Council appealed the district court's entry of summary judgment for the federal defendants on their cross-claims for declaratory relief. The Council wished to litigate the challenges in the District of Columbia. The court of appeals addressed the argument that the district court lacked jurisdiction to hear the cross-claims for declaratory judgment or alternatively abused its discretion by exercising its jurisdiction.

The court stated that where jurisdiction exists, the Declaratory Judgment Act (Act) is intended to allow earlier access to the courts to spare potential defendants from the threat of litigation and to help defendants avoid a multiplicity of lawsuits. The court found the cross-claim to be appropriate under the act in this action, since the federal defendants were faced with the possibility of different judgments on the same issues and the expense of litigating the issues again in another forum. The court of appeals, therefore, affirmed the judgment of the district court.

- by Michael Hunter

*Western Radio Services Co., Inc. v. Espy*, 79 F.3d 896 (9th Cir. 1996)

Western Radio Services (Western) brought suit against the Department of Agriculture, United States Forest Service, and other defendants (the Service), claiming that the Service abused its discretion when it granted Slater Communications Corporation (Slater) a special use permit to build a radio tower at Gray Butte in the Ochoco National Forest in Oregon. Western argued that the radio tower caused interference with its broadcasts and the grant of permit violated various regulations, including the National Environmental Policy Act (NEPA) and National Forest Management Act (NFMA).

Western's claim originally arose when the Service allowed Slater to build at Gray Butte. The Forest Supervisor denied Western's claim that Slater's tower would result in radio frequency interference. Western appealed to the Regional Forester, who upheld the decision but required meetings to be held between parties sharing the Gray Butte location to insure that Slater's tower was built in the best possible location. Western contended it never agreed to the current location. Western then filed this action in district court alleging the permit violated NEPA and NFMA, which grants the Service's authority. Western further claimed that the Forest Service Manual (Manual) and Forest Service Handbook (Handbook) were also "regulations" that the Service had failed to comply with. The district court granted summary judgment in favor of the Service, holding that the Service did not abuse its discretion in issuing Slater's permit, and that Western lacked standing to challenge the permit under NEPA.

After noting that it was proper for the court to review the case, the Court of Appeals for the Ninth District noted that it may only overturn the Service's decision if it found the decision to be arbitrary and capricious. Here, the court stated that arbitrary and capricious meant that the agency relied on factors that Congress did not intend, entirely failed to consider

important aspects, offered a explanation countered by evidence, or offered a completely implausible justification. The court also noted that it would only entertain allegations that the Service did not comply with regulations if those regulations have the force of law.

The court of appeals held that the Handbook and Manual did not have the force of law, nor did applicable code sections adopt the Manual and Handbook by reference. The two-part "force of law" test used by the court: 1) the rules be substantive rather than interpretive; and 2) the agencies have conformed to procedural requirements in promulgating the pronouncements in question.

On review, the court found that the Manual and Handbook did not meet the first requirement because they establish guidelines for Service authority, not binding limitations. The court noted that the Manual and Handbook did not meet the second requirement either because they were not promulgated under a specific grant of authority and in the manner proscribed by Congress; they were not published under the Administrative Procedure Act, nor in the Federal Register or the Code of Federal Regulations, were not subject to notice and comment rule making, and were not promulgated under some specific Congressional authority.

The court also dismissed Western's argument that the Manual and Handbook were incorporated by reference in other Service regulations, because incorporation did not lend the Manual and Handbook substantive status if the Manual and Handbook still lacked the elements from the force of law test. Having decided that the Manual and Handbook did not have the force of law, the court found it unnecessary to evaluate Western's allegation that the Service had gone beyond the scope of its authority.

The court of appeals then denied Western's claim that the Service had not followed established Service guidelines and therefore acted arbitrarily and capriciously. The code section gave the

discretionary instruction that the Service should consider if new buildings will cause interference with existing structures. However, the court stated that since the section was discretionary, even if the Service had not acted upon it, the court would have no authority. The court also pointed out that the Service had actually included a provision protecting against interference in this particular permit grant, even though there was no requirement to do so, and no indication at the time that there would be interference at all.

Finally, the court dismissed Western's claim under NEPA. Distinguishing this case from those where there is at least some environmental harm in addition to interference with radio broadcasts, the court of appeals found that Western alleged only harm to the broadcasts, or economic harm.

The court affirmed the summary judgment of the lower court.

- by Kevin Murphy

## CLEAN WATER ACT

*Hughey v. JMS Development Corporation*, 78 F.3d 1523 (11th Cir. 1996)

Hughey, a homeowner in Gwinnett County, Georgia, filed a citizen suit under the Clean Water Act (CWA) seeking to enjoin JMS Development Corp. (JMS) from discharging storm water runoff. Hughey argued that JMS, the developer of a residential subdivision in Gwinnett County, was violating the CWA by allowing storm water runoff without possessing a National Pollutant Discharge Elimination System (NPDES) permit setting forth the conditions under which storm water could be discharged.

At trial, the evidence showed that JMS submitted its subdivision plans and specifications to Gwinnett County for approval and obtained a county permit to begin construction. In addition, a CWA NPDES permit was not then available in the State of Georgia. Nevertheless, the district court's interpretation of the CWA relied upon a "zero discharge" standard,

which absolutely prohibited the discharge of any storm water by JMS in the absence of an NPDES permit. The court ignored testimony that some storm water discharge beyond the control of JMS would naturally occur whenever it rained.

The district court issued a permanent injunction ordering that JMS "not discharge storm water into the waters of the United States from its development property in Gwinnett County, Georgia . . . if such discharge would be in violation of [CWA]." The court, also fined JMS for continuing violations of the CWA and awarded Hughey attorney fees and costs. From those orders and judgment of the district court, JMS appealed.

On appeal to the Eleventh Circuit Court of Appeals, JMS argued that the broad, generalized language of the injunction violated the standard of specificity required by Federal Rule of Civil Procedure 65(d). JMS's second contention was that it should not be punished for failing to secure an NPDES permit when no such permit was available. Finally, JMS objected to the award of attorney fees and costs.

First, the appellate court determined that Congress could not have intended a strict application of the zero discharge standard when compliance is factually impossible. The court further found that once JMS began the development, compliance would have been impossible. The evidence was uncontroverted that whenever it rained in Gwinnett County, some discharge was going to occur, regardless of efforts by JMS to prevent it. In addition, the court determined that Congress did not intend the zero discharge standard to apply when: 1) a CWA NPDES permit was not available; 2) the discharger was in good-faith compliance with local pollution control requirements that substantially mirrored the proposed NPDES discharge standards; and 3) the discharges were minimal.

The court of appeals vacated the lower court's injunction, finding that the district court's order merely required JMS to stop discharges, but failed to specify

how JMS was to do so. The court held that the district court's injunction did not contain an operative command capable of enforcement, nor was it tailored to remedy specific harms rather than to enjoin all possible breaches of the law.

Finally, the appellate court reversed the district court's award of attorney fees and costs to Hughey. Under the CWA's citizen suit provision, a court may issue costs of litigation to any prevailing party. However, the reviewing court held that Hughey was not a prevailing party. Since the Eleventh Circuit did not find in favor of Hughey, it was inappropriate to give such an award.

- by Constance S. Chandler

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***Shady Valley Park & Pool, Inc. v. Fred Weber, Inc.***, 913 S.W.2d 28 (Mo. Ct. App. 1995)

Gene Lambrich (Lambrich) purchased Shady Valley Park & Pool, Inc., (Shady Valley), in 1965. Originally operating as a swimming pool, the property became a fee fishing area around 1967. Shady Valley raised numerous species of fish, and high quality water was essential to the success of both the fee fishing and fish hauling businesses.

The Missouri Highway and Transportation Commission (MHTC) hired Fred Weber (Weber) to make improvements to Missouri State Highway 21. The construction project involved two phases, with the entire project taking place on property directly above that which Shady Valley owned. The contract for both phases contained special provisions regarding the Shady Valley property, which stated that since the lakes on the Shady Valley property were stocked with fish, precautions would have to be taken to ensure that the lakes were protected from mud and silt accumulation.

In September, 1987, Weber and his subcontractor began construction on Phase 1 of the project. Weber, in implementing the plans of the MHTC, began clearing the property and removing tree stumps and roots. These operations

involved stripping the ground to the bare soil, and took place just above Shady Valley's lakes. Construction for Phase II of the project began in the fall of 1988. All the drainage and silt from the second phase traveled through the ditch systems constructed during the first phase, despite efforts to prevent mud and silt accumulation in the lakes.

As a result of the problems Shady Valley had in obtaining suitable water, the operation also had difficulty holding an inventory. The entire Shady Valley complex discontinued operations in October, 1991. Prior to the closing of the business, Lambrich tried to obtain relief from Weber and the MHTC. Negotiations proved unsuccessful, and Shady Valley filed its original petition for relief from Weber and the MHTC on June 18, 1990. An amended petition was also filed, but was eventually dismissed. Shady Valley charged the MHTC with separate counts of trespass, inverse condemnation, nuisance and negligence. The petition charged Weber with negligence, and also contained a third party beneficiary contract claim and a request for punitive damages.

The MHTC was severed from the case against Weber, and the trial court directed a verdict against Shady Valley on the punitive damages and third-party beneficiary contract claims. A verdict in the amount of three million dollars was entered in favor of Shady Valley on the trespass and negligence claims. Weber appealed the judgment, and Shady Valley cross-appealed.

The Missouri Court of Appeals for the Eastern District affirmed the trial court's judgment in all respects. In affirming the decision, the court rejected Weber's contention that the "acceptance doctrine" directly prohibited the imposition of any liability. This doctrine states that once a highway contractor's work has been accepted by the state, the contractor is not liable to a third party with whom there is no contractual relationship for injuries that occur as a result of tortious conduct. The acceptance by the state may be

constructive or practical, but must be deemed by the court to have occurred in some manner. The court of appeals held that damage to the lakes occurred prior to any conceivable acceptance by the state. Therefore, the doctrine did not apply, and Weber was liable for the negligence and torts that occurred while in possession of the property.

Weber also contended on appeal that the trial court erred in giving an instruction that allowed the jury to provide that Shady Valley could recover for "all damages for all time." The instant court rejected this contention on the basis that Shady Valley's claims for recovery were not for nuisance damages alone, but were also for trespass. The court stated that a trespasser is liable for damages for any natural, direct, necessary and proximate consequences of his action. The court held that the instruction was valid when damage to the property went beyond mere property loss.

Weber further argued that the trial court erred in not submitting two requested jury instructions. One instruction would have allowed the jury to consider any mitigating circumstances, and the second instruction was on comparative fault. On review, the court stated that the burden of proof for mitigation of damages is on the defendant. The defendant must show that the injured party had the opportunity to mitigate and any reasonable perspective consequences. The court also stated that since Weber presented no evidence that Shady Valley had the opportunity to mitigate damages, there was not an adequate showing. Therefore, the court held that there was no abuse of discretion in disallowing Weber's offered instructions.

The final point the court analyzed on appeal was the right of Shady Valley to recover punitive damages. Shady Valley contended that the trial court erred in directing a verdict in favor of Weber on this issue. The court of appeals held that the standard of review for a submissible punitive damages claim was whether a reasonable juror could have found that

Weber's conduct showed conscious disregard or complete indifference to the interests of Shady Valley. The court found that even though Weber's actions were ineffective at controlling the mud and silt accumulation, there was no conscious disregard nor complete indifference to the interests of Shady Valley. Therefore, Weber's activities did not rise to the level of justifying punitive damages, and Shady Valley's contention was denied.

- by Tricia Ann Baker

## CONSTITUTION

*City of Jefferson v. Missouri Dep't of Natural Resources*, 916 S.W.2d 794 (Mo. 1996)

The issue presented by this case was whether Mo. Rev. Stat. § 260.325 was unconstitutional, in light of a provision of the Missouri Constitution found in Article X (Hancock Amendment). Section 260.325 required counties and cities that were not members of solid waste management districts, which had populations of over 500 people, to submit a new or revised solid waste plan that complied with § 260.220-325. However, the Hancock Amendment was violated if both "(1) a new or increased activity or service is required of a political subdivision by the State and (2) the political subdivision experiences increased costs in performing the activity or service."

The circuit court first addressed this controversy in *City of Jefferson I*, holding that Jefferson City would experience increased costs in its attempt to comply with § 260.325. As a city with a population of over 500 people, Jefferson City would have been required to file a new solid waste plan discussing the following: the separation of household waste, the reduction of solid waste placed in landfills, a timetable for such reduction, minimization of small quantities of hazardous waste, and establishment of educational programs. Therefore, the court enjoined not only future enforcement of § 260.325, but also the development of

solid waste management plans meeting the "Model Plan Guidelines for Solid Waste Management." The Missouri Department of Natural Resources (MDNR) and the State of Missouri appealed.

The Missouri Supreme Court analyzed whether the increased cost to Jefferson City was more than de minimis by examining specific evidence presented by the city. Although MDNR argued that Jefferson City presented insufficient evidence showing this increase, the court found that Jefferson City's demonstration of cost was adequate. The city's evidence included an estimation of costs "two to three times" over what was spent on previous waste plans, due to the subsequent need to employ additional engineers. Therefore the court held that Jefferson City need not comply with the mandate to submit a revised solid waste plan.

With respect to the state's enforcement of the statute against other political subdivisions that had failed to prove the existence of increased costs, the supreme court reversed the lower court's decision. Absent actual proof of higher costs resulting from the plan's development, a city or county must still meet the requirements established in § 260.325.

- by Lynette McCloud

## OTHER

*American States Insurance Co. v. Nethery*, 79 F.3d 473 (5th Cir. 1996)

In 1991, Mary Jane Nethery, (Nethery) hired DAPA, Inc., (DAPA) to paint portions of the interior of her home. Nethery claimed she explicitly contracted for the repairs to be made with special paint that would be "non-toxic" to her, because of her hypersensitivity to chemicals. However, DAPA used regular industry paint in glue in Nethery's home. She specifically contended that she was allergic to the chemical 1,1,1 trichloroethane, (1,1,1 tca) found in the paint DAPA used, and that the fumes from the materials injured her and caused the loss of part of her home. She sued DAPA, its

president and the franchisor, (the insureds) alleging breach of contract, gross negligence, and intentional infliction of emotional distress. The insureds looked to their insurer, American States, for defense and coverage of Nethery's claims. American States filed the declaratory action involved in the instant case.

The district court held that American States did not have a duty to defend against Nethery's claims for breach of contract and intentional infliction of emotional distress; however, it did have a duty to defend against her gross negligence claim, and the claim was not barred from coverage by a pollution exclusion clause contained in the policy. American States appealed, contending that the absolute pollution exclusion did apply to bar Nethery's claim.

The Fifth Circuit Court of Appeals found that if an insurance policy is unambiguous, its terms must be given their plain meaning and enforced as written. Unless the lower court were to find the exclusion ambiguous on its face, the court would lack the prerogative to engraft limitations on the exclusion as it appears in the policy.

The instant court determined that American States pollution exclusion clearly applied in this case. The exclusion defined "pollutant as "any . . . gaseous . . . irritant or contaminant, including . . . vapor . . . fumes . . . and chemicals." Accordingly, the paint fumes in Nethery's claim fell under the definition of gaseous substances, vapors, and fumes, while the 1,1,1 tca in the paint was plainly a chemical.

The insureds suggested that the fumes

did not constitute an "irritant," because they do not normally inflict injury. The court quickly dismissed the argument, saying that an irritant was a substance that produced a particular effect, not one that generally or probably caused such effects. Further, cases cited by the insureds concerning the ambiguity of the exclusion clause were unpersuasive. The court of appeals concluded that American State's absolute pollution exclusion was unambiguous and excluded Nethery's claim.

- by Debbie Martinez

*Colonial Properties, Inc. v. Vogue Cleaners, Inc.*, 77 F.3d 384 (Ala. 1996)

The United States District Court for the Northern District of Alabama addressed the question of whether improperly disposed toxic wastes gave a landlord a trespass cause of action against a tenant for trespass to a common area. This was a question of first impression in Alabama and was reviewed by the United States Court of Appeals, Eleventh Circuit.

The case arose from Vogue Cleaners', Inc., (Vogue Cleaners) disposal of toxic waste generated by a dry cleaning operation. Vogue generated several toxic wastes, most of which were properly disposed of by disposal companies. However, toxic waste containing perchloroethylene was not disposed by these companies, rather it was poured onto a curb behind the business. This resulted in several incidents in which workers were burned by groundwater contaminated with perchloroethylene. The Emergency

Response Management and Training Corporation and the Alabama Department of Environmental Management were called to the scene to contain the waste and assess the damage.

As a result, the landlord of the building, Colonial Properties, Inc., (Colonial Properties) filed suit against Vogue Cleaners under several theories to recover damages. At issue in the instant case was whether the district court properly held in favor of Colonial Properties for the claim of trespass against Vogue Cleaners for damage to the common area contaminated by the toxic waste. Vogue Cleaners maintained the action was improper since Colonial Properties did not have exclusive control over the contaminated area, thus preventing recovery for trespass damages. Colonial Properties argued that it needed only to exercise "sufficient" possession and control over a common area to entitle a landlord to a trespass cause of action. The district court determined that the later was the proper reasoning, and would apply were the Alabama Supreme Court to address the issue.

Upon review, the Eleventh Circuit pointed out that since this is a case of first impression, the district court should not have speculated as to how the Alabama Supreme Court would have ruled if confronted with the issue. Accordingly, the court certified the case to the Alabama Supreme Court to answer the question of whether the facts of this case give rise to a trespass cause of action by a landlord against a tenant for damages to a common area.

- by Marc Poston