

## 2009-2010 ENVIRONMENTAL LAW SURVEY

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### INTRODUCTION<sup>1</sup>

This Article surveys federal and Indiana court decisions decided between October 1, 2009 and September 30, 2010 that are most likely to affect the Indiana environmental law practitioner.<sup>2</sup>

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1. All opinions expressed in this article are solely those of its authors and should not be construed as opinions of Ice Miller LLP or any other person or entity.

2. Additional decisions that because of space constraints could not be addressed here, but that may nonetheless be of interest, include: *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743 (2010) (affirming Animal and Plant Health Inspection Service's (APHIS) decision to deregulate a genetically modified strain of alfalfa without completing a detailed environmental impact statement because respondents could not demonstrate irreparable harm); *Theodore Roosevelt Conservation Partnership v. Salazar*, 616 F.3d 497 (D.C. Cir. 2010) (NEPA); *Howmet Corp. v. EPA*, 614 F.3d 544 (D.C. Cir. 2010) (affirming summary judgment for EPA regarding RCRA violations by aerospace parts manufacturer); *Reckitt Benckiser Inc. v. EPA*, 613 F.3d 1131 (D.C. Cir. 2010) (reversing dismissal of suit challenging EPA's labeling of pesticide products as misbranded under FIFRA without commencing cancellation proceedings); *Habitat Education Center v. U.S. Forest Service*, 609 F.3d 897 (7th Cir. 2010) (NEPA); *General Electric Co. v. Jackson*, 610 F.3d 110 (D.C. Cir. 2010) (holding that EPA pattern and practice of administering CERCLA's unilateral administrative orders (UAOs) system did not violate Due Process clause; harm to stock price, brand value, and credit worthiness as a result of UAO was not a deprivation of property interest; and rejecting plaintiff's *Ex Parte Young* challenge to UAOs), *cert. denied*, 2011 WL 2175219 (June 6, 2011); *Muscarello v. Ogle County Board of Commissioners*, 610 F.3d 416 (7th Cir. 2010) (holding that county's approval of special use permits for the construction of windmills on adjacent property was not a "taking"; nuisance and trespass claims were not ripe for adjudication where none of the permitted windmills had yet been constructed); *Commuter Rail Division of the Regional Transportation Authority v. Surface Transportation Board*, 608 F.3d 24 (D.C. Cir. 2010) (NEPA); *American Trucking Assoc. v. EPA*, 600 F.3d 624 (D.C. Cir. 2010)

Continuing on the developments from the prior survey period, this year's survey period presented several key decisions. In Part I, we survey issues surrounding the Clean Air Act (CAA),<sup>3</sup> including decisions applying the statute of limitations, review of the U.S. Environmental Protection Agency's ("U.S. EPA") ambient air standards, and retroactive application of new U.S. EPA cap-and-trade rules. In Part II, we discuss federal cases involving the Resource Conservation and Recovery Act (RCRA) and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), including certification of a RCRA class action, dismissal of a RCRA open dumping claim, apportionment of liability under CERCLA to both parties, whether motor vehicles are "facilities" under CERCLA, and the interplay of corporate law and statutes of limitation for CERCLA claims. Part III examines cases involving water rights including two United States Supreme Court decisions. In Part IV, this Article considers recent environmental case law arising under state law, including a federal appellate court's review of attorneys' fees and costs under Indiana's Underground Storage Tank Act (USTA) and the state appellate court's reversal of summary judgment regarding the economic loss doctrine as applied to an environmental negligence claim. Finally, Part V examines recent opinions that may impact environmental insurance coverage cases under Indiana law.

#### I. DEVELOPMENTS IN CLEAN AIR ACT CASES

In Part I, we survey issues surrounding the CAA, including decisions applying the statute of limitations, review of U.S. EPA's ambient air standards, and retroactive application of new U.S. EPA cap-and-trade rules.

##### *A. Statute of Limitations Bars PSD Claim: Sierra Club v. Duke Energy Indiana, Inc.*

Sierra Club filed suit against Duke Energy Indiana, Inc. ("Duke") alleging Duke violated the Prevention of Significant Deterioration ("PSD") provisions of

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(holding that EPA's grant of preemption waiver for California's emission standards for in-use, non-road engines—specifically, diesel-powered refrigeration units—should be upheld; rule did not impose de facto national rule; and EPA adequately considered industry's costs of compliance); *North Carolina v. EPA*, 587 F.3d 422 (D.C. Cir. 2009) (finding that North Carolina lacked standing to challenge EPA's action removing part of Georgia from measurement of ozone while making local National Ambient Air Quality Standard (NAAQS) determination); *Burnett & Morand Partnership v. Estate of Lora L. Youngs*, No. 3:10-cv-3-RLY-WGH, 2010 WL 3703356 (S.D. Ind. Sept. 10, 2010) (allowing amended complaint under RCRA seeking injunctive relief); *In re Endangered Species Act Section 4 Deadline Litigation*, 716 F. Supp. 2d 1369 (U.S. J.P.M.L. 2010); *Pardue v. Perdue Farms Inc.*, 925 N.E.2d 482 (Ind. Ct. App. 2010) (affirming judgment in favor of turkey farmer because plaintiff horse breeder could not establish that turkey farmer's operation constituted a nuisance); *Cinergy Corp. v. St. Paul Surplus Lines Ins. Co.*, 915 N.E.2d 524 (Ind. Ct. App. 2010) (holding that excess liability insurers did not owe coverage to Cinergy based on prior court rulings that the evidence failed to show an occurrence during the policy periods).

3. 42 U.S.C. §§ 7401-7671 (2006 & Supp. 2009).

the CAA<sup>4</sup> at its Edwardsport generating station in Indiana by undertaking a series of maintenance projects without obtaining the necessary permits.<sup>5</sup> In order to prevent further deterioration of air quality, the PSD provisions of the CAA require that prior to a company making any “major modification” at a facility, that company must obtain a permit from the appropriate issuing governmental agency<sup>6</sup> to make sure the modification considers emission limits and controls to the extent compliant with “best available control technology” (BACT). Sierra Club sought both civil penalties as well as equitable relief. Duke argued that any civil penalty claim was time-barred by the statute of limitation and the equitable relief requested was barred by the concurrent remedy doctrine.<sup>7</sup>

Claims brought under the CAA are subject to the general federal five-year statute of limitation.<sup>8</sup> Duke argued that the PSD provisions were solely preconstruction requirements and therefore time-barred by the statute of limitations since construction at the facility took place more than five years before the suit was filed; Sierra Club claimed the violations were ongoing and therefore not time-barred.<sup>9</sup> While the question of whether PSD applies not just to construction but also to operations has not been directly answered by the Seventh Circuit, the court did find supporting decisions that have held that PSD violations are not continuing in nature, but rather accrue no later than the time at which construction is complete.<sup>10</sup> The court held that the violations of PSD provisions are discrete infractions governed by the five-year statute of limitation and are not continuing violations.<sup>11</sup> The PSD requirements are under a section of the CAA entitled “Preconstruction Requirements” and contain construction requirements, but they are silent as to the subsequent operation of the facility, and other sections of the CAA clearly establish operational conditions.<sup>12</sup> Sierra Club attempted to make the BACT analysis under PSD an ongoing compliance obligation, but the court disagreed here as well, finding that BACT is also a one-time obligation tied to the construction process.<sup>13</sup>

In regards to the claims for equitable relief, Duke argued that Sierra Club’s claims were barred by the concurrent remedy doctrine. In the Seventh Circuit, this doctrine states that where “the sole remedy is not in equity and an action at

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4. *Id.* §§ 7470-92.

5. *Sierra Club v. Duke Energy Ind., Inc.*, No. 1:08-cv-437-SEB-TAB, 2010 WL 3667002, at \*1 (S.D. Ind. Sept. 14, 2010).

6. While Indiana has now been granted authority to issue permits under PSD, at the time the projects subject to this litigation occurred, PSD approval had not been granted, and U.S. EPA was responsible for reviewing and issuing PSD permits.

7. *Id.* at \*4-5.

8. *Id.* at \*4 (citing 28 U.S.C. § 2462).

9. *Id.* at \*4-5.

10. *Id.* (citing *Sierra Club v. Franklin Cnty. Power of Ill., LLC*, 546 F.3d 918, 928 (7th Cir. 2008); *United States v. Midwest Generation, LLC*, 694 F. Supp. 2d 999, 1008 (N.D. Ill. 2010)).

11. *Id.* at \*9.

12. *Id.* at \*7-8.

13. *Id.* at \*9-10.

law can be brought on the same facts, the remedies are concurrent for purposes of the [concurrent remedy doctrine] even though more effective relief would be available in equity.”<sup>14</sup> The court held that in this case, because the Sierra Club’s claims for civil penalty are based on the same set of facts as the equitable relief, the claim for equitable relief is also barred by the concurrent remedy doctrine.<sup>15</sup> The court did acknowledge that a different result was found in *United States v. Cinergy Corp.*<sup>16</sup> and noted that it is well-established that the concurrent remedy doctrine does not apply to suits brought by the United States in its official enforcement capacity.<sup>17</sup> Sierra Club also made an attempt to challenge Duke’s compliance with its CAA Title V permit, but the court determined that Sierra Club failed to follow the administrative process of challenging the Title V permit when the permit was issued, and therefore, the claim was not ripe.<sup>18</sup>

*B. U.S. EPA’s Ambient Air Lead Standard Affirmed:  
Coalition of Battery Recyclers Ass’n v. EPA*

This case involved a challenge of the U.S. EPA’s revision of the primary and secondary National Ambient Air Quality Standards (NAAQS) for lead.<sup>19</sup> Under the CAA, U.S. EPA is responsible for setting emission standards for various pollutants to protect public health and welfare.<sup>20</sup> In 2004, U.S. EPA began to review the emission limits set for lead and concluded that there is no recognizable safe level of lead in children’s blood, warranting revision of the standards.<sup>21</sup> The Plaintiffs challenged U.S. EPA’s revision, arguing that it was overprotective and that there was not a sufficient record for the new standard; reliance on certain studies was arbitrary and capricious; and setting the level itself was arbitrary and capricious.<sup>22</sup> The court disagreed.

First, the court found the plaintiffs’ argument that the lead standard was overprotective because it focused on a “sensitive population” of young U.S. children rather than focusing only on the entire U.S. children population unpersuasive.<sup>23</sup> The scientific information on which U.S. EPA relied was sufficient to allow it to focus on revising the NAAQS to protect the subset of children likely to be exposed to airborne lead, and therefore, the revision was not arbitrary or capricious.<sup>24</sup> The Plaintiffs also challenged U.S. EPA’s reliance on

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14. *Id.* at \*9 (quoting *Nemkov v. O’Hare Chi. Corp.*, 592 F.2d 351, 355 (7th Cir. 1979)).

15. *Id.* at \*10.

16. 397 F. Supp. 2d 1025 (S.D. Ind. 2005).

17. *Duke Energy Ind., Inc.*, 2010 WL 3667002, at \*10 n.18.

18. *Id.* at \*11.

19. *Coal. of Battery Recyclers Ass’n v. Env’tl. Prot. Agency*, 604 F.3d 613 (D.C. Cir. 2010).

20. 42 U.S.C. §§ 7408-09 (2006).

21. *Coal. of Battery Recyclers Ass’n*, 604 F.3d at 616 (citing 40 C.F.R. § 50.12 (2010)).

22. *Id.* at 617.

23. *Id.* at 617-18.

24. *Id.* at 618-19.

IQ data rather than blood levels since IQ levels are more uncertain.<sup>25</sup> However, the court agreed with the record of scientific evidence presented by U.S. EPA to demonstrate that IQ levels were affected by lead exposure and met its obligation to protect the public health, including sensitive groups.<sup>26</sup> The plaintiffs further challenged the scientific studies relied upon by U.S. EPA in setting the new NAAQS, but the court again reviewed the record established by U.S. EPA and concluded that the agency had engaged in reasoned decisionmaking and should be permitted as the regulatory agency to “err on the side of caution by setting primary NAAQS that ‘allow[ ] an adequate margin of safety.’”<sup>27</sup>

*C. U.S. EPA Cannot Retroactively Enforce New Cap-and-Trade Rules:*  
*Arkema Inc. v. EPA*

In *Arkema Inc. v. EPA*,<sup>28</sup> the D.C. Circuit vacated part of a final rule promulgated by the U.S. EPA that allocated allowances for the production of ozone-depleting substances, hydrochlorofluorocarbons (HCFCs), under a cap-and-trade system pursuant to Title VI of the CAA.<sup>29</sup> Pursuant to the Final Rule, U.S. EPA had previously authorized companies to make permanent inter-pollutant trades of the substances, and it later approved a number of such trades by companies that included Arkema.<sup>30</sup> Subsequently, in the rule at issue in this case, U.S. EPA took the position that permanent inter-pollutant trades were never permissible, and it refused to give effect to prior trades by certain companies, including Arkema.<sup>31</sup> Arkema challenged U.S. EPA’s actions, arguing that the final rule was arbitrary and capricious and had an impermissibly retroactive effect as to its HCFC baseline allowances.<sup>32</sup> The court agreed with Arkema’s position and vacated the Final Rule insofar as it operated retroactively.<sup>33</sup> However, the court did state that the U.S. EPA could limit inter-pollutant trades to a single year and prohibit inter-pollutant baseline transfers.<sup>34</sup>

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25. *Id.* at 618.

26. *Id.* at 619.

27. *Id.* at 621 (quoting *Am. Trucking Ass’n v. EPA*, 283 F.3d 355, 369 (D.C. Cir. 2002)).

28. 618 F.3d 1 (D.C. Cir. 2010).

29. *Id.* at 3, 10 (citing 42 U.S.C. § 7671 (2006)). The rule, Protection of Stratospheric Ozone: Adjustments to the Allowance System for Controlling HCFC Production, Import, and Export, 40 C.F.R. § 82 (2009) (“Final Rule”), was promulgated pursuant to § 607 of the CAA, 42 U.S.C. § 7671f.

30. *Arkema Inc.*, 618 F.3d at 2-3.

31. *Id.* at 3-7.

32. *Id.* at 3-4.

33. *Id.* at 3, 10.

34. *Id.* at 10.

*D. Vague State Air Regulations Are Not Enforceable in a Private Suit:*

*McEvoy v. IEI Barge Services, Inc.*

The Seventh Circuit recently ruled in *McEvoy v. IEI Barge Services, Inc.*<sup>35</sup> that the citizen suit provision of the CAA<sup>36</sup> cannot be used to enforce state environmental regulations lacking objectively measurable metrics.<sup>37</sup> In that case, Charles McEvoy filed suit under the citizen-suit provision of the CAA against a neighboring company, IEI Barge Services, Inc., because coal dust from IEI's coal handling operations was drifting into his home. Other neighbors subsequently filed similar suits against IEI. The theory of recovery in all of these suits was that IEI's violation of two Illinois environmental regulations<sup>38</sup> provided plaintiffs with a remedy under the CAA.<sup>39</sup>

The Seventh Circuit, however, found that McEvoy and the other neighbors' claims fell outside the scope of the CAA. In reaching this conclusion, the court explained that the citizen-suit provision of the CAA only permits a private action against a person who is alleged to have violated an "emission standard or limitation" under the CAA.<sup>40</sup> The court further noted that to be enforceable under the CAA, the Illinois regulations at issue had to qualify as either an "emission limitation, standard of performance or emission standard,"<sup>41</sup> or "any other standard, limitation, or schedule established under any permit issued pursuant to . . . [another section of the Act] or under any applicable State implementation plan."<sup>42</sup> The Seventh Circuit found that neither Illinois regulation met this requirement. In reaching this conclusion, the court explained that the first regulation the plaintiffs sought to enforce (entitled "Prohibition of Air Pollution") was little more than a statement that "thou shall not pollute."<sup>43</sup> The court concluded that the broad statement did not qualify as a standard or limitation enforceable under the CAA but was merely a statement of principle prohibiting air pollution.<sup>44</sup> The second regulation, the "fugitive particulate matter" regulation,<sup>45</sup> contained more specifics than the general prohibition, but it fell far short of other highly specific standards contained in Illinois's regulations.<sup>46</sup> In particular, the court noted that other Illinois regulations contained specific metrics subject to objective measurement which were not found in the fugitive particulate

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35. 622 F.3d 671 (7th Cir. 2010).

36. 42 U.S.C. § 7604(a) (2006).

37. *McEvoy*, 622 F.3d at 677-80.

38. ILL. ADMIN. CODE tit. 35, §§ 201.141, -.301 (2011).

39. *McEvoy*, 622 F.3d at 672-74.

40. *Id.* at 674-75 (citing 42 U.S.C. § 7604(a)(1)).

41. *Id.* at 674 (quoting 42 U.S.C. § 7604(a)(1)).

42. *Id.* (quoting 42 U.S.C. § 7604(f)(4)).

43. *Id.* at 678 (citing ILL. ADMIN. CODE tit. 35, § 201.141).

44. *Id.*

45. ILL. ADMIN. CODE tit. 35, § 212.301.

46. *McEvoy*, 622 F.3d at 678-80.

matter regulation.<sup>47</sup> Furthermore, because there was no guidance or definitions to guide a court in interpreting the fugitive particulate matter regulation, the court concluded that the regulation was not specific enough for judicial enforcement and therefore could not be enforced through the CAA.<sup>48</sup>

## II. DEVELOPMENTS IN FEDERAL REGULATION OF RCRA AND CERCLA

This year, several key opinions were rendered involving RCRA and CERCLA. The Southern District of Indiana certified a RCRA class action matter, dismissed a RCRA open dumping claim, and found that administratively dissolved corporations could not avoid CERCLA liability. The Northern District of Indiana issued opinions determining that liability under CERCLA applied to both parties involved in a suit and held that motor vehicles are not “facilities” under CERCLA.

### *A. Class Action Certified Based on Anticipated Geographic Boundaries of Solvent Plume: Stoll v. Kraft Foods Global, Inc.*

In *Stoll v. Kraft Foods Global, Inc.*, one hundred families (“Residents”) petitioned for class certification regarding environmental issues following releases of trichloroethene (TCE) and tetrachloroethene (PCE) from a facility in Attica, Indiana operated by Kraft’s predecessors—first, P.R. Mallory & Co (“Mallory”), and later Radio Materials Corp. (RMC)—from 1957 until 1978.<sup>49</sup> Residents’ proposed class consisted of “all persons and non-governmental entities that own residential property or reside on property located within specified geographic boundaries in Attica.”<sup>50</sup> In this opinion, Judge Pratt certified the class, reserving reevaluation of the class, if necessary, based on future developments in the record.<sup>51</sup>

The defendants opposed the class certification by (1) objecting to Residents’ evidence of contamination supporting the proposed class definition; (2) objecting to Residents’ use of “geographic boundaries” for the class; and (3) arguing that the representatives were not “adequate representatives” for the class.<sup>52</sup> As indicated above, none of these arguments were sufficient to defeat Residents’ motion.

As to the evidence supporting class certification, the court found that debates regarding expert testimony evidence should not be entertained at the class certification stage.<sup>53</sup> The court would not “jump the gun and assess the parties’

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47. *Id.* at 679.

48. *Id.* at 679-80.

49. *Stoll v. Kraft Foods Global, Inc.*, No. 1:09-CV-0364-TWP-DML, 2010 WL 3613828, at \*1 (S.D. Ind. Sept. 6, 2010).

50. *Id.*

51. *Id.* at \*2.

52. *Id.* at \*2-3.

53. *Id.* at \*3.

estimations from the sampling data.”<sup>54</sup> The court refused what it viewed as Kraft’s “invit[ation] . . . to weigh the credibility of the parties’ experts and evidence.”<sup>55</sup> The court noted that the class definition was made based on Kraft’s own expert’s identification of the “potentially problematic” area. Finally, prior to the determination of the class, Kraft had offered to install vapor mitigation systems in homes occupied by class members. While Kraft argued that it made the offer “merely [as] a proactive, preventative measure” and that the offer should not be considered relevant to class certification.<sup>56</sup> Nevertheless, the court found Kraft’s willingness to install these systems “suggests the possibility that . . . [Residents] have correctly circumscribed the geographic boundaries.”<sup>57</sup>

Second, the court did not agree that the class needed to be defined in terms of environmental impact rather than geographic scope. Kraft argued that defining the class by geographic terms, rather than environmental impact, failed to link the class to “actual or threatened contamination of property.”<sup>58</sup> The court disagreed and found that the proposed class was “reasonable, closely tied to geographic boundaries, and based on . . . [Kraft’s] alleged conduct.”<sup>59</sup> The court tried to balance the Seventh Circuit’s admonition that it should “not accept . . . [Residents’] allegations and statements in lockstep”<sup>60</sup> with Supreme Court precedent that courts do not have “license to weigh evidence and determine merits at the class certification stage.”<sup>61</sup>

Third, Kraft argued that Residents failed to show that the proposed class had adequate representation. Kraft argued that the difference in circumstances between homeowners, landlord owners, and renters meant that each group would be required to prove a separate set of damages. Kraft suggested that the divergent interests would result in irreconcilable conflicts and inadequate representation.<sup>62</sup> The court disagreed. The court found that all Residents shared an aligned interest in holding Kraft liable for the contamination.<sup>63</sup> In addition, even if there were differences in the anticipated damages, the court believed an “individualized assessment of damages” would be necessary.<sup>64</sup> Thus, “the existence of administrative hiccups related to calculating damages . . . [did] not establish that Plaintiffs have interests antagonistic to or in conflict with other [c]lass members.”<sup>65</sup>

It is worthwhile to note that the court specifically cited case law permitting

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54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* at \*4.

59. *Id.*

60. *Id.* (citing *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 676 (7th Cir. 2011)).

61. *Id.* (citing *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974)).

62. *Id.* at \*6.

63. *Id.* at \*7.

64. *Id.*

65. *Id.*

a district court to revisit its class certification decision at a later time, before final judgment is rendered.<sup>66</sup> Therefore, the court indicated that Kraft could raise future developing issues with class certification after such issues were ripe. For all of these reasons, the court certified the class under Federal Rule of Civil Procedure 23.

Simultaneous with her certification of the class action, the court denied Kraft's motion to dismiss or stay the case.<sup>67</sup> Kraft argued that it was entitled to relief from Residents' complaint because Kraft was currently working with U.S. EPA to complete investigative and remedial activities at the site. In March 2009, Residents filed their complaint asserting five legal theories: (1) negligence, (2) private nuisance, (3) trespass, (4) willful and wanton misconduct, and (5) a claim under RCRA.<sup>68</sup> Kraft argued that the court should abstain from deciding the case while the U.S. EPA rendered its decisions regarding the clean-up, or alternatively, that Residents' complaint: (a) failed to properly plead a RCRA claim, (b) was moot as to its claims for injunctive relief, and (c) Residents' common law claims were preempted by Residents' RCRA claim.<sup>69</sup>

As discussed above, the site had been subject to investigation for several years, and in 1999, U.S. EPA issued an order compelling RMC to investigate the site.<sup>70</sup> Kraft was not a party to that order, but in 2002, Kraft agreed to provide RMC with "financial and implementation assistance" regarding the Attica, Indiana site.<sup>71</sup> Among other activities, Kraft hired a consulting firm, CRA, to investigate and remediate the site.<sup>72</sup> This work included investigation of the site to delineate groundwater impacts, excavation of impacted soils, injection of treatments into soils, and installation of soil vapor extraction systems.<sup>73</sup> Thereafter, Kraft formally notified Residents regarding the contamination and agreed to install vapor mitigation systems in 125 homes.<sup>74</sup> At the time of the order, Kraft had submitted a corrective measures work plan, U.S. EPA had commented on that plan, and Kraft was responding to those comments.<sup>75</sup>

First, the court rejected Kraft's arguments that the court should abstain from considering the civil complaint until after the U.S. EPA determined its investigative and remedial actions were substantially complete.<sup>76</sup> Kraft argued that under the doctrine of primary jurisdiction, the court should abstain from

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66. *Id.* (citing *Alliance to End Repression v. Rochford*, 565 F.2d 975, 977 (7th Cir. 1977)).

67. *Stoll v. Kraft Foods Global, Inc.*, No. 1:09-cv-0364-TWP-DML, 2010 WL 3702359 (S.D. Ind. Sept. 6, 2010).

68. *Stoll*, 2010 WL 3613828, at \*4.

69. *Stoll*, 2010 WL 3702359, at \*1.

70. *Id.* at \*2.

71. *Id.*

72. *Id.* at \*3.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.* at \*5.

“second-guessing U.S. EPA’s decisions” during the administrative process.<sup>77</sup> The court considered the factors established by the Seventh Circuit for considering whether to abstain. Specifically, a court weighs: (1) whether the decision is one outside the “conventional experience of judges”; (2) whether permitting the case to proceed could result in conflicting orders; (3) whether agency proceedings have been initiated; (4) whether the agency has demonstrated diligence or if the issue has languished; and (5) whether the court can provide the type of relief requested by the plaintiff.<sup>78</sup> The court found that these factors supported a finding that Residents’ suit should proceed. First, while courts do not “confront esoteric environmental issues on a daily basis,” Congress had expressly authorized private lawsuits under RCRA; thus, if the court were to apply the primary jurisdiction doctrine to a private right of action authorized under RCRA, it would “amount to an abdication of Congressionally-vested responsibility.”<sup>79</sup> Second, the court noted that while Kraft had been participating in the process through its agreement with RMC, it was not a party to, or necessarily bound by, the 1999 U.S. EPA order.<sup>80</sup> Even if Kraft was a party to the agreement, the court found that by “listening to any [U.S. EPA] proposed orders, the [c]ourt is confident that it can fashion a non-conflicting remedy.”<sup>81</sup> Third, while Kraft argued the fact that U.S. EPA proceedings at the site were ongoing, the court again noted that Kraft was not an actual party to the U.S. EPA order and technically, no proceedings were ongoing against Kraft.<sup>82</sup> Fourth, while the U.S. EPA order was issued eleven years prior, “final corrective measures have yet to be developed, let alone effectuated.”<sup>83</sup> Finally, based on Congress’s directive in support of private suits under RCRA, the court was confident that it could fashion a non-conflicting order.<sup>84</sup> For all of these reasons, the court found that the primary jurisdiction argument did not apply to this case.

Kraft also argued that because remediation was incomplete, “damages cannot be calculated with sufficient certainty,” and therefore, the dispute was not ripe for adjudication.<sup>85</sup> But the court found this argument premature at the pleading stage. Distinguishing *Allgood v. General Motors Corp.*,<sup>86</sup> the court concluded that a motion to dismiss could not sufficiently evaluate the merits of Residents’ damages claims.<sup>87</sup>

The court next rejected Kraft’s argument that Residents had failed to demonstrate an imminent and substantial endangerment. Kraft argued that its

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77. *Id.*

78. *Id.* at \*5-6 (citing *Wilson v. Amoco Corp.*, 989 F. Supp. 1159, 1169 (D. Wyo. 1998)).

79. *Id.* at \*6.

80. *Id.* at \*7.

81. *Id.*

82. *Id.* at \*8.

83. *Id.*

84. *Id.*

85. *Id.*

86. No. 1:02-cv-1077-DFH-TAB, 2006 WL 2669337 (S.D. Ind. Sept. 18, 2006).

87. *Stoll*, 2010 WL 3702359, at \*9.

involvement with U.S. EPA removed any “imminent and substantial danger” because the remediation was ongoing.<sup>88</sup> The court disagreed because the complaint alleged an imminent and substantial harm, and the cases cited by Kraft either were not decided at the pleadings stage or involved sites over which remediation had been entirely completed.<sup>89</sup>

Next, Kraft argued that Residents’ request for injunctive relief was moot because “[t]here is no injunctive relief available . . . that is not already being required by U.S. EPA.”<sup>90</sup> Again, the court rejected this argument because Kraft was not a direct party to the U.S. EPA order, the work plan was not finalized, and the cases cited by Kraft were decided at the summary judgment stage.<sup>91</sup> The court found that this case was better governed by those cases where a remedial plan was still being developed, and it denied the motion to dismiss for that reason.<sup>92</sup>

Finally, Kraft’s argument that Residents’ common law claims were preempted by RCRA was also rejected.<sup>93</sup> The court again noted that Kraft was not technically a party to the U.S. EPA order. Furthermore, Kraft’s cited case involved an U.S. EPA order under 42 U.S.C. § 6973 (which precludes private citizen-suits), whereas the U.S. EPA order regarding the site was issued under 42 U.S.C. § 6928(h), which does not serve as a bar to citizen-suits.<sup>94</sup> Finally, RCRA’s statutory language does not support this conclusion; rather, it states: “Nothing in this section shall restrict any right which any person . . . may have under . . . *common law*. . . .”<sup>95</sup> For these reasons, the court concluded that “Congress sought to preserve state common law actions under § 6972.” For all of these reasons, the court rejected Kraft’s motion to dismiss, and Residents’ suit was permitted to proceed.<sup>96</sup>

*B. RCRA Open Dumping Claim Requires Current Activity by Defendants:*  
*Mervis Industries, Inc. v. PPG Industries, Inc.*

From 1895 until approximately 1931, PPG Industries, Inc. (“PPG”) operated glassmaking operations in Kokomo, Indiana.<sup>97</sup> While PPG still owns part of that facility, two properties were later acquired by Mervis Industries, Inc. (“Mervis”). Between 1991 and 2007, Mervis operated an auto shredding and scrap metal yard

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88. *Id.* at \*10.

89. *Id.*

90. *Id.* (citation omitted).

91. *Id.* at \*10-11.

92. *Id.* at \*11 (citing *Morris v. Primetime Stores of Kansas, Inc.*, No. 95-1328-JTM, 1996 WL 563845, \*3-4 (D. Kan. Sept. 5, 1996); *Lambrinos v. Exxon Mobil Corp.*, No. 1:00-CV-1734, 2004 WL 2202760, \*2, 6-7 (N.D.N.Y. Sept. 29, 2004)).

93. *Id.* at \*11-12 (citing *Feikema v. Texaco, Inc.*, 16 F.3d 1408 (4th Cir. 1994)).

94. *Id.* at \*12.

95. *Id.* (citing 42 U.S.C. § 6972(f) (2006)).

96. *Id.*

97. *Mervis Indus., Inc. v. PPG Indus., Inc.*, No. 1:09-cv-633-SEB-JMS, 2010 WL 1381671, at \*1 (S.D. Ind. Mar. 30, 2010).

at one property and a warehouse, steel fabrication operation, and electronic equipment exchange operation at the other property. Mervis sold its two properties but continued to have contractual obligations concerning contamination of its properties.<sup>98</sup>

Mervis sued PPG under various theories, including a RCRA open dumping claim, violations of the Clean Water Act (CWA), private nuisance, and other claims pursuant to RCRA, CERCLA, and Indiana's Environmental Legal Actions statute (ELA).<sup>99</sup> PPG counterclaimed under Sections 107(a) and 113(f) of CERCLA.<sup>100</sup> Mervis alleged that PPG's historic glassmaking operations caused arsenic contamination; PPG countered that Mervis's operations caused contamination of various metals and volatile organic compounds (VOCs).

In its order, the court addressed dueling motions to dismiss filed by both parties. PPG alleged that Mervis's open dumping, CWA, and nuisance claims must be dismissed.<sup>101</sup> Mervis countered by alleging that PPG's CERCLA counterclaims did not state a recognizable claim.<sup>102</sup>

RCRA prohibits "any solid waste management practice or disposal of solid waste or hazardous waste which constitutes the open dumping of solid waste or hazardous waste."<sup>103</sup> The act explicitly limits this prohibition to "persons engaged in the act of dumping;"<sup>104</sup> therefore, in order to sustain a claim under this section, a party must allege that the defendant was engaged in the act of open dumping "at the time of filing."<sup>105</sup>

PPG argued that Mervis's claim was barred because it did not allege current conduct.<sup>106</sup> Mervis countered that because unremediated waste continued to leach and migrate on the property, an open dumping claim could be sustained.<sup>107</sup> Relying on Second Circuit authority, the district court determined that "the mere presence of pollutants is not sufficient to allege an ongoing violation of the open dumping prohibition."<sup>108</sup> The court also rejected Mervis's argument that PPG's movement of soils (allegedly containing contaminants) also constituted introduction of contaminants for purposes of RCRA.<sup>109</sup> For these reasons, Mervis's open dumping claim was dismissed.<sup>110</sup>

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98. *Id.*

99. *Id.*

100. 42 U.S.C. §§ 9607(a) (response costs); *id.* § 9613(f)(1) (contribution).

101. During the briefing, Mervis abandoned its private nuisance claims. For this reason, the court dismissed that count without discussion. *Mervis Indus., Inc.*, 2010 WL 1381671, at \*5.

102. *Id.* at \*2.

103. 42 U.S.C. § 6945(a).

104. *Id.*

105. *Mervis Indus., Inc.*, 2010 WL 1381671, at \*3 (quoting *S. Rd. Assocs. v. Int'l Bus. Machs. Corp.*, 216 F.3d 251 (2d Cir. 2000)).

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

The court also dismissed Mervis's claims for violation of the CWA.<sup>111</sup> Under the CWA, a party may be held liable for discharge of a pollutant made from a "point source."<sup>112</sup> A point source must be a "discernible, confined and discrete conveyance."<sup>113</sup> Mervis argued that PPG's landfill of construction materials on the properties constituted a "point source."<sup>114</sup> The court disagreed, finding that this "general statement that contaminants are now migrating or leaching . . . was not sufficient to state a claim under the CWA."<sup>115</sup>

Mervis moved to dismiss PPG's CERCLA § 107(a) counterclaim because Mervis did not own the two properties at issue at the time PPG disposed of the arsenic, and it argued that any response costs related to the arsenic were solely attributable to PPG.<sup>116</sup> This argument was rejected, as the court noted that PPG alleged that other hazardous substances—that is, metals and VOCs—had been released by Mervis at the properties. Mervis's argument that PPG could not pursue a § 107(a) claim because it was a potentially responsible party (PRP) was summarily rejected.<sup>117</sup>

Finally Mervis argued that PPG's CERCLA § 113(f)(1) counterclaim must be dismissed because PPG had not been sued under § 106 or 107(a).<sup>118</sup> However, Mervis's suit included a CERCLA § 107(a) claim, and on that basis, the district court permitted PPG's counterclaim under § 113.<sup>119</sup>

*C. Both the Plaintiff and Defendants Are Liable Under CERCLA and the ELA: City of Gary v. Shafer*

At the resolution of liability in *City of Gary v. Shafer*, the United States District Court for the Northern District of Indiana decreed that several defendants and the plaintiff, the City of Gary ("the City"), were liable for contamination at a former auto salvage site.<sup>120</sup> The site at the center of the suit was contaminated with lead, and the City filed suit against prior owners under CERCLA and ELA. The prior owners, Paul Shafer ("Shafer") and his company, Paul's Auto Yard,

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111. *Id.* at \*4 (citing 33 U.S.C. § 1311(a) (2006)).

112. *Id.* (citing 33 U.S.C. § 1362(12)).

113. 33 U.S.C. § 1362(14).

114. *Mervis Indus., Inc.*, 2010 WL 1381671, at \*4.

115. *Id.*

116. *Id.* at \*5.

117. *Id.* at \*6 (citing *United States v. Atl. Research Corp.*, 551 U.S. 128, 131 (2007)).

118. Although the court's opinion is silent, it appears that Mervis was attempting to distinguish between the type of contaminant at issue. Because Mervis had only sued PPG on the basis of arsenic, it appears that Mervis was arguing that its § 107(a) claim could not create the basis for PPG's § 113(f)(1) counterclaim. Nevertheless, if this distinction was Mervis's argument, the court found it unpersuasive.

119. *Id.* (citing *Atl. Research Corp.*, 551 U.S. at 140 (noting that if a PRP sought to impose joint and several liability on another PRP, a "defendant PRP in such a 107(a) suit could blunt any inequitable distribution of costs by filing a § 113(f) counterclaim.")).

120. 683 F. Supp. 2d 836, 864-65 (N.D. Ind. 2010).

Inc., filed counterclaims against the City and a subsequent owner, Waste Management.<sup>121</sup> Prior to Shafer's ownership, his father had operated an auto salvage business for thirty years. Shafer continued the auto salvage business for another eleven years before selling the property to Waste Management.<sup>122</sup> For two years after the sale of the property, Paul's Auto Yard wound up the business and removed the inventory of the salvage business from the site.<sup>123</sup> The City unsuccessfully argued that the lead contamination at the site was caused by leaking or damaged batteries at the salvage yard. The court focused instead on the movement of contaminated soil.<sup>124</sup>

When Paul's Auto Yard cleaned up the site, dirt was moved as well. Even though the court found that the amount was *de minimis*, this was enough to be a "disposal" of hazardous materials and trigger liability under CERCLA because it "exacerbate[d] a pre-existing contamination on the property."<sup>125</sup> Knowledge of the contamination or the amount of soil moved was irrelevant for CERCLA liability, and the court therefore declared judgment on the issue of CERCLA liability against Paul's Auto Yard, but not Shafer as an individual, based on the company's minimal movement of contaminated soil when removing piles of tires.<sup>126</sup> This same activity also made Paul's Auto Yard liable under the ELA.<sup>127</sup> Paul's Auto Yard and Shafer attempted to prove CERCLA's innocent landowner defense; however, they were unable to show that the sole cause of the contamination was from another party (the City) or to demonstrate that they exercised due care concerning the lead contamination because they failed to investigate or remove hazardous substances likely released by Shafer's predecessor.<sup>128</sup>

Paul's Auto Yard was not the only party found liable for the contamination; the court found that Waste Management and the City also contributed to the contamination.<sup>129</sup> Waste Management's liability stemmed from a similar activity as Paul's Auto Yard—the company had also moved contaminated soil around the property while removing auto parts and grading soil.<sup>130</sup>

The City's liability under CERCLA and the ELA was tied to its operation of a municipal landfill adjacent to Paul's Auto Yard. The City "disposed" or "released" hazardous materials into the landfill, and lead-contaminated run-off traveled from the landfill onto the subject property.<sup>131</sup> The court also found that

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121. *Id.* at 840, 844.

122. *Id.* at 848.

123. *Id.* at 842-43.

124. *Id.* at 846-48, 855-56.

125. *Id.* at 853 (citing *Alcan-Toyo Am., Inc. v. N. Ill. Gas. Co.*, 881 F. Supp. 342, 346 (N.D. Ill. 1995)).

126. *Id.* at 857-58.

127. *See* IND. CODE §§ 13-30-9-1 to -8 (2011).

128. *Shafer*, 683 F. Supp. 2d at 858-60.

129. *Id.* at 860-62.

130. *Id.* at 849, 863-64.

131. *Id.* at 849-51, 861-62.

Paul's Auto Yard had incurred costs, as required to seek contribution from the City under CERCLA.<sup>132</sup> Though the Seventh Circuit had not addressed the issue, the court reasoned that the declaratory judgment entered against Paul's Auto Yard meant that it would incur costs in the future.<sup>133</sup> The court entered declaratory judgment against the City on Paul's Auto Yard's claims brought under CERCLA and the ELA even though the defendants had not sought this type of relief.<sup>134</sup> The allocation of response costs and shares of liability will be handled at a separate proceeding.<sup>135</sup>

*D. Motor Vehicles Are Not "Facilities" Under CERCLA:*  
*Emergency Services Billing Corp. v. Allstate Insurance Co.*

In *Emergency Services Billing Corp. v. Allstate Insurance Co.*, the United States District Court for the Northern District of Indiana rejected the plaintiff's argument that motor vehicles are facilities under the meaning of CERCLA.<sup>136</sup> The plaintiff, Emergency Services Billing Corporation ("ESBC"), acted as the billing agent for a fire department that responded to several car accidents. These car accidents had the potential to release hazardous materials into the air, and the fire department's billing agents sent invoices for these removal services to the automobile owners and their insurers.<sup>137</sup> When the invoices remained unpaid, ESBC sought a declaratory judgment that it could recover amounts owed by the defendant insurance company pursuant to CERCLA.<sup>138</sup>

After the defendants moved for judgment on the pleadings, the district court evaluated whether the motor vehicles in the accidents could be considered a "facility" under CERCLA, which was a required element of the plaintiff's private cost recovery action.<sup>139</sup>

The court examined several definitions in determining whether the motor vehicles met the definition of "facility." The court noted that no court had "squarely addressed" this issue.<sup>140</sup> "Facility" is defined broadly under CERCLA,

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132. *Id.* at 860-61 (citing 42 U.S.C. 9613(f) (2006)).

133. *Id.* at 861 (quoting *Basic Management, Inc. v. United States*, 569 F. Supp. 2d 1106, 1120 (D. Nev. 2008)).

134. *Id.* at 862. The court had the authority to enter declaratory judgment under the Declaratory Judgment Act, 28 U.S.C. § 2201, and nothing in CERCLA's contribution framework precluded that remedy. *Id.* at 861-62 (citing *Appleton Papers, Inc. v. George A. Whiting Paper Co.*, 572 F. Supp. 2d 1034, 1046 (E.D. Wis. 2008)).

135. *Id.* at 864.

136. *Emergency Servs. Billing Corp. v. Allstate Ins. Co.*, No. 4:09-cv-45-RL-APR, 2010 U.S. Dist. LEXIS 26327, at \*2 (N.D. Ind. Mar. 19, 2010).

137. *Id.* at \*2-3.

138. *Id.* at \*2.

139. *Id.* at \*8-9 (citing *Env'tl. Transp. Sys., Inc. v. ENSCO, Inc.*, 969 F.2d 503, 506 (7th Cir. 1992) (listing elements plaintiff must establish for a private cost recovery action under CERCLA)).

140. *Id.* at \*12 (citing William B. Johnson, Annotation, *What Constitutes "Facility" Within Meaning of § 101(9) of the Comprehensive Environmental Response, Compensation, and Liability*

and it includes “motor vehicle” but excludes “any consumer product in consumer use.”<sup>141</sup> Due to the fact that “consumer product” is not defined in CERCLA, the court looked to *Amcast Industrial Corp. v. Detrex Corp.*,<sup>142</sup> in which the Seventh Circuit Court of Appeals stated that the consumer products exception applied only to facilities that are in and of themselves consumer products, “not for consumer products contained in facilities.”<sup>143</sup> As a result, the trial court applied a two-part test: “(1) whether the object from which the leak/spill emanates is a facility defined by the statu[t]e; and (2) whether the object from which the leak/spill emanates is a ‘consumer product in consumer use.’”<sup>144</sup> The court focused on the second step, looking at definitions from *Black’s Law Dictionary*,<sup>145</sup> the Magnuson-Moss Warranty Act,<sup>146</sup> and the Consumer Product Safety Act.<sup>147</sup> *Black’s Law Dictionary* cited the definition from the Magnuson-Moss Warranty Act, which defined consumer product in part as “any tangible personal property which is distributed in commerce and which is normally used for personal, family, or household purposes.”<sup>148</sup> The court determined that the vehicles in the accidents met this definition because they were personal property used for personal purposes.<sup>149</sup> The court rejected the definition by the plaintiff because the definition excluded motor vehicles,<sup>150</sup> and a finding that motor vehicles could never be consumer products under CERCLA “defies the plain language of CERCLA.”<sup>151</sup> The purpose of the consumer products exception in CERCLA was intended to guard consumers from the “strict liability under CERCLA for a ‘release’ from a product in consumer use.”<sup>152</sup> Interestingly, the U.S. EPA had adopted a rule regarding the meaning of “consumer product” that referred to the definition within the Consumer Product Safety Act, but did not include the motor vehicle exception or other exceptions to the definition found

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*Act (CERCLA) (42 U.S.C. § 9601(9))*, 147 A.L.R. FED. 469 (1998)).

141. 42 U.S.C. § 9601(9) (2006).

142. *Emergency Servs. Billing Corp.*, 2010 U.S. Dist. LEXIS 26327, at \*10-11 (citing *Amcast Indus. Corp. v. Detrex Corp.*, 2 F. 3d 746, 750 (7th Cir. 1993)).

143. *Id.* at \*11 (quoting *Amcast Indus. Corp.*, 2 F.3d at 750).

144. *Id.* (citing *Amcast Indus. Corp.*, 2 F.3d at 746).

145. BLACK’S LAW DICTIONARY 359 (9th ed. 2009).

146. 15 U.S.C. § 2301(1).

147. *Id.* § 2052(a)(5).

148. *Emergency Servs. Billing Corp.*, 2010 U.S. Dist. LEXIS 26327, at \*15 (quoting 15 U.S.C. § 2301(1)).

149. *Id.* at \*17-18.

150. The definition offered by the plaintiffs for “consumer product” is found in the Consumer Product Safety Act, 15 U.S.C. § 2052(a)(5). This definition excludes motor vehicles. *Id.* § 2052(a)(5)(C).

151. *Emergency Servs. Billing Corp.*, 2010 U.S. Dist. LEXIS 26327, at \*17.

152. *Id.* at \*19-20 (citing Lewis Barr, *CERCLA Made Simple: An Analysis of the Cases Under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980*, 45 BUS. LAW. 923, 961-62 (1990)). The court also examined the legislative history of CERCLA. *Id.* at \*20-21.

within that act.<sup>153</sup> At the end of its analysis, the court stated: “‘consumer product in consumer use’ refers to its ordinary meaning, which includes the private passenger motor vehicles specifically at issue in this case being used for personal purposes.”<sup>154</sup> The court later denied ESBC’s motion for reconsideration, standing by its reasoning in this opinion.<sup>155</sup>

*E. Applying Statutes of Limitation to Administratively Dissolved Companies and Addressing an “Open Question” from United States v. Atlantic Research Corp.: Bernstein v. Bankert*

In *Bernstein v. Bankert*, the United States District Court for the Southern District of Indiana ruled that an administratively dissolved company’s insurers could not use the two-year protection within the Indiana Business Corporations Law (IBCL) to bar a suit to recover response costs brought by trustees of a trust fund for a Superfund site.<sup>156</sup> The defendant company, Enviro-Chem, was administratively dissolved on December 31, 1987, and the plaintiffs filed suit over twenty years later on April 1, 2008.<sup>157</sup> Contamination at the Third Site Trust Fund (“Third Site”) at issue in this case was linked to activities of defendant Enviro-Chem, and U.S. EPA filed a cost recovery action against Enviro-Chem for costs expended for clean-up near the Third Site in 1983.<sup>158</sup> U.S. EPA issued an administrative order for the Third Site on March 22, 1996. Even though over a decade passed after the first U.S. EPA order before suit was filed, that fact was not sufficient for Indiana’s corporate laws to protect Enviro-Chem.<sup>159</sup> The court reasoned that the two-year statute of limitation protection was afforded to voluntarily dissolved corporations, not administratively dissolved corporations “because no notice of its dissolution was given to its creditors.”<sup>160</sup> An administratively dissolved corporation formed under the IBCL is not permitted to carry on business, but it is permitted to conduct business “necessary to wind up and liquidate its business and affairs . . . and notify claimants.”<sup>161</sup> The court examined (and quoted at length from) *United States v. SCA Services of Indiana, Inc.*, which also involved an administratively dissolved corporation that unsuccessfully tried to assert that the plaintiff’s case was time-barred.<sup>162</sup> The court in *SCA Services* reasoned, “It would defy simple logic for this court to hold

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153. *Id.* at \*22 (citing Superfund, Emergency Planning, & Community Right-to-Know Programs, 40 C.F.R. § 302.3 (2011)).

154. *Id.* at \*24.

155. *Emergency Servs. Billing Corp. v. Allstate Ins. Co.*, No. 4:09-cv-45-RL-APR, 2010 U.S. Dist. LEXIS 47673 (N.D. Ind. May 14, 2010).

156. 698 F. Supp. 2d 1042, 1052-53 (S.D. Ind. 2010).

157. *Id.* at 1048, 1050.

158. *Id.* at 1046, 1048-49.

159. *Id.* at 1053.

160. *Id.* at 1052.

161. *Id.* (citing IND. CODE § 23-1-46-2(c) (2011)).

162. 837 F. Supp. 946, 953 (N.D. Ind. 1993).

that . . . [the defendant], a corporation which can still be sued by its general business creditors, cannot be sued by a creditor proceeding under the federal CERCLA statute.”<sup>163</sup> The court in *Bankert* agreed with this reasoning and distinguished this case from those involving voluntarily dissolved corporations.<sup>164</sup>

Several months later, the non-insurer defendants in *Bankert* received a favorable ruling on a summary judgment motion based on the statute of limitation within CERCLA.<sup>165</sup> A plaintiff has three years after the date of an administrative order or entry of a settlement to bring a contribution claim under § 113 of CERCLA.<sup>166</sup> A cost recovery action brought pursuant to § 107<sup>167</sup> has a longer statute of limitation period, depending on the nature of the activity for which the plaintiff is seeking recovery.<sup>168</sup> After examining *Cooper Industries, Inc. v. Aviall Services, Inc.*<sup>169</sup> and *United States v. Atlantic Research Corp.*,<sup>170</sup> the court determined that the plaintiffs did not “voluntarily” clean up the site because the work at the site was done under two separate consent orders issued by U.S. EPA.<sup>171</sup> This meant that contribution claims were the plaintiffs’ available remedy under CERCLA.<sup>172</sup>

The court then evaluated how to handle the “open question” from *Atlantic Research*—namely, how to treat plaintiffs who neither incur costs voluntarily nor reimburse the costs of another party.<sup>173</sup> The court looked to a recent opinion from another circuit, *Agere Systems, Inc. v. Advanced Environmental Technology Corp.*,<sup>174</sup> for analysis on this same issue. The court in *Agere Systems* studied additional language within *Atlantic Research* where the Supreme Court reasoned that a defendant in a § 107 cost recovery suit could “blunt any inequitable distribution of costs by filing a § 113(f) counterclaim.”<sup>175</sup> However, in *Agere Systems*, the plaintiffs had settled their liability with the U.S. EPA, and therefore,

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163. *Bankert*, 698 F. Supp. 2d at 1052-53 (citing *SCA Servs.*, 837 F. Supp. at 953).

164. *Id.* at 1053.

165. *Bernstein v. Bankert*, No. 1:08-cv-0427-RLY-DML, 2010 WL 3893121 (S.D. Ind. Sept. 29, 2010).

166. 42 U.S.C. § 9613(g)(3)(B) (2006). The same limitations period applies if a contribution claim is brought after “the date of judgment in any action under this Act for recovery of such costs or damages.” *Id.* § 9613(g)(3)(A).

167. *Id.* § 9607.

168. A plaintiff has three years to bring a suit to recover costs for a removal action or six years to bring a suit to recover remedial action costs. *Id.* § 9613(g)(2). Remedial action is a “permanent remedy,” whereas a removal action addresses the immediate threats to the environment because of a release or threat of release of hazardous substances. *Id.* § 9606.

169. 543 U.S. 157 (2004).

170. 551 U.S. 128 (2007).

171. *Bankert*, 2010 WL 3893121, at \*5.

172. *Id.* The consent orders issued by U.S. EPA in this case were properly characterized as “administrative settlements” under 42 U.S.C. 9613(g)(3)(B). *Id.*

173. *Id.* at \*7 (citing *United States v. Atl. Research Corp.*, 551 U.S. 128, 139 n.6 (2007)).

174. 602 F.3d 204 (3d Cir. 2010).

175. *Id.* at 228 (quoting *Atl. Research Corp.*, 551 U.S. at 140).

the defendants could not bring a contribution counterclaim against them because of CERCLA's contribution bar within § 113(f)(2).<sup>176</sup> The plaintiffs in *Bankert* had entered into agreements that offered similar protections, and the court agreed with the reasoning in *Agere Systems* that allowing the plaintiffs to pursue a cost recovery action with the protection from contribution would allow them to recover all of their costs, even though they were also identified as responsible parties for the contamination at the Third Site.<sup>177</sup> Therefore, because the plaintiffs' claims could only be contribution claims, the CERCLA count of their complaint was time-barred.<sup>178</sup> More than three years had passed since the date of the U.S. EPA consent orders in 1999 and 2002.<sup>179</sup> The court also dismissed the plaintiffs' common law and ELA claims because the statutes of limitation had run for these claims.<sup>180</sup>

### III. DEVELOPMENTS IN THE LAW RELATED TO WATER RIGHTS

In the survey period, two opinions issued by the United States Supreme Court involved water rights disputes. In *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*, four members of the Court held that state court judicial decisions could be prohibited takings if a court declares that a previously held right no longer exists.<sup>181</sup> In *South Carolina v. North Carolina*, the Supreme Court rejected South Carolina's attempt to shut out private riparian users from intervening in its border dispute with North Carolina.<sup>182</sup> Finally, the U.S. EPA's stormwater construction rule and other water related decisions warrant a brief discussion.

#### *A. Recognition of the Concept of Judicial Taking with Regard to Riparian Rights: Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*

A plurality of the United States Supreme Court,<sup>183</sup> purporting to redefine the

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176. *Id.* CERCLA's contribution bar states, "A person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement." 42 U.S.C. § 9613(f)(2).

177. *Bankert*, 2010 WL 3893121, at \*8 (citing *Agere Sys.*, 602 F.3d at 228-29).

178. *Id.* at \*9.

179. *Id.*

180. *Id.* at \*9-10. The EPA issued an administrative order by consent for this site in 1996, which was the first date the plaintiffs' predecessors in interest had been ordered to clean up the property, which meant that the plaintiff had ten years from the enactment of the ELA to file suit. *Id.* at \*10.

181. *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Prot.*, 130 S. Ct. 2592, 2602 (2010).

182. *South Carolina v. North Carolina*, 130 S. Ct. 854, 865-66 (2010).

183. Justice Stevens did not participate because he owns a beachfront condo in Florida. See *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*, ENDANGERED ENVTL. LAWS, [http://www.endangeredlaws.org/case\\_beach\\_protection.htm](http://www.endangeredlaws.org/case_beach_protection.htm) (last

application of the Takings Clause of the Fifth Amendment to the United States Constitution, recently concluded that a decision by a state court of last resort may constitute a “taking” of private property without just compensation.<sup>184</sup> In *Stop the Beach Renourishment*, two Florida cities sought to deposit new sand along the shoreline of the beaches eroded by hurricanes, thereby extending the beaches into the sea by seventy-five feet.<sup>185</sup> A group of property owners challenged these actions, arguing that the actions violated the Takings Clause of the U.S. Constitution because they deprived the owners of their exclusive access to the water as well as ownership of any new land subsequently added by gradual natural change.<sup>186</sup> The Florida Supreme Court rejected that argument, relying in part on the doctrine of avulsion, which permits a state to reclaim a restored beach on behalf of the public.<sup>187</sup>

The Court unanimously held that the Florida Supreme Court, by upholding Florida’s decision to restore an eroded beach by filling in submerged land owned by the state, did not engage in an unconstitutional taking of beachfront property owners’ property rights.<sup>188</sup> The Court reasoned that under Florida law,<sup>189</sup> the property owners did not have any right to the filled-in land.<sup>190</sup> Instead, the state had the right to fill in its own seabed, and any previously submerged land that is exposed by a sudden event belongs to the state—even if the state causes the exposure and disrupts the property owner’s contact with the water.<sup>191</sup> Indeed, the Court held that there could be no “taking” unless the petitioner could “show that, before the Florida Supreme Court’s decision, littoral-property owners had rights to future accretions and contact with the water superior to the State’s right to fill in its submerged land.”<sup>192</sup>

However, Justice Scalia, joined by Justices Thomas and Alito and Chief Justice Roberts, went further and declared that future state court judicial decisions—as opposed to actions by state executive or legislative entities—could be prohibited takings if “a *court* declares that what was once an established right

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visited Aug. 13, 2011).

184. *Stop the Beach Renourishment*, 130 S. Ct. at 2602. Generally, state law defines property interests, including property rights in navigable waters and the lands underneath them. *Id.* at 2597 (citations omitted).

185. *Id.* at 2600.

186. *Id.*

187. *Id.* (citation omitted).

188. *Id.* at 2602.

189. Florida law provided that “the State owns in trust for the public the land permanently submerged beneath navigable waters and the foreshore (the land between the low-tide line and the mean high-water line).” *Id.* at 2598 (citing FLA. CONST. art. X, § 11; *Broward v. Mabry*, 50 So. 826, 829-30 (Fla. 1909)). “[T]he mean high-water line (the average reach of high tide over the preceding 19 years) is the ordinary boundary between private beachfront, or littoral property, and state-owned land.” *Id.* at 2598 (citations omitted).

190. *Id.* at 2598-2611.

191. *Id.* at 2600.

192. *Id.* at 2611.

of private property no longer exists.”<sup>193</sup> The plurality reasoned that the Takings Clause is concerned with the act of taking property, rather than with the branch of government that does the taking.<sup>194</sup> Justice Scalia further opined that the Takings Clause “applies as fully to the taking of a landowner’s riparian rights as it does to the taking of an estate in land.”<sup>195</sup> The remainder of the Justices<sup>196</sup> concurred in the judgment but filed opinions either criticizing the plurality for expressing “views” not called for by the facts of the case or disagreeing with the notion of a judicial taking, or both.<sup>197</sup> In particular, Justices Sotomayor, Kennedy, Ginsburg, and Breyer emphasized in their respective opinions that because the Florida Supreme Court’s decision did not constitute a taking, there was no reason to resolve the broader question of whether a judicial decision could ever constitute a taking.<sup>198</sup>

*B. The Expansion of Intervention Rights to Private Water Users in Interstate Water Litigation: South Carolina v. North Carolina*

In a 5-4 decision, the United States Supreme Court opened the door in its *South Carolina v. North Carolina*<sup>199</sup> opinion for private water users to intervene in interstate water rights disputes. In that case, the state of South Carolina filed a complaint alleging that North Carolina had authorized upstream water transfers from the Catawba River that exceeded North Carolina’s equitable share of the river.<sup>200</sup> South Carolina claimed that the net effect of these transfers was to deprive South Carolina of its equitable share of the Catawba River’s water.<sup>201</sup> As such, South Carolina sought to have the Court equitably apportion the Catawba River between the two states and to declare that North Carolina’s permitting statute was invalid to the extent it authorized use of the river that exceeded North Carolina’s equitable share.<sup>202</sup>

Shortly after South Carolina filed its complaint, entities permitted by North Carolina, the Catawba River Water Supply Project (CRWSP), Duke Energy Carolinas, LLC (“Duke”), and the City of Charlotte, North Carolina (“Charlotte”) moved to intervene in the dispute as parties.<sup>203</sup> CRWSP argued that it should be allowed to intervene because the existing parties did not adequately represent its

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193. *Id.* at 2602.

194. *Id.*

195. *Id.* at 2601.

196. Justices Sotomayor, Kennedy, Ginsburg, and Breyer were the remaining Justices.

197. *Stop the Beach Renourishment*, 130 S. Ct. at 2613-19.

198. *Id.* at 2613-14, 2618-19.

199. 130 S. Ct. 854 (2010).

200. *Id.* at 859-60.

201. *Id.* at 859.

202. *Id.*

203. *Id.* at 860. Both CRWSP and Duke were specifically referenced in South Carolina’s complaint. *Id.*

interests as a riparian user that was owned and operated in both states.<sup>204</sup> Similarly, Duke argued that it should be allowed to intervene in the lawsuit because it operated eleven dams and reservoirs on the river that controlled the river's flow, it held a fifty-year license from the Federal Energy Regulatory Commission (FERC), and it orchestrated the multi-stakeholder negotiation process that resulted in a re-licensing agreement signed by entities from both states.<sup>205</sup> Finally, Charlotte argued that it should be allowed to intervene in the lawsuit because it held the largest transfer authorization for the Catawba River granted by North Carolina.<sup>206</sup>

The Court rejected South Carolina's efforts to prevent CRWSP and Duke from actively participating in the Catawba River dispute with North Carolina.<sup>207</sup> The Court acknowledged that an intervener must show some compelling interest "in his own right, apart from his interest in a class with all other citizens and creatures of the state, which interest is not properly represented by the state" for intervention to be proper.<sup>208</sup> The Court found that both CRWSP and Duke met this burden.<sup>209</sup> In particular, the Court noted that North Carolina had specifically admitted that it could not represent the full scope of CRWSP's interests and that neither state had sufficient interest in representing the full scope of CRWSP's interest, as CRWSP serviced areas in both jurisdictions.<sup>210</sup> The Court further noted that there was no other similarly situated entity on the Catawba River like Duke because Duke used the river's water to provide electricity to the region.<sup>211</sup> Duke also had an interest in protecting its FERC license, which regulated "the very subject matter in dispute: the river's minimum flow into South Carolina."<sup>212</sup>

The Court, however, did agree that Charlotte should not be allowed to intervene because the city's interests were already fairly represented by a party to the litigation—North Carolina.<sup>213</sup> In this regard, the Court noted that Charlotte, as a North Carolina municipality, received its ability to transfer water from the Catawba River from North Carolina.<sup>214</sup> No relief was requested by Charlotte. Moreover, Charlotte's interests fell squarely within the category of interests to which a State, as *parens patriae*, must be deemed to represent on behalf of all of its citizens—i.e., ensuring an equitable share of an interstate river's water.<sup>215</sup> Thus, the Court held that Charlotte could not show a compelling interest in its own right, apart from its interest as a permittee of North Carolina, and

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204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.* at 865-66.

208. *Id.* at 863 (citing *New Jersey v. New York*, 345 U.S. 369, 373 (1953)).

209. *Id.* at 864, 866.

210. *Id.* at 864-65.

211. *Id.* at 866-67.

212. *Id.* at 866.

213. *Id.* at 867.

214. *Id.*

215. *Id.* at 868.

intervention was not proper.<sup>216</sup>

*C. U.S. EPA's Stormwater Construction Rule: An  
Uncertain Enforcement State*

In December 2009, U.S. EPA issued its final construction stormwater effluent guidelines rule (the "Rule"), which established a numeric limit on the turbidity of stormwater discharges from large construction sites and required monitoring to ensure compliance with the numeric limit.<sup>217</sup> The Rule also required nearly all construction sites that obtained stormwater permits after February 1, 2010 to implement a range of erosion and sediment controls and pollution prevention measures.<sup>218</sup> U.S. EPA's Rule elicited a lawsuit by industry groups in the Seventh Circuit: *Wisconsin Builders Ass'n v. EPA*.<sup>219</sup> The petitioners raised a variety of challenges to the Rule, including that U.S. EPA had promulgated a flawed numeric turbidity limit.

In response to objections from industry groups, U.S. EPA conceded that the Rule's controversial numeric turbidity limit was flawed. Consequently, in August 2010, U.S. EPA filed an unopposed motion requesting that the court vacate the numeric turbidity limit, remand that part of the Rule to the agency, and hold the suit in abeyance until February 15, 2012 to give U.S. EPA time to reevaluate the Rule's numeric limit.<sup>220</sup> The Seventh Circuit granted U.S. EPA's request to remand the Rule and to hold the suit in abeyance but refused to vacate the numeric turbidity limit.<sup>221</sup> Since the admittedly flawed turbidity limit remains an enforceable component of the Rule, the Seventh Circuit's decision has essentially left various states in an awkward position of having to decide how to accommodate a numeric turbidity limit that will be subject to suit while U.S. EPA goes through the potentially time-consuming administrative process of revising its Rule.<sup>222</sup> As such, it is uncertain what, if any, enforcement action will actually

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216. *Id.* at 867-68.

217. *See* Effluent Guidelines and Standards, 40 C.F.R. § 450 (2011).

218. *See generally id.*

219. *See* Complaint, *Wis. Builders Ass'n v. EPA*, No. 09-4113 (7th Cir. Dec. 28, 2008). The Seventh Circuit consolidated various petitions for review of the Rule filed by organizations that included the Wisconsin Builders Association and the National Association of Home Builders into one case. *See, e.g.,* Order, *Utility Water Act Grp.*, Nos. 09-4113, 10-1247, 10-1876 (7th Cir. Sept. 20, 2010).

220. EPA's Unopposed Motion for Partial Vacatur of the Final Rule, Remand of the Record, to Vacate Briefing Schedule, and to Hold the Case in Abeyance, *Wis. Builders Ass'n v. EPA*, No. 09-4113 (7th Cir. Aug. 13, 2010).

221. Order Re: Petitioners' Unopposed Motion for Clarification or Reconsideration of the Aug. 24, 2010 Order, No. 09-4113 (7th Cir. Sept. 20, 2010).

222. U.S. EPA retains authority to mandate technology-based performance criteria for point source categories as well as new source performance standards (NSPS). *See* 33 U.S.C. § 1314 (2006). Furthermore, U.S. EPA's national regulations set a floor for technology-based effluent limits in NPDES permits, although states may set more stringent limitations to protect water

occur with regard to this Rule.

*D. Other Water-Related Decisions*

In *United States v. Ritz*,<sup>223</sup> the United States District Court for the Southern District of Indiana held that the Cottonwood Campground, which was run by the defendants (collectively, “the Campground”) had violated the Safe Drinking Water Act (SDWA) by failing to properly test its water for coliform and nitrate.<sup>224</sup> In that case, the Campground had between fifty and eighty campsites, each of which had a water spigot and a sewer hookup for use by campers.<sup>225</sup> The water spigots were marked “non-potable.”<sup>226</sup> However, the Campground argued that it should not be considered a public water system (PWS) required to test its water system because the Campground did not have a minimum of twenty-five individuals daily or at least fifteen service connections in use at least sixty days of the year.<sup>227</sup> In rejecting this argument, the court stated that because the Campground contained at least fifty water spigots, it was a PWS subject to the SDWA, and this PWS designation did not require that the spigots be used on a regular basis or by a certain number of people.<sup>228</sup> Consequently, the court held that the Campground was in violation of the SDWA because the campground’s water samples tested positive for total coliform.<sup>229</sup>

In the past year, the United States District Court for the Northern District of Indiana issued an instructional opinion in *Stillwater of Crown Point Homeowner’s Ass’n, Inc. v. Kovich*<sup>230</sup> regarding the standard for obtaining a default judgment against a party when multiple defendants are involved. In *Kovich*, a heavy rainstorm caused a ditch running through two subdivisions to overflow, causing damage to various common areas and homes within the subdivisions.<sup>231</sup> The homeowners filed suit against the three developers of the subdivisions, the individual partners of the land developer, and the City of Crown Point, Indiana, alleging a violation of the CWA, nuisance, negligence, and other claims.<sup>232</sup> All the defendants, except developer Stillwater Properties, answered the plaintiffs’ complaint.<sup>233</sup> The plaintiffs moved for default judgment against

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quality. *Id.* As such, any rule promulgated by U.S. EPA with regard to its permit requirements must trickle down to the states that implement these discharge programs.

223. *United States v. Ritz*, No. 1:07-cv-1167-WTL-DML, 2010 U.S. Dist. LEXIS 87851 (S.D. Ind. Aug. 25, 2010).

224. *Id.* at \*1, \*3-4.

225. *Id.* at \*3.

226. *Id.*

227. *Id.* at \*5; 42 U.S.C. § 300f(4)(A) (2006).

228. *Ritz*, 2010 U.S. Dist. LEXIS, at \*6-7.

229. *Id.* at \*9.

230. No. 2:09-CV-157-PPS-PRC, 2010 WL 1541188 (N.D. Ind. Apr. 15, 2010).

231. *Id.* at \*1.

232. *Id.*

233. *Id.*

Stillwater Properties.<sup>234</sup> The court rejected the plaintiff's motion for default judgment because

[e]ach of the claims against Stillwater is asserted against nondefaulting defendants as well, who may, in the course of defending against the claims, demonstrate that no liability properly lies on one or more of the various causes of actions, or that the amount of damages is other than claimed in the motion for default judgment. This possibility mitigates against a default judgment against Stillwater Properties—at least at this point in time. This is because such an entry may ultimately be inconsistent with the adjudication of the same claim on the merits against the nondefaulting defendants.<sup>235</sup>

The court further explained that where default judgment has not been sought from all defendants, entry of default judgment prior to adjudication of the merits on the case is improper when the “nature of the relief is such that [it] is necessary that judgments against the defendants be consistent.”<sup>236</sup> The court pointed out that entry of default judgment was also not proper because the plaintiffs' claims against the defendant did not carry liability that was joint or joint and several.<sup>237</sup> Thus, the court noted that the plaintiffs could pursue a default judgment against Stillwater after the case against the nondefaulting defendants was resolved.<sup>238</sup>

#### IV. ENVIRONMENTAL CASES UNDER STATE LAW

During the survey period, the Seventh Circuit Court of Appeals issued a lengthy opinion affirming in almost all respects the well-known legal principle that a trial judge has broad discretion in determining the amount of attorneys' fees and costs, in this particular instance under Indiana's Underground Storage Tank Act (USTA). The Indiana Court of Appeals also issued a decision that an environmental negligence claim was not barred by the economic loss doctrine.

##### A. Wickens v. Shell Oil Co.

The *Wickens v. Shell Oil Co.* litigation has been the subject of multiple court opinions, survey articles, and other commentary.<sup>239</sup> As the Seventh Circuit noted at the outset of its opinion, “there is not much left of it at this point.”<sup>240</sup> This opinion addressed cross-appeals of the district court's award of attorneys' fees and costs following a settlement of liability issues. While the facts may be very familiar to many readers, we will briefly state facts important to this opinion.

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234. *Id.*

235. *Id.* at \*2.

236. *Id.* (citation omitted).

237. *Id.* at \*3.

238. *Id.* at \*3-4.

239. See, e.g., Freedom S.N. Smith et al., *2007-2008 Environmental Law Survey: A System in Flux*, 42 IND. L. REV. 973, 1000 (2009) (discussing trial court's opinion on fees).

240. *Wickens v. Shell Oil Co.*, 620 F.3d 747, 750 (7th Cir. 2010).

In 2004, as the Wickenses prepared to retire from its shoe store business, they discovered that the store rested on a bed of contaminated soil.<sup>241</sup> Their property had been used as a Shell gas station prior to their ownership. The Wickenses retained Mark Shere as their attorney and began negotiating with Shell regarding the contamination.<sup>242</sup> Dissatisfied with those negotiations, the Wickenses filed suit alleging that Shell was responsible under Indiana's USTA.<sup>243</sup>

At the outset of the investigation, the Wickenses hired a consultant, HydroTech, to conduct an investigation at the site.<sup>244</sup> Through that investigation, HydroTech concluded that a neighboring property ("Gardner Property") was also contaminated. The Gardner Property had been affiliated with a different oil company, but HydroTech concluded that the contamination on the Gardner Property likely originated from Shell's tanks on the Wickenses' property.<sup>245</sup> Shell, of course, strenuously disagreed with this conclusion, and a bitter fight ensued.

Both parties began submitting competing environmental assessments to the Indiana Department of Environmental Management (IDEM), causing IDEM to decide that as of November 2006, it would deal exclusively with the Wickenses for both properties.<sup>246</sup> Moreover, the district court denied Shell's motion for summary judgment, finding that Shell in all likelihood bore full responsibility for the contamination.<sup>247</sup> Following these developments, settlement talks accelerated, but the parties were unable to reach settlement on their own. On January 9, 2007, the district court entered an order "temporarily freezing the parties' liability for each other's attorneys' and experts' fees."<sup>248</sup> The Wickenses challenged the order, but the court declined, and the parties were eventually able to reach a settlement agreement. The parties could not resolve the calculation of corrective action costs and attorneys' fees but agreed that the Wickenses were entitled to some award.<sup>249</sup> The district court received evidence and, using a date of January 9, 2007, entered an order awarding the Wickenses \$391,307.83 in attorneys' fees and \$116,511.27 in corrective action costs.<sup>250</sup>

After the district court entered its order, the Wickenses' attorney revealed for the first time that the litigation had been funded in part by Employers Fire Insurance Company ("Employers").<sup>251</sup> Shell moved to vacate the court's order, which the court denied. Both parties then appealed the court's order on costs and

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241. *Id.*

242. *Id.*

243. IND. CODE § 13-23-13-8 (2011).

244. *Wickens*, 620 F.3d at 750.

245. *Id.* at 750-51.

246. *Id.* at 751.

247. *Id.*

248. *Id.*

249. *Id.*

250. *Id.* at 752.

251. *Id.*

fees, and Shell appealed the denial of its Rule 60(b) motion to vacate.<sup>252</sup>

On appeal, Shere argued that the court should not have used a cut-off date at all.<sup>253</sup> In the alternative, Shere argued that a later date should have been used, and Shell argued for three earlier dates in the litigation.<sup>254</sup> Shere also contended that the court should have awarded prejudgment interest on his attorneys' fee award, whereas Shell argued that the whole decision should be revisited based on Shere's misrepresentation regarding who was paying his fees.<sup>255</sup>

The Seventh Circuit Court of Appeals first considered whether the district court had properly used the "statutory-purpose test" instead of simply awarding Shere fees without regard to a cut-off date.<sup>256</sup> Shere argued that he had obtained significant victories for his client after the court-imposed cut-off date; therefore, the imposition of a cut-off date would short-change him for such efforts.<sup>257</sup> The court affirmed the use of the cut-off date because "fees may not be awarded on the basis of non-Act claims."<sup>258</sup>

Both parties then argued about what date should be used for the cut-off date. Shell suggested three earlier dates, and Shere argued for a later date.<sup>259</sup> The appellate court found that Shell's arguments for an earlier date were unpersuasive. As to the first date, Shell argued that it had offered to clean up the Wickenses' property at that time.<sup>260</sup> The court noted that the Wickens (and IDEM) believed that Shell was responsible for both properties, so Shell's offer did not fully resolve the Wickenses' USTA claim. The court expressly rejected Shell's argument that the USTA did not require it to clean up another person's property.<sup>261</sup> Because the Wickenses "had a right under the Act to hold Shell liable for the full extent of the corrective action costs they owed," the district court's rejection of the January 2005 date was proper.<sup>262</sup>

Shell next argued that the court should have used its August 2006 date because it submitted a further site investigation plan to IDEM at that time. But

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252. *Id.* Shell also moved to modify the judgment because Shere had submitted invoices for his wife, Colleen Shere, whose law license had lapsed before this litigation ensued. *Id.* The opinion addresses the detail of that calculation, and Shere's objection to those fees, but for our purposes, we will simply note that the trial court's decision against awarding such fees was affirmed. *Id.*

253. *Id.*

254. *Id.* at 754.

255. *Id.* Shere also argued that the district court's findings that were critical of his professionalism and candor should be stricken. The Seventh Circuit gave short shrift to such arguments, reminding counsel that it sits "to review judgments, not particular language in district court opinions," and that the overall award was largely favorable to him. *Id.* at 759.

256. *Id.* at 753.

257. *Id.*

258. *Id.*

259. *Id.* at 754.

260. *Id.*

261. *Id.* (citing IND. CODE § 13-23-13-8(b) (2011)).

262. *Id.* at 754-55.

this argument suffered similar fallacies, as Shell was still contending at that time that contamination on the Wickenses' property was not attributable to Shell, but the other company's tanks from the Gardner Property. Because Shell had not promised to cover the Wickenses' corrective action costs by August 2006, this date was also properly rejected by the district court.<sup>263</sup>

Shell's final proposed cut-off date was November 21, 2006, the day it offered "to pay 100% of the past and future corrective action costs at the Wickens[es'] property, to indemnify the Wickens[es] and any future owners or tenants of the property against these costs . . . and to pay reasonable costs of litigation as determined by the [c]ourt."<sup>264</sup> While this offer seemed to resolve the issues on liability, negotiations over attorneys' fees were routine, so the district court's decision to award Shere fees from November to January was not overturned.<sup>265</sup> Furthermore, Shell had an opportunity to accept a settlement number based on the magistrate judge's proposal, and therefore, Shell was responsible for the continuation of the litigation.<sup>266</sup> While a fee award must be reasonable, "counsel may legitimately hold out for a better deal (for at least some time) because fee litigation is costly and often is not reimbursed as part of the fee award."<sup>267</sup>

Shere argued that the court's January 2007 cut-off was too early and that the district court's "time-out" order conflicted with the fee-shifting provisions of the USTA.<sup>268</sup> For reasons similar to the court's rejection of Shell's November 2006 proposed cut-off date, this argument failed. Just as the district court was allowed to award fees for a period of time after Shell indicated it would accept full responsibility for liability, the court was permitted to "force an end" to the litigation over fees.<sup>269</sup> The appellate court found that Judge Barker was "generous" in only restricting fees for ninety days; furthermore, Shere's "overblown reaction" to the time-out order was evidence that Shere was "unnecessarily expanding the scope of the IDEM investigation."<sup>270</sup>

Shere also argued that the district court erred by not awarding prejudgment interest on the attorneys' fees and costs.<sup>271</sup> Under Indiana law, prejudgment interest may be awarded where damages are "ascertainable in accordance with fixed rules of evidence and accepted standards of valuation at the time the damages accrued."<sup>272</sup> Where the damages are subject to a "good faith dispute," prejudgment interest need not be awarded.<sup>273</sup> Shere argued that under *Shell v.*

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263. *Id.* at 755.

264. *Id.*

265. *Id.* at 756.

266. *Id.*

267. *Id.* at 755.

268. *Id.* at 755-56.

269. *Id.* at 756.

270. *Id.*

271. *Id.*

272. *Id.* at 757-58 (citation omitted).

273. *Id.* at 758 (quoting *Whited v. Whited*, 859 N.E.2d 657, 665 (Ind. 2007)).

*Meyer*,<sup>274</sup> prejudgment interest was appropriate to compensate for the delay in payment. The Seventh Circuit found that while *Meyer* did award prejudgment interest on attorneys' fees in a disputed USTA claim, *Meyer* did not indicate that such an award is mandatory.<sup>275</sup> Furthermore, the calculation of attorneys' fees in *Meyer* did not involve the contentious arguments regarding when to begin calculating such fees and costs; thus, it was not error for the district court to refuse Shere's request for prejudgment interest.<sup>276</sup>

Finally, Shell argued that the district court erred by denying its motion to vacate based on Shere's failure to disclose the fact that an insurer was partially funding the Wickenses' litigation.<sup>277</sup> Under Federal Rule of Civil Procedure Rule 26, litigants must "automatically disclose 'any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment.'"<sup>278</sup> The Seventh Circuit affirmed the district court's conclusion that the rule required disclosure of Employers' involvement as an insurer funding the litigation.<sup>279</sup> But the court declined to find error in the lower court's denial of the motion to vacate.<sup>280</sup> While Shell argued that it "would have reached a different settlement if it knew about Employers's 'deep pockets,'" the court reasoned that these same deep pockets could have caused Shell to offer a bigger settlement in this case, where Shell had already lost on its summary judgment motion.<sup>281</sup>

*B. Economic Loss Doctrine Does Not Bar Environmental Negligence Claim:*  
*KB Home Indiana, Inc. v. Rockville TBD Corp.*

This case pitted a property developer against an airplane parts manufacturer.<sup>282</sup> KB Home Indiana, Inc. ("KB"), a developer, sought to recover under theories of negligence, nuisance, and trespass for contamination on land it acquired from a third party, allegedly emanating from Rockville TBD Corp.'s ("Rockville's") former site.<sup>283</sup> The court of appeals reversed the trial court's determination that the economic loss doctrine did not allow KB to pursue its negligence claims against Rockville, where the developer did not purchase the land (or any property or product) from Rockville.<sup>284</sup> However, the court affirmed the trial court's entry of summary judgment for Rockville on KB's trespass and nuisance claims, as the contaminating activities had ceased before the property

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274. 684 N.E.2d 504, 526-27 (Ind. Ct. App. 1997).

275. *Wickens*, 620 F.3d at 758 (citing *Meyer*, 684 N.E.2d at 526-27).

276. *Id.*

277. *Id.*

278. *Id.* at 759 (citing FED. R. CIV. P. 26(a)(1)(A)(iv)).

279. *Id.*

280. *Id.*

281. *Id.*

282. *KB Home Ind., Inc. v. Rockville TBD Corp.*, 928 N.E.2d 297, 299 (Ind. Ct. App. 2010).

283. *Id.*

284. *Id.* at 304-05.

was purchased by the developer.<sup>285</sup>

## V. DEVELOPMENTS IN INDIANA ENVIRONMENTAL INSURANCE LAW

In this section, we examine recent opinions that may impact environmental insurance coverage cases under Indiana law. Several cases had the potential to make a paradigm-shifting change in Indiana insurance law. For example, the Indiana Court of Appeals indicated a willingness to adopt a “site-specific” approach to interpreting choice of law in insurance policies for multi-state environmental suits.<sup>286</sup> Nevertheless, this opinion was vacated after the survey period concluded, but before the survey article was published.<sup>287</sup> Therefore, Indiana remains committed to the uniform-contract-interpretation method that has been followed for a number of years.<sup>288</sup> Likewise, most of the other decisions in this year’s survey period were logical extensions of prior precedent.

### *A. Actual Controversy Existed over Insurance Policy Without Formal Claim or Strict Compliance with Proof of Loss Provision: ESI Environmental, Inc. v. American International Specialty Lines Insurance Co.*

In *ESI Environmental, Inc. v. American International Specialty Lines Insurance Co.*, a used oil processing company sought declaratory judgments in separate actions against two of its insurers.<sup>289</sup> The insurers provided coverage for oil contamination that occurred at ESI Environmental, Inc.’s (“ESI’s”) property.<sup>290</sup> One of those insurers, National Union, argued that the court did not have subject matter jurisdiction over the dispute and that ESI’s complaint should be dismissed under Federal Rule of Civil Procedure Rule 12(b)(6) for failure to state a claim upon which relief can be granted.<sup>291</sup> In this case, one of ESI’s customers discovered large amounts of polychlorinated biphenyls (“PCBs”) in oil that it shipped to ESI for processing.<sup>292</sup> The oil had been certified as PCB-free, and ESI was not notified until after it had already processed the oil. Because the PCBs mixed with and cross-contaminated ESI’s equipment and other oil, ESI’s capacity to process oil had been compromised. ESI alleged that National Union

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285. *Id.* at 308-09.

286. *See Nat’l Union Fire Ins. Co. v. Standard Fusee Corp.*, 917 N.E.2d 170, 179 (Ind. Ct. App. 2009), *trans. granted, opinion vacated*, 940 N.E.2d 810 (Ind. 2010).

287. *See Standard Fusee Corp.*, 940 N.E.2d 810, *reh’g denied*.

288. *See id.* at 815-16.

289. *ESI Envtl., Inc. v. Am. Int’l Specialty Lines Ins. Co.*, No. 1:07-cv-1182-LJM-DML, 2010 WL 582215, at \*1 (S.D. Ind. Feb. 10, 2010).

290. *Id.*

291. *Id.* at \*5. The court interpreted the parties’ briefs under Federal Rule of Civil Procedure Rule 12(b)(6) to request a ruling on the merits of National Union’s affirmative defenses relating to written notice and proof of loss requirements. The court rejected this request and determined that the complaint sufficiently pleaded a claim for declaratory relief that was plausible on its face. *Id.* at \*7.

292. *Id.* at \*1.

breached its contract of insurance and that the contract of insurance provided coverage for the contamination event.<sup>293</sup> National Union argued that both claims were not ripe, or alternatively, that ESI had not properly pleaded either claim.<sup>294</sup>

First, the court considered whether “an actual controversy” existed “of sufficient immediacy and reality to warrant issuance of a declaratory judgment.”<sup>295</sup> National Union argued that ESI’s claim was not ripe because ESI had not filed a formal claim and proof of loss with National Union.<sup>296</sup> The court noted that the parties had an “actual controversy” because ESI had made several attempts to notify National Union of ESI’s claim. National Union’s arguments that “strict compliance with an insurance contract’s notice provisions” was not required to have an actual controversy under the act.<sup>297</sup>

However, the court found that ESI’s breach of contract claim was not ripe because National Union had never actually denied coverage.<sup>298</sup> The court reasoned that in order to have a justiciable claim for breach of contract, National Union must have made a decision to “deny coverage;” therefore, there was no live controversy between the parties.<sup>299</sup> ESI’s claim for declaratory judgment was a live controversy, and that portion of the case was permitted to proceed.<sup>300</sup>

*B. Notice After Decades of Discussion and Investigation Precludes Coverage:*  
P.R. Mallory & Co. v. American Casualty Co.

In the late 1940s, Radio Materials Corporation began operating a factory in Attica, Indiana that manufactured picture tubes and other television parts.<sup>301</sup> P.R. Mallory and Company (“P.R. Mallory”) purchased Radio Materials stock in 1957.<sup>302</sup> From 1950 until 1980, waste from these operations was disposed in two open unlined pits located at the plant site (“the Site”). As early as May 1969, the Indiana State Board of Health was involved with the Site regarding contamination flowing from these pits.<sup>303</sup> In 1980 and 1986, Radio Materials sent notices to U.S. EPA regarding its waste activity and potential releases from the unlined pits.

The court of appeals considered whether P.R. Mallory’s notice to two of its insurers (American Casualty Company (“ACC”) and Continental Casualty

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293. *Id.* at \*1-2.

294. *Id.* at \*6.

295. *Id.* (citation omitted).

296. *Id.*

297. *Id.* at \*7.

298. *Id.*

299. *Id.*

300. *Id.*

301. P.R. Mallory & Co. v. Am. Cas. Co., 920 N.E.2d 736, 739 (Ind. Ct. App.), *trans. denied*, 929 N.E.2d 795 (Ind. 2010).

302. *Id.* Plaintiffs in this suit included P.R. Mallory & Company, Inc., Radio Materials Corporation, Kraft Foods Global, Inc., and Dart & Kraft Inc. *Id.* For purposes of this discussion, “P.R. Mallory” is used to describe all plaintiffs.

303. *Id.* at 739.

Company ("CCC") (collectively, "the Insurers")) was sufficient to sustain coverage for releases from the unlined pits near the Attica facility.<sup>304</sup> For the reasons stated below, the Indiana Court of Appeals found that P.R. Mallory's notice was insufficient and coverage was barred by the policies' notice provisions.<sup>305</sup>

P.R. Mallory argued that notice was not late under the policies because "no notice requirement was triggered because an occurrence had not yet occurred."<sup>306</sup> From P.R. Mallory's perspective, taken together, "the . . . [p]olicies require notice only when the insured becomes aware of 'an accident . . . resulting in . . . physical injury to . . . tangible property'" during the policy period."<sup>307</sup> For this reason, P.R. Mallory argued that unless it became subjectively aware of such property damage taking place by ACC and CCC from 1980 to 1984 (the period insured), P.R. Mallory was not required to give notice to the Insurers.<sup>308</sup> The Insurers argued that the question turned on whether it had "any knowledge of an accident" between 1980 and 2000, which triggered the notice provision under the policy.<sup>309</sup>

The court of appeals affirmed summary judgment for the Insurers.<sup>310</sup> In addition to the notices provided to U.S. EPA in 1980 and 1986, the Insurers designated numerous communications and activities by P.R. Mallory in support of late notice.<sup>311</sup> In particular, minutes from a 1989 board of directors meeting revealed discussions of notifying third parties of the potential liabilities emanating from the unlined pits.<sup>312</sup> Later that same year, the general counsel sent a letter stating that "potential environmental pollution problems exist at the plant site in Attica, Indiana."<sup>313</sup> In 1991, another meeting was held regarding "potential environmental liability" and directing the company to consult legal counsel for advice.<sup>314</sup>

Moreover, P.R. Mallory hired environmental consultants to perform investigation and site characterization.<sup>315</sup> These reports demonstrated the presence of excessive amounts of contaminants at the property. After this investigation, an excavation project was initiated on the property, but this clean-

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304. *Id.* at 739-40.

305. *Id.* at 754.

306. *Id.* at 749.

307. *Id.* at 750.

308. *Id.*

309. *Id.* (citation omitted).

310. *Id.* at 754.

311. *Id.* at 753. The court of appeals first refused to consider some evidence cited by Radio Materials on appeal because it had failed to properly designate the evidence in response to ACC and CCC's motions for summary judgment. *Id.* at 754. The court of appeals reminded counsel of its obligations to separately designate its evidence on summary judgment and to limit its arguments to evidence properly designated. *Id.* at 755.

312. *Id.* at 740.

313. *Id.* (citation omitted).

314. *Id.* at 741.

315. *Id.* at 752.

up was conducted improperly.<sup>316</sup> Thereafter, in 1999, P.R. Mallory entered into a consent order with the U.S. EPA in which the agency found that “there had been a release of hazardous waste” at the facility.<sup>317</sup> For all of these reasons, the court concluded that P.R. Mallory had knowledge of an occurrence before it notified ACC and CCC and that the delay constituted unreasonably late notice under the policy.<sup>318</sup>

The court also found that the late notice in this case prejudiced the Insurers. Based on another court of appeals decision, the court presumed that late notice was prejudicial to ACC and CCC.<sup>319</sup> Furthermore, the Insurers’ reliance on other grounds to deny coverage did not preclude the late notice defense.<sup>320</sup>

P.R. Mallory argued that the insurers were not actually prejudiced by the notice. It argued that the Insurers’ experts had praised the investigatory work performed by P.R. Mallory’s expert.<sup>321</sup> But the court disagreed, finding that commentary on environmental work performed after the notice was given was not relevant to whether prejudice existed in the notice’s delay.<sup>322</sup> The court also found that P.R. Mallory had not rebutted the Insurers’ assertions that potential witnesses had died and were unable to participate in the defense and investigation prior to the notice.<sup>323</sup>

Judge Najam concurred in result but disagreed with the determination that late notice was the dispositive issue.<sup>324</sup> Rather, he agreed with P.R. Mallory’s argument that the notice provision was not triggered until after P.R. Mallory knew of an occurrence.<sup>325</sup> However, he opined that P.R. Mallory had failed to prove any occurrence during the policy period, and therefore, summary judgment on coverage was appropriate.<sup>326</sup> He suggested that there was “no evidence regarding when or for how long the contamination had migrated off-site, and there is no evidence of actual third-party property damage . . . [during the policy period].”<sup>327</sup> Judge Najam criticized P.R. Mallory’s citation to suits by neighboring third-party plaintiffs as evidence.<sup>328</sup> Because such complaints were not attached in opposition to the summary judgment motion, Judge Najam found

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316. *Id.*

317. *Id.* at 752-53.

318. *Id.* at 753.

319. *Id.* at 754 (citing *Tri-etch, Inc. v. Cincinnati Ins. Co.*, 891 N.E.2d 563 (Ind. Ct. App. 2008)).

320. *Id.*

321. *Id.* at 755.

322. *Id.* at 755-56.

323. *Id.* at 756.

324. *Id.* (Najam, J., concurring).

325. *Id.* at 757.

326. *Id.* at 758.

327. *Id.*

328. *Id.* Coincidentally, at least one such suit against P.R. Mallory’s successor, Kraft, is discussed herein. See discussion *supra* Part II.A (discussing *Stoll v. Kraft Foods Global, Inc.*, No. 1:09-CV-0364-TWP-DML, 2010 WL 3702359 (S.D. Ind. Sept. 6, 2010)).

that no showing of a duty to defend or occurrence could be made by P.R. Mallory.<sup>329</sup>

*C. One Insurer Uses Modified Pollution Exclusion Against Another Insurer:  
West Bend Mutual Ins. Co. v. U.S. Fidelity & Guaranty Co.*

In *West Bend Mutual Insurance Co. v. U.S. Fidelity & Guaranty Co.*, the Seventh Circuit Court of Appeals affirmed summary judgment for an insurer on a pollution exclusion in an environmental case.<sup>330</sup> In this case, two insurers—West Bend and Federated—were litigating whether one insurer should reimburse the other for costs paid during a class action against MDK, their mutual insured.<sup>331</sup> MDK, a corporation, owned a gas station and stored gasoline in underground storage tanks. In September 1996, MDK notified IDEM that a leak had occurred from these tanks. Following that leak, neighboring parcels filed a class action lawsuit against the gas station.<sup>332</sup> MDK properly tendered the case to its insurers, and West Bend provided a defense, which was subject to a reservation of rights.<sup>333</sup> Federated received a similar request but declined coverage on the grounds of a pollution exclusion (among other defenses).<sup>334</sup> West Bend paid \$4 million to settle the class action.<sup>335</sup>

This opinion dealt with subsequent litigation by West Bend alleging that Federated should have participated in the defense and settlement of the class action. Federated's policy contained a pollution exclusion that excluded "[b]odily injury" or "property damage" arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants."<sup>336</sup> The pollution exclusion specifically mentioned "motor fuels" in the exclusion and defined motor fuels as "petroleum or a petroleum-based substance that is typically used in the operation of a motor or engine."<sup>337</sup> Federated's definition of "pollutants" did not specifically include "gasoline."<sup>338</sup> The policy also included an endorsement stating that the pollution exclusion "applies whether or not such irritant or contaminant has any function in your business, operations, premises, site or location."<sup>339</sup>

The Seventh Circuit Court of Appeals considered the Indiana Supreme Court's decision in *American States Ins. Co. v. Kiger*.<sup>340</sup> The definition of

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329. *P.R. Mallory*, 920 N.E.2d at 758 (Najam, J., concurring).

330. *W. Bend Mut. Ins. Co. v. U.S. Fid. & Guar. Co.*, 598 F.3d 918, 926 (7th Cir. 2010).

331. *Id.* at 919-20.

332. *Id.* at 920.

333. *Id.*

334. *Id.*

335. *Id.*

336. *Id.* (citation omitted).

337. *Id.* at 921.

338. *Id.*

339. *Id.*

340. 662 N.E.2d 945 (Ind. 1996).

pollutants was identical in both the American States policy at issue there and in the Federated policy in this litigation.<sup>341</sup> But the American States policy made no mention of “motor fuels or gasoline” anywhere in the policy.<sup>342</sup> According to the majority in *West Bend*, *Kiger* focused on “whether American States adequately identified gasoline as an uncovered pollutant.”<sup>343</sup> The majority concluded that the Indiana Supreme Court “determined that the policy did not resolve . . . [the] ambiguity [regarding gasoline] and proceeded to interpret it against the defendant drafter and in favor of coverage.”<sup>344</sup>

*West Bend* argued that because the policy did not mention gasoline or motor fuels in the definitions in the policy, the policy did not explicitly exclude claims related to gasoline. This argument was unpersuasive to the majority, who held that “[t]he plain language . . . [of the pollution exclusion] explains that Federated will not cover property damage or personal injuries related to gasoline.”<sup>345</sup> The court stated that the insured (who was presumed by Indiana law to have read the policy) “would know to a certainty that Federated would not be responsible for damage arising out of gasoline leaks.”<sup>346</sup> The majority distinguished three other Indiana cases on the pollution exclusion because the policies in those cases also did not mention “specific substances” in their pollution exclusions.<sup>347</sup>

The majority also considered whether the excess liability coverage in the policy provided coverage, even in the face of the court’s conclusion on the pollution exclusion. The excess coverage defined pollutants differently from the underlying coverage, and this definition was “identical to the one in *Kiger*.”<sup>348</sup> For coverage to exist, the policy’s products-completed operations coverage needed to apply. The majority concluded that “as a matter of Indiana law, the products hazard clause [in this policy] . . . cannot reach accidental spills.”<sup>349</sup> The supreme court’s decision in that case was based on distinct policy language that was not present in the instant policy.<sup>350</sup> Because the underlying class action at issue in this case was predicated on an accidental leak of gasoline, there was no coverage under the excess policy’s coverage for products-completed operations.<sup>351</sup>

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341. *W. Bend Mut. Ins. Co.*, 598 F.3d at 922 (citing *Kiger*, 622 N.E.2d at 949).

342. *Id.*

343. *Id.*

344. *Id.*

345. *Id.* at 923.

346. *Id.*

347. *Id.* at 923-24 (citing *Nat’l Union Fire Ins. Co. v. Standard Fusee Corp.*, 917 N.E.2d 170, 179 (Ind. Ct. App. 2009), *trans. granted, opinion vacated*, 940 N.E.2d 810 (Ind. 2010); *Friedline v. Shelby Ins. Co.*, 774 N.E.2d 37 (Ind. 2002); *Travelers Indemnity Co. v. Summit Corp.*, 715 N.E.2d 926 (Ind. Ct. App. 1999)).

348. *Id.* at 925.

349. *Id.* (citation omitted).

350. *See id.* at 922 (citing *Kiger*, 662 N.E.2d at 949).

351. *Id.*

Judge Sykes dissented from the majority's holding.<sup>352</sup> While she agreed with the interpretation of the underlying policy, she disagreed that coverage did not exist through the products-completed operation coverage in the excess policy. She noted that the policy covered "any goods or products . . . sold . . . by [MDK] . . . and . . . containers . . . furnished in connection with such goods or products."<sup>353</sup> Judge Sykes would have found against the insurer on this policy because the loss stemmed from bodily injury or property damage "arising out of MDK's 'product'—that is, its gasoline—which was not in MDK's possession at the time of the loss."<sup>354</sup> Judge Sykes noted that *B & R Farm Services* dealt with an exclusion, but the language in this policy was in a coverage-granting provision.<sup>355</sup> This distinction required reading the coverage-grant "broadly in favor of coverage" rather than "more narrowly" like an exclusion would be read.<sup>356</sup> Judge Sykes also noted additional limiting language in *B & R Farm Services* that was not present in the instant policy.<sup>357</sup> Finally, Judge Sykes disagreed with "engraft[ing] the limitations applicable to the 'completed operations' hazard onto the 'products' hazard."<sup>358</sup> She viewed the majority's decision as a "fairly significant *extension*" of *B & R Farm Services*, when there was no clear indication in that case that the Indiana Supreme Court so intended that result.<sup>359</sup> Because she found a disputed issue on whether the loss was known by MDK, she would have remanded for further proceedings to resolve that question.<sup>360</sup>

*D. Indiana Retains Uniform Contract Interpretation Approach for Deciding Choice of Law: National Union Fire Insurance Co. v. Standard Fusee*

Since the publication of the last survey article, three opinions have been issued regarding issues of choice of law in environmental insurance cases. Two of those opinions were decided in appeals in the *Standard Fusee* litigation, but the Indiana Supreme Court's opinion was issued after the survey period concluded.<sup>361</sup> Thus, while the court of appeals decision would have represented

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352. *Id.* at 926 (Sykes, J., dissenting).

353. *Id.* at 927.

354. *Id.*

355. *Id.* (citing *B&R Farm Servs., Inc. v. Farm Bureau Mut. Ins. Co.*, 483 N.E.2d 1076, 1077 (Ind. 1985)).

356. *Id.*

357. *Id.*

358. *Id.* at 928 n.1.

359. *Id.* at 929 n.2.

360. *Id.* at 929-30.

361. The third opinion on this topic is *Pulse Engineering, Inc. v. Travelers Indemnity Co.*, 679 F. Supp. 2d 969 (S.D. Ind. 2009). In this case, Judge McKinney followed the court of appeals decision in *Standard Fusee* before the supreme court's opinion on transfer had been issued. *Id.* at 973 (citing *Nat'l Union Fire Ins. Co. v. Standard Fusee Corp.*, 917 N.E.2d 170, 179 (Ind. Ct. App. 2009), *trans. granted, opinion vacated*, 940 N.E.2d 810 (Ind. 2010)).

a dramatic shift in the approach for evaluating choice of law, the supreme court has since concluded that the traditional “uniform-contract-interpretation” approach “is more consistent with Indiana’s choice-of-law jurisprudence” and “should apply in cases involving multisite, multistate insurance policies.”<sup>362</sup> Because the court of appeals decision has been vacated, we will preview next year’s article, which will more fully explore the supreme court’s reasoning in this case.

Standard Fusee Corporation (“Standard Fusee”) manufactures emergency signaling flares.<sup>363</sup> It is incorporated in Delaware and headquartered in Maryland, and in 1988, Standard Fusee owned one facility in Maryland, two in Pennsylvania, one in New Jersey, and one in Ohio.<sup>364</sup> That year, Standard Fusee began leasing facilities in both Indiana and California. Over the years, Standard Fusee bought and sold various properties, and at the time of the opinion, Standard Fusee had operations in Maryland, Indiana, and Pennsylvania.<sup>365</sup>

Standard Fusee purchased the policies at issue through two brokers, one located in Maryland and one in Massachusetts.<sup>366</sup> The insurance negotiations were completed through Standard Fusee’s Maryland headquarters.<sup>367</sup> The policies did not specify the law of the state that would govern their interpretation.<sup>368</sup>

In 2002, Standard Fusee was informed that perchlorate, a chemical used in the production of flares, had been discovered in groundwater samples near its California facility.<sup>369</sup> Thereafter, numerous lawsuits were filed in California, but ultimately, they were dismissed because it was determined that Standard Fusee had never discharged perchlorate at that facility.<sup>370</sup> Thereafter, Standard Fusee voluntarily tested its Indiana facility.<sup>371</sup> As a result of that test, Standard Fusee applied for, and was granted, inclusion in the Indiana Department of Environmental Management’s Voluntary Remediation Program (VRP) the following year.

Standard Fusee requested defense and indemnification from its insurers with respect to the proceedings in California and Indiana.<sup>372</sup> After the insurers refused, Standard Fusee filed this case against the insurers seeking a declaratory judgment that the insurers must defend and indemnify Standard Fusee against the environmental liabilities arising in Indiana and California.<sup>373</sup> After the trial court

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362. *Standard Fusee Corp.*, 940 N.E.2d at 813.

363. *Id.* at 811.

364. *Id.*

365. *Id.*

366. *Id.* at 811-12.

367. *Id.* at 812.

368. *Id.*

369. *Id.*

370. *Id.*

371. *Id.*

372. *Id.*

373. *Id.*

granted partial summary judgment on these grounds, the insurers appealed.<sup>374</sup>

The court of appeals acknowledged that Indiana courts have traditionally followed Restatement (Second) of Conflict of Laws when confronted with a choice of law issue.<sup>375</sup> The Restatement uses a multi-factor test to decide a choice of law issue.<sup>376</sup> With regard to contract cases, “[t]he rights and duties of the parties . . . are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties.”<sup>377</sup> Under the “uniform-contract-interpretation” approach the court would determine the most significant relationship by considering: “(a) the place of contracting, (b) the place of negotiation of the contract, (c) the place of performance, (d) the location of the subject matter of the contract, and (e) the domicile, residence, nationality, place of incorporation and place of business of the parties.”<sup>378</sup> Despite the prior precedent, the court of appeals reasoned that Indiana courts “did not explicitly reject the site-specific approach” that some states have applied to multi-state contract cases.<sup>379</sup> The court reasoned that if it applied a site-specific approach, “the parties [will] know in advance which law will apply, the insurer can quantify its risk, the insured will know it has coverage, and the court need not concern itself with the [Restatement’s] . . . factors in order to choose a single state’s law.”<sup>380</sup> Therefore, the court of appeals concluded that Indiana law should apply to Standard Fusee’s Indiana site, California law would apply to its California sites, and Maryland law would apply for the insurance policy on the Maryland site.<sup>381</sup>

The court of appeals decision accomplished the rare feat of unifying two parties involved in active litigation. Both Standard Fusee and National Union sought transfer with the supreme court, and both parties argued that the court of appeals decision to implement a “site-specific” approach was wrongly decided, with Standard Fusee arguing for uniform application of Indiana law, and the insurers arguing for Maryland law.<sup>382</sup> The Indiana Supreme Court vacated the court of appeals decision and reaffirmed the “uniform-contract-interpretation” approach that “has been an integral part of . . . [Indiana’s] choice-of-law analysis in contract cases for two-thirds of a century.”<sup>383</sup>

Using that approach, the Indiana Supreme Court found that the state with the

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374. *Id.*

375. *Nat’l Union Fire Ins. Co. v. Standard Fusee Corp.*, 917 N.E.2d 170, 176 (Ind. Ct. App. 2009) (citing *Utopia Coach Corp. v. Weatherwax*, 379 N.E.2d 518 (Ind. Ct. App. 1978)), *trans. granted, opinion vacated*, 940 N.E.2d 810 (Ind. 2010).

376. *Id.* (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (2010)).

377. *Id.* (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6).

378. *Id.* (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6).

379. *Id.* at 178.

380. *Id.*

381. *Id.* at 181.

382. *Nat’l Union Fire Ins. Co. v. Standard Fusee Corp.*, 940 N.E.2d 810, 811 (Ind. 2010).

383. *Id.* at 815.

intimate contacts was Maryland.<sup>384</sup> While previous cases involved one state with more insured sites than any other, in this case, both Maryland and Indiana had one site each. But because Maryland was Standard Fusee's headquarters, this factor favored the insurers' position.<sup>385</sup> Furthermore, Standard Fusee was a Delaware corporation headquartered in Maryland; the insurers were not incorporated or headquartered in either Maryland or Indiana.<sup>386</sup> Next, all of the insurance was retained in, and the premiums were paid from, Maryland—a factor that also favored Maryland.<sup>387</sup> Finally, while the trial court had determined that the “place of performance of the contract” was Indiana, counsel for Standard Fusee had apparently conceded in argument before the supreme court that “a large amount of its claim arose . . . in California,” so the court found that “the place of performance is not exclusively Indiana.”<sup>388</sup> So while none of the factors were determinative, the Indiana Supreme Court held that “the substantive law of Maryland applies to the entire dispute.”<sup>389</sup>

Interestingly, the court of appeals decision covered two issues that are once again undecided based on the supreme court's grant of transfer. The court of appeals had held that the absolute pollution exclusions in the insurers' policies were unenforceable under Indiana law, and Standard Fusee's participation in the VRP was a “suit” for purposes of determining the insurers' duty to defend.<sup>390</sup> But given that the supreme court decided that Maryland law applied to this dispute, it “express[ed] no opinion beyond that set forth in this decision on these . . . issues.”<sup>391</sup> Given the “no opinion” footnote, the court neither expressly adopted, nor summarily affirmed the court of appeals's findings; thus, these two holdings are no longer controlling law in Indiana.<sup>392</sup>

*E. Self-Serving Affidavit Sufficient to Defeat Insurer Summary Judgment on Duty to Defend: Indiana Farmers Mutual Insurance Co. v. North Vernon Drop Forge, Inc.*

This declaratory judgment action was filed by a commercial general liability insurer.<sup>393</sup> The action arose after North Vernon Drop Forge, Inc. (“NVDF”) sought an insured defense from Indiana Farmers Mutual Insurance Company

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384. *Id.* at 817.

385. *Id.*

386. *Id.*

387. *Id.*

388. *Id.*

389. *Id.*

390. *Nat'l Union Fire Ins. Co. v. Standard Fusee Corp.*, 917 N.E.2d 170, 185-86 (Ind. Ct. App. 2009), *trans. granted, opinion vacated*, 940 N.E.2d 810 (Ind. 2010).

391. *Standard Fusee Corp.*, 940 N.E.2d at 812 n.1.

392. *See* IND. APP. R. 58(A).

393. *Ind. Farmers Mut. Ins. Co. v. N. Vernon Drop Forge, Inc.*, 917 N.E.2d 1258, 1262 (Ind. Ct. App.), *trans. denied*, 929 N.E.2d 796 (Ind. 2010).

(“IFMI”) against claims brought against NVDF and its employees.<sup>394</sup> The claim alleged that NVDF deposited contaminated fill dirt on the property of an auction operation to improve its parking area.<sup>395</sup> The owner of the auction operation accused NVDF of depositing fill material containing contaminated industrial waste on its property and brought various claims, including a claim for negligence.<sup>396</sup>

IFMI denied coverage and initiated the declaratory judgment action, seeking a declaration that it had no duty to defend or indemnify NVDF. Both parties moved for summary judgment, with NVDF submitting an affidavit from its principal stating that he was unaware the fill materials were contaminated when they were provided.<sup>397</sup> The trial court denied IFMI’s motion to strike the affidavit, denied summary judgment to IFMI, and granted summary judgment to NVDF, ordering IFMI to both defend and indemnify NVDF.<sup>398</sup>

The court of appeals held that extrinsic evidence could be considered to determine an insurer’s duty to defend, particularly where an insured submits an affidavit “denying intent and favoring coverage.”<sup>399</sup> The court of appeals thus considered the affidavit in connection with the underlying complaint in determining IFMI’s duty to defend. The court of appeals also relied on *Harvey* in finding that there was an “occurrence” implicating the duty to defend in that “[t]he unintended consequence of an intentional act may qualify as an ‘occurrence’ for insurance purposes.”<sup>400</sup> Because NVDF did not intend to contaminate the auction property when depositing the fill material on the land, and because the complaint alleged (at least in part) unintentional conduct by NVDF in the form of negligence, the court of appeals held that evidence demonstrated an “occurrence” triggering IFMI’s duty to defend NVDF. Utilizing the same reasoning, the court of appeals found that the “expected or intended” exclusion was inapplicable.<sup>401</sup>

The court also found that late notice was no bar to coverage because the evidence of the insured’s conduct in safeguarding the insurer’s interest and defending the claims was sufficient to rebut any presumption of prejudice as a matter of law.<sup>402</sup> Finally, the court of appeals held that the trial court’s ruling that there was a duty to indemnify was premature, and such duty could not be ascertained until the underling litigation was concluded.<sup>403</sup>

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394. *Id.* at 1262-63.

395. *Id.* at 1264.

396. *Id.* at 1265.

397. *Id.* at 1265-66.

398. *Id.* at 1266.

399. *Id.* at 1268-69 (citing *Auto-Owners Ins. Co. v. Harvey*, 842 N.E.2d 1279, 1291 (Ind. 2006)).

400. *Id.* at 1271 (citing *Harvey*, 842 N.E.2d at 1291).

401. *Id.* at 1273.

402. *Id.* at 1276.

403. *Id.*

## CONCLUSION

Court decisions during the survey period illustrate that environmental law continues to be an emerging practice area.<sup>404</sup> Indiana's state and federal courts were not left out of this phenomenon. Hopefully, our survey of these decisions will provide practitioners with a quick reference guide to the most significant decisions of this period and some insight into the issues that will be decided in the years to come.

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404. *Occupational Outlook Handbook, 2010-11 Edition*, BUREAU OF LABOR STATISTICS, <http://www.bls.gov/oco/ocos053.htm> (last modified June 7, 2011) ("Job growth among lawyers also will result from increasing demand for legal services in such areas as . . . environmental law.").