SCHNAPF ENVIRONMENTAL JOURNAL

A Newsletter Covering Recent Environmental Developments and Caselaw

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The Schnapf Environmental Journal is a bi-monthly report that provides updates on regulatory developments and highlights significant federal and state environmental law decisions affecting corporate and real estate transactions, and brownfield redevelopment. The information contained in this newsletter is not offered for the purposes of providing legal advice or establishing a client/attorney relationship. Environmental issues are highly complex and fact-specific and you should consult an environmental attorney for assistance with your environmental issues.

DUE DILIGENCE

Bank Agrees to Pay Nearly $1 Million For Environmental Conditions at Defunct Borrower's Facility

HSBC Bank USA, N.A. agreed to pay $850,000 in fines and reimburse environmental agencies for response costs involving a facility that was abandoned by a borrower. The bank also agreed to implement an internal environmental awareness training program for its staff and to adopt revised workout procedures. This case highlights the risks that lenders face during workouts and foreclosure involving manufacturing facilities or contaminated property.

In this case, HSBC extended a $4.1 million loan to Westwood Chemical Corp. After the borrower defaulted, HSBC established a lockbox and directed customers to forward payments to that account. A few months later, HSBC seized Westwood's operating funds and asked the company to prepare a plan for an orderly shutdown. As part of this request, Westwood requested approximately $60,000 to properly dispose of hazardous materials in drums, containers and wastewater tanks as well as raw materials and work in process. HSBC refused this request and also declined to follow the recommendations of its consultants to winterize the facility.

During the winter, pipes from the fire suppression system burst as well as many of the containers storing hazardous materials. The contents of the drums mixed with water when the weather warmed. At some point in early 2005, the local code enforcement officer became aware of the conditions and notified the New York State Department of Environmental Conservation (NYSDEC), which then referred the matter to EPA.

In the meantime, the trustee for the bankrupt debtor filed a motion under section 506(c) of the bankruptcy code seeking to subordinate the bank's lien. EPA, DEC and the town also filed administrative claims seeking reimbursement of their response costs. In the fall of 2006, HSBC arranged for the sale of the property for $3 million. Approximately $2.3 million of the sales price was used to reimburse some of the costs incurred by the regulatory agencies.

In its lawsuit against HSBC, the New York Attorney General asserted that HSBC was not entitled to the secured creditor exemption because it had become involved in the management of the facility when it seized the operating funds, refused to allow money to be used to properly dispose of the hazardous materials or otherwise enable the borrower to comply with its closure obligations, and failed to properly winterize the facility when it had assumed control of the building and constructive possession of the hazardous materials. The attorney general also charged that the bank had an obligation to notify the NYSDEC of the conditions at the facility.

HSBC must implement a training program that will educate its employees on the environmental compliance obligations of companies facing financial difficulty and a lender's obligations in such circumstances. In particular, the

training program must address the extent to which facilities shut down without an opportunity to perform appropriate wind-down and environmental compliance measures can present significant hazards. In addition, the training program must also review the applicability of state and federal laws disclosure obligations for persons having knowledge of the release or threat of release of hazardous substances.

Commentary: *Perhaps the most interesting aspect of the HSBC case is the state's view that the bank had an obligation to notify the state about the presence of the drums and containers in the borrower's facility.*

As we have discussed on numerous occasions during the eight years that the SEJ has been published, lenders encounter their greatest risk of liability during post-foreclosure activities, and the HSBC case highlights the importance of a lender exercising extreme caution when winding down operations at a borrower's manufacturing facilities. Under the 1996 Asset Conservation, Lender Liability Deposit Insurance Act, also known as the Lender Liability Amendments, a lender may maintain business operations, wind down operations, take measures to preserve, protect and prepare the vessel or facility for sale or disposition, and even undertake response actions under section 107(d)(l) of CERCLA so long as the lender seeks to sell or re-lease (in the case of a sale/leaseback transaction) and complies with certain foreclosure requirements.

Due to the secured creditor exemption, many banks have become somewhat cavalier about environmental liability and have been accepting substandard Phase I ESA reports and otherwise diluting their environmental due diligence standards as part of a general decline in lending standards.

Perhaps because of these developments, banks continue to find themselves subject to environmental issues because of the actions they took during workouts or following foreclosures. Many of these enforcement actions involve administrative orders or lawsuits that are quietly settled by governmental agencies. These situations have typically taken place when a borrower has gone out of business and the bank takes control of the facility in order to sell off the inventory, fixtures, machinery and equipment of the borrower subject to the bank's lien. The bank typically does not take title to the property because of fear that it will lose its exemption, but instead hires an auction house to conduct the sale of the property. Usually, there are barrels or drums of hazardous waste strewn about the facility and the equipment that is being auctioned off may even contain hazardous wastes. To avoid any suggestion that the bank or the auction had any control over hazardous wastes, the auction will often rope off the area where the drums or barrels are found. After the auction is conducted, the drums and barrels are then left in the abandoned facility. At some point, government authorities discover that there are abandoned drums at the facility and order the lender to pay for the removal of the materials.

Lenders should be aware that the definition of "release" under CERCLA includes abandonment of drums. Thus, a lender who has taken control of a facility to conduct an auction and leaves

behind drums or equipment containing hazardous wastes could be deemed to have caused a threatened release of hazardous substances. EPA has consistently taken the position that such action constitutes abandonment of hazardous wastes (when the borrower is insolvent) and creates generator liability for the lender. As a result, financial institutions should consult with environmental counsel prior to taking possession of a former borrower's facility or conducting any auction at a manufacturing facility. It would also be advisable for lenders to retain an environmental consultant or environmental attorney to inspect the facility prior to taking control in order to evaluate the possible environmental liabilities that might be associated with the auction. The financial institution could have its environmental consultant or attorney perform a regulatory review of the facility to minimize the possibility that the lender could incur liability for releases of hazardous substances at that treatment or disposal facility.

Tax Sale Purchaser Liable CERCLA Owner

An increasingly popular strategy used by real estate investors to acquire contaminated properties is to acquire rights to the properties through foreclosure or tax sales without actually taking title to the land. The successful bidder then either brings an action under section 7002 of the Resource Conservation and Recovery Act (RCRA) to compel responsible parties to remediate the site and sell the tax certificate or note at a profit, or to wait for brownfield developers to purchase the property. However, this strategy is not without risk as illustrated in *United States v. Capital Tax Corporation*, 2007 U.S. Dist. LEXIS 1184 (N.D. Ill. 1/4/07).

In this case, Capital Tax acquired a tax certificate for five of the seven parcels comprising a facility that had been previously owned and operated by the National Lacquer and Paint Company. The assets of the company were sold in 1995 to a new entity that continued the paint reclamation business and the facility was conveyed to a trust. Following a 1998 inspection by the Chicago Department of the Environment (CDOE), the company entered into a consent order with the City of Chicago to remove damaged drums and hazardous wastes, repair a leaking roof and remediate spills in a storage yard and a building that had migrated to the street and into a sewer.

Prior to participating in the October 2001 tax sale, a representative of Capital Tax inspected the complex and was aware that the site had been used to manufacture and reclaim paint. As in prior tax foreclosure sales, Capital Tax agreed to re-convey the tax certificates to Mervyn Dukatt who, in turn, agreed to pay a part of the purchase price.

After Capital Tax obtained tax deeds, though, the company refused to vacate the premises. Capital Tax then obtained an order of possession on January 7, 2002. Several weeks later, deputies from the Cook County Sheriff's office evicted the principal of National Lacquer at the request of Capital Tax. Dukatt was present during the eviction and represented himself as an agent of Capital Tax. Dukatt also agreed to allow National Lacquer to remove personal property, but the company reportedly left cans and drums in the warehouse and storage yard.

Reportedly acting on his behalf, Dukatt subsequently visited the facility several times and hired workers to dissemble and remove paint machines located in the garage, repair and replace an overhead door and demolish two walls. Capital Tax, meanwhile, did not take any action regarding the materials abandoned by National Lacquer and failed to safeguard the property against third parties. Indeed, Capital Tax failed to observe a 15-foot hole in a door that allowed trespassers to gain access to the facility.

In April 2002, the Chicago Police and Fire Department responded to a spill report and observed a trail of spilled product that apparently originated from containers that had been moved from the warehouse to the storage yard. Capital Tax denied that it had hired workers to move the containers but the CDOE issued a notice of violation to Capital Tax for allowing spills of hazardous substances due to container movement. In July 2003, CDOE inspected the site and requested Capital Tax to remove hazardous materials located on the property but Capital Tax refused.

CDOE then referred the site to EPA to perform a removal assessment. The agency detected elevated levels of volatile organic compounds (VOCs) in the indoor air, observed leaking containers, identified soil contamination in the storage yard, and determined that the site posed a risk of fire or explosion. In August 2003, EPA issued a Unilateral Administrative Order (UAO) to Capital Tax and National Lacquer. When they failed to comply, EPA conducted a removal action, disposing of 18,000 drums and containers, draining USTs, excavating contaminated soil and cleaning building interiors.

EPA then filed a cost recovery action seeking reimbursement of approximately $2 million. Capital Tax argued it was not liable as an owner under CERCLA under the secured creditor exemption because it held title pursuant to the tax deed solely to protect a security interest. However, the court ruled that Capital Tax was in the business of purchasing and re-selling real estate for a profit and there was no evidence suggesting that Capital Tax held title for any other purpose than as an investor seeking to profit from a resale of the property. The court noted that Capital Tax had not extended loans to National Lacquer or Dukatt that had been secured by title to the parcels. To the contrary, the court said that Capital Tax had planned to make a quick profit immediately after the sale by conveying the parcels to Dukatt. According to the court, it did not matter that Dukatt did not pay the purchase price.

Capital Tax also asserted the third party defense, claiming that the release was solely caused by National Lacquer or Dukatt and that it had exercised due care by keeping the premises locked and not moving containers around. The court said it did not matter that Capital Tax did not place the hazardous substances at the site since once it learned of the presence of hazardous materials, Capital Tax was required to take actions to prevent a release.

Capital Tax argued that it had exercised due care by locking the premises and ignoring the presence of hazardous substances. However, the court said that to satisfy the due care prong of the third party defense, Capital Tax was required to take some action. The court said it was undisputed that Capital Tax was aware that hazardous

substances had been left behind when it obtained the tax deeds in 2001 and was also aware of the deteriorated conditions at the site in 2002 since it had received the notice of violation (NOV) and had attended the hearing. Despite this knowledge, the court said Capital Tax not only failed to take any action, but also specifically refused to take action when requested by CDOE in July 2003.

The court also dismissed Capital Tax's claim that it did not know what it could have done to exercise due care. The court said Capital Tax should have at least sealed leaking containers, mopped up and properly disposed of spilled hazardous substances. Since Capital Tax failed to produce sufficient evidence to show that it took actions to prevent releases of hazardous substances, the court granted the government's motion for summary judgment.

Following the ruling, the principals of National Lacquer resolved their CERCLA liability by making an initial payment of $330,000 and paying in addition at least $250,000 in proceeds from the sale of five properties that the United States alleged had been fraudulently transferred by a principal of National Lacquer. The settling parties were required to use their "best efforts" to sell the properties, which was defined as responding to the reasonable inquiries of prospective buyers, maintaining the properties in a condition suitable for showing to prospective buyers, allowing the properties to be shown at reasonable times as well as assisting brokers or agents in any reasonable way requested to sell the properties at the highest price and as quickly as possible. The consent decree also provided that the inability to sell one or more of the properties would not delay or excuse the settling parties from making the required payments. Within 60 days of receiving the required payments, EPA is required to file a release of the CERCLA lien filed in July 2004. The settling defendants are also required to provide access to EPA to conduct response actions, including monitoring, verifying information provided to EPA, conducting investigations, collecting samples, assessing or planning additional response actions, evaluating the defendants' compliance with the consent decree and determining if the property is being used in a manner that is prohibited or restricted, or to impose such restrictions.

According to the consent decree, the covenant not to sue (CNTS) will not take effect until EPA receives the payments, interest and stipulated penalties. The CNTS is also expressly conditioned on the veracity and completeness of the financial information provided to EPA. If EPA subsequently determines the information is false or materially inaccurate, the CNTS and contribution will be voided and all payments forfeited.

Commentary: *In State of New York v. Fumex Sanitation, Inc., No. 04-1295 (E.D.N.Y.), a similar case that was first discussed in the April 2006 issue of SEJ, the parties are preparing to argue cross-motions for summary judgment. The State of New York has charged that a purchaser of a mortgage note that never foreclosed on a site that was on the state superfund list was not entitled to the secured creditor exemption. The state argues that the purchaser of the note participated in the management of*

the facility and held the mortgage note primarily as a real estate investor and not to protect a security interest. New York cited several factors in its memorandum of law to support its claim. The state noted that the purchaser acquired the note at a discounted price because of the contamination, received rents that almost equaled the purchase price of the note, rejected reasonable offers for the property, arranged for repairs to the roof, received rents, retained an environmental consultant to obtain remediation cost estimates and met with the New York State Department of Environmental Conservation to negotiate a possible remedy for the site.

Missouri Supreme Court Upholds Fraud Ruling Against Bank For Failing To Disclose Environmental Conditions

In our April 2006 SEJ issue, we discussed a jury verdict in *Hess v. Chase Manhattan Bank* finding a bank liable for common law fraud for failing to disclose the existence of an EPA investigation in a foreclosure sale. The court granted the defendant's motion to dismiss on the claim that the bank had violated the Missouri Merchandising Practices Act (MPA).

The defendant bank filed a motion for a judgment notwithstanding the verdict on the fraud claim, arguing that the disclaimers in the contract should have precluded the fraud claim. After the trial court denied the motion, the bank appealed; however, in *Hess v. Chase Manhattan Bank*, 2007 Mo. LEXIS 65 (Mo. 5/1/07), the Supreme Court of Missouri ruled that because the plaintiff claimed fraud in the inducement, the disclaimers in the contract did not preclude the fraud claim. The court said Chase had an obligation to disclose material information that was not discoverable through ordinary diligence and that the plaintiff could not have reasonably discovered the existence of EPA's investigation in the kind of diligence ordinarily done for real estate transactions of this kind. The court also noted that the bank failed to file the required property disclosure form.

The court also ruled that the trial court erred when it dismissed the MPA claim. The law was amended in 2000 to allow private parties to bring actions for misrepresentations. Since the property was conveyed prior to the effective date of the amendment, the trial court ruled that the plaintiff was not entitled to relief under the MPA. However, the majority ruled that the MPA had always barred deceptive or fraudulent acts associated with real estate transactions. Since the amendment only created a new remedy for an existing obligation of sellers of real estate, a majority of the judges ruled that the MPA could be applied retrospectively. The court held that the jury found that the plaintiff satisfied three of the four elements of the MPA claim. However, the court dismissed the MPA claim prior to trial and the jury did not hear evidence on the remaining element of the MPA cause of action—that the plaintiff purchased the real estate primarily for personal, family or household purposes—and Chase did not have the opportunity to contest this claim. Thus, the court remanded the MPA claim to the trial court.

Injunction Amending State Approved Cleanup Plan

Parties to a transaction involving contaminated property frequently

negotiate post-closing remedial mechanisms where a seller may be required to implement a post-closing remediation in accordance with state cleanup standard. However, in this era of risk-based cleanups where the remediator is often allowed to propose or select a cleanup that does not remove all of the contamination, purchasers and their lenders may discover to their disappointment that the cleanup approved by a state agency may not be as comprehensive as they may have wished. Unless the agreement linked the cleanup to a particular end use or cleanup standard, the purchaser frequently will either have to incur the increased costs or "delta" to bring the site to the desired cleanup level, or file an action to enforce a more stringent cleanup.

Such was the case in *Kennedy Building Associates v. CBS Corporation*, 2007 U.S. App. LEXIS 2282 (8th Cir. 2/1/07). The plaintiff purchased a former electrical transformer repair facility from the defendant in 1982 and discovered PCB contamination in 1997. Following jury trial, the plaintiff obtained injunction under Minnesota Environmental Rights Act (MERA) requiring the defendant to remediate the site. The defendant negotiated a cleanup plan with the Minnesota Pollution Control Agency (MPCA) requiring the defendant to remove contaminated soil down to 12 feet. The plaintiff was not satisfied with the cleanup plan because it allowed contaminated soils beneath the building to remain and did not require the defendant to clean the interior of the building. After unsuccessfully challenging the cleanup plan, the plaintiff moved to modify the injunction to require the defendant to remediate the building interior and post bond to cover costs to remediate soils beneath the building in the event the building was renovated or demolished. The district court agreed to modify the injunction, requiring the defendant to implement the remediation plan and to submit a revised remediation plan if sampling results showed that the contamination had migrated. The court also instructed the plaintiff to notify the defendant if future development would involve excavation deeper than 12 feet or disturbance of soils beneath the building. The court also ordered the defendant to post and maintain a bond of approximately $1.3 million for five years.

On appeal, the defendant asserted that the injunction was improperly issued because there was no evidence of a continuing release of PCBs. However, the appeals court found no clear error by the district court because there was conflicting evidence on the stability of the plume and the continuing migration of the PCBs. The defendant also challenged the authority of the court to require a performance bond; however, the appeals court ruled that MERA provides that courts may fashion equitable relief or impose conditions that are necessary and appropriate to achieve the goals of MERA.

Consultant Claim for Improper Vapor Intrusion Sampling Allowed to Proceed

In 1992, the owner of a Mobil service station retained a consultant, the plaintiff, to investigate and delineate the extent of groundwater contamination. The plaintiff detected limited groundwater contamination and installed a soil vapor extraction system, but did

not submit the results to the New York State Department of Environmental Conservation (NYSDEC). In 1998, the gas station owner retained the plaintiff to implement a remedial plan for a petroleum spill pursuant to a stipulation agreement. The plaintiff found that gasoline was present in the groundwater one block from the gas station but the concentrations appeared to be decreasing. When NYSDEC required additional investigation, the gas station owner hired another consultant who detected MTBE in the irrigation well of a school located one block further south. When the Valley Stream Free School District learned that MTBE was detected in its well, the school district retained the defendant to conduct indoor air sampling. After the sampling detected elevated levels of benzene, the school relocated the kindergarten classes to a building that housed its administrative offices. The new facility had to be reconfigured and the administrative offices moved to another location. As it turned out, since gasoline-powered equipment was stored at the school, the sampling results overstated the impact from the gasoline spill.

In 2002, the school district commenced an action to recover the fees it paid to the defendant as well as the costs for relocating the kindergarten and administrative offices. The plaintiff and Exxon Mobil reached a settlement where the plaintiff agreed to pay $550,000 and Exxon Mobil $110,000. As part of the settlement, the school district agreed to assign its rights against the defendant to the plaintiff.

The plaintiff then sought damages for breach of contract claim, negligence and unjust enrichment. After the plaintiff agreed to discontinue the latter two claims without prejudice, the defendant filed a motion to dismiss the breach of contract claim. The defendant asserted that it complied with the Environmental Laboratory Approval requirements of Public Health Law §502. However, the court said that compliance with the Public Health Law did not necessarily establish that the defendant exercised due care when the defendant conducted the indoor air sampling. In particular, the court said it could not determine without the benefit of expert testimony if evaluating indoor air without taking into account the potential for gasoline vapors emanating from gasoline-powered equipment was good and accepted practice for an engineer functioning in the capacity of an environmental consultant. Accordingly, the court denied the motion to dismiss.

Commentary: *Due to the absence of well-established procedures for collecting vapor intrusion samples and the extremely low concentrations involved in vapor intrusion assessments, vapor sampling frequently may be inaccurate. Thus, it is extremely important for clients and their consultants to be familiar with state vapor intrusion analytical requirements and to establish the protocols to be used for assessing vapor intrusion. It is also important to advise the laboratory about what screening levels to use and to ensure that the screening level is consistent with that required by a particular state for determining if further action is required*.

RCRA §7003 Vapor Intrusion Action to Proceed

In *U.S. v. Apex Oil Company, Inc.*, 2007 U.S. Dist. LEXIS 18143 (S.D.

Ill. 3/15/07), the United States alleged that multiple leaks from a petroleum pipeline resulted in dangerous levels of vapor-phase hydrocarbons in soil and air that posed an imminent and substantial endangerment, and sought injunctive relief under section 7003 of RCRA. The defendant disputed that the contamination posed an imminent and substantial endangerment.

The court agreed with the United States that the standard for finding an endangerment was lower than the defendant suggested; however there were factual disputes on the degree of contamination. Since it could not be determined if the contamination posed a risk to human health or if the vapor intrusion was attributable to the hydrocarbon plume, the court determined it was not in a position to make factual findings at this time and denied the government's motion for summary judgment.

Federal Government Held Liable for Asbestos-Contaminated Soil

In prior issues, we have discussed how the presence of asbestos in soils has complicated reuse of former military facilities and other brownfield sites. One of the more highly publicized examples of asbestos-contaminated soils has been the former Lowry Air Force Base in Colorado that was closed in the second round of the Defense Base Closure and Realignment Act of 1991, 10 U.S.C. §2687 (Base Closure Act). The Air Force prepared a Basewide Environmental Baseline Survey (EBS) that did not identify asbestos in soil. In 1995, the base was sold to the Lowry Redevelopment Authority (LRA) pursuant to an Economic Development Conveyance Agreement (EDC) for $32.6 million. After LRA prepared the land for construction, the parcels were then conveyed to builders.

When LRA faced a number of unexpected development impediments including asbestos containing materials in buildings and steam lines that dramatically increased redevelopment costs, the Air Force agreed in 1999 to reduce the purchase price to approximately $8 million and cancel the remaining promissory note for the outstanding debt. The Air Force also issued Findings of Suitability (FOST) each time it transferred parcels and indicated that the Northwest Parcels were suitable for residential development without any restrictions.

In the process of improving and developing the parcels, LRA and builders incurred substantial remediation costs due to asbestos in the soil related to the demolition and burial of former structures between 1959 and 1979. Following the discovery of the asbestos-contaminated soil, the Colorado Department of Public Health and Environment (CDPHE) issued two Compliance Advisories requiring the builders to implement approved remediation plans and conduct indoor air sampling. The builders requested that the Air Force reimburse them for $9 million in cleanup costs but the Air Force declined to indemnify the builders in 2005.

In *Richmond American Homes of Colorado, Inc., et al v. The United States of America*, No. 05-280C (Ct. Claims 2/22/07) the United States Court of Federal Claims granted summary judgment to the builders, holding that the Air Force was liable under section 330 of the Base Closure Act (10 U.S.C. §2687). The Air Force had argued that

section 330 was triggered only when there was a claim for personal injury or property damage. However, the court ruled that this interpretation was inconsistent with the sweeping language and purpose of the law. The court noted that section 300 was risk-shifting legislation that was designed to encourage economic redevelopment of former military facilities and to remove disincentives to reuse. The court also ruled that the CDPHE advisories may not have been the final agency actions for purposes of filing administrative appeals but were assertions of regulatory authority that could not be construed as a mere invitation to take voluntary action.

While not the basis of the decision, the court did suggest that the environmental covenants that the Air Force was required to insert into the deeds under section 120(h) of CERCLA ran with the land and applied to grantees of the LRA. In addition, the court held that the disclaimers in the deeds indicating that no representations were made for ACM applied to asbestos abatement for equipment and facilities conveyed by the Air Force and were not general waivers of any existing but unknown releases of asbestos in the soil.

Seller of Buildings With ACM Not Liable Under CERCLA or RCRA

In *Sycamore Industrial Park Associates v. Ericsson, Inc.,* 2007 U.S. Dist. LEXIS 23881 (N.D. Ill. 3/30/07), the plaintiff purchased an industrial park from the defendant in 1985. Sometime prior to the sale, the defendant installed a new heating system but left in place the old heating system that was incorporated into the building.

The plaintiff sued the defendant under CERCLA, RCRA and common law, and requested an injunction ordering the defendant to remove the ACM or to pay the plaintiff for its abatement costs. The defendant then filed a motion to dismiss.

In its CERCLA claim, the plaintiff tried to distinguish the long line of CERCLA case law, holding that sellers of buildings with ACM incorporated into structures could not be liable for arranging for disposal of a hazardous substance. The plaintiff argued that since the ACM in the building was associated with an abandoned and obsolete heating system, it was no longer a useful product. However, the court said that since installing ACM in a building was not disposal under CERCLA, then simply leaving the same material where it was originally installed could not qualify as disposal. Moreover, the court noted that the plaintiff did not allege that asbestos fibers were being released into the environment. If the defendant had dismantled the equipment with the ACM or detached and abandoned the ACM, the court said it would not hesitate to impose liability on the seller. Since no such facts were alleged in the complaint, the court granted the defendant's motion to dismiss.

On the RCRA claim, the plaintiff argued that the heating system with asbestos left in place was discarded material since it had served its purpose and was no longer wanted by the defendant when it installed a new heating system. However, the court noted that the case law relied on by the plaintiff was not applicable because those cases involved manufactured

products that were no longer wanted by customers as opposed to building materials in an otherwise useful building. The court held that a RCRA solid waste does not extend to discontinued use of building materials that are left in place within a building structure unless it is alleged that the building itself is discarded, and granted the defendant's motion to dismiss.

Commentary: *Hazardous materials that are part of building structures, such as ACM, are excluded from the definition of a CERCLA release. However, if the ACM has been removed and fibers are escaping into ambient air through building openings or the building has been demolished, then the costs to remove the ACM debris could be recovered under CERCLA. Since the cost of abating ACM in buildings is generally not recoverable under CERCLA, it is important for developers and lenders of renovation projects of older buildings to make sure that asbestos abatement costs are included in the construction budget.*

Supreme Court Rules that PRPs May Seek Cost Recovery Under CERCLA Section 107

In *United States v. Atlantic Research Corp*. 2007 U.S. LEXIS 7718, 551 U.S., No. 06-562, (6/11/2007), the United States Supreme Court ruled that potentially responsible parties (PRPs) may seek cost recovery under Section 107 of the CERCLA. The case focused on the meaning of the phrase "any other person" in §107(a)(4)(B) of CERCLA, which provides that PRPs may be liable for "any other necessary costs of response incurred by any other person consistent with the national contingency plan." The federal government argued that "other person" refers to non-PRPs or any person not identified in §107(a)(1)–(4), while Atlantic Research asserted that subparagraph (B) provides a cause of action to anyone except the United States, a state, or an Indian tribe because subparagraph (A) provides a cause of action to those parties. Following the maxim that "statutes must be read as a whole," the Court held that subparagraph (B) could be understood only with reference to subparagraph (A) and held that "it is natural to read the phrase any other person by referring to the immediately preceding subparagraph (A), which permits suit only by the United States, a State, or an Indian tribe."

In so ruling, the Court did not find that §107 had an implied right of contribution but created a separate right of cost recovery that was distinct from the right of contribution established under §113(f)(1). The Court said that §113(f)(1) authorizes a contribution action among PRPs with common liability while §107 permits cost recovery for a private party that has *voluntarily* incurred cleanup costs. In contrast, the Court said when a PRP pays money to satisfy a settlement agreement or a court judgment, it is not actually incurring its own costs, but reimbursing response costs paid by other parties.

Commentary: *Other opinions interpreting Aviall that were decided prior to the Supreme Court's Atlantic Research decision are summarized in the litigation summary below.*

LITIGATION ROUNDUP

Editor's Note: *The year 2007 is proving to be as interesting as 2006 for environmental litigation. Following are summaries of significant cases decided during the first quarter of 2007. The next SEJ issue will provide summaries for significant environmental cases issued during the second quarter.*

Aviall Cases

Metropolitan Water Reclamation District of Greater Chicago v. North American Galvanizing & Coatings, Inc, 2007 WL 102979 (7th Cir. 1/17/07)

Following decisions of Second and Eighth Circuits, the United States Court of Appeals for the Seventh Circuit upholds district court ruling allowing plaintiff to recover $1.8 million under CERCLA §107 for voluntary cleanup of parcel leased to the defendant.

GenCorp, Inc. v. Olin Corporation, 477 F.3d 368 (6th Cir. 2007)

Following a trial and final judgment holding GenCorp liable for $19 million in contribution costs and $9.7 million in prejudgment interest, the plaintiff filed a motion under the intervening-change-in-law exception of rule 60(b)(6) of the federal rules of civil procedure asking to set aside the judgment in the wake of the Supreme Court's opinion in *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 540 U.S. 1099 (2004). The plaintiff argued that the defendant was not entitled to seek contribution under CERCLA §113(f)(1) because the unilateral administrative orders (UAO) issued by EPA did not qualify as a "civil action" under §113(f)(1). The court said that rule 60(b)(6) existed to protect litigants who, despite due diligence, failed to prophesy a reversal of established adverse precedent. The court noted that because there had not been any controlling precedent in the Sixth Circuit, the Supreme Court's decision did not alter any existing precedent. Moreover, the court observed that GenCorp did not argue this issue in a 2004 appeal of the district court denial of a motion for reconsideration, and thus had waived appellate consideration of this issue. Finally, the court said that to exercise its equitable authority to overturn a prior judgment, it must be clear to a court that the intervening decision plainly foreclosed the relief obtained by the prevailing party. Because the Supreme Court decision had not decided if a UAO qualified as a civil action, it was not certain that GenCorp would prevail and affirmed the district court's denial of the rule 60(b)(6) motion.

Differential Development-1994, Ltd. and Dean Lee, d/b/a Pro Cleaners v. Harkrider Distributing Co., 2007 U.S. Dist. LEXIS 1592 (S.D. Tex. 1/9/07)

A former owner of a shopping center and a dry cleaner tenant entered into a state voluntary cleanup program agreement (VCA) with the Texas Commission on Environmental Quality (TCEQ) in 2004 following the discovery that wastewater containing PCE was discharged into the sewer system. VCA provided that the parties reserved their rights to seek contribution. The parties to the VCA then filed a complaint against the supplier of the PCE, the

waste management company collecting the waste PCE, and the City of Houston as owner of the sewer system. The owner of the shopping center also asserted state law claims against CB Richard Ellis (CBRE) as property manager of the shopping center for failing to ensure that the dry cleaner complied with lease provisions prohibiting discharge of contaminants and allowing the dry cleaner's insurance policy to lapse for two years.

On the motion to dismiss the CERCLA §113(f) contribution claim, the court found that the VCA did not specifically resolve CERCLA liability and the plaintiffs were not released from liability until the work was completed and a Certificate of Completion issued. Likewise, the court said the EPA Memorandum of Understanding with Texas did not resolve CERCLA liability because federal enforcement was only suspended until the work under the VCA was completed. The court also found that the plaintiffs were PRPs because they either owned or operated the facility at the time the PCE was released from the sewer into the environment. Since PRPs were not entitled to bring claims under §107, the court dismissed the CERCLA claims. Since the federal law claims were dismissed, the court declined to assert jurisdiction over the state law claims, and dismissed them without prejudice.

Universal Paragon Corporation v. Ingersoll-Rand Company, 2007 U.S. Dist. LEXIS 14530 (N.D.Cal. 2/13/07)

Following reasoning of other district courts in California as well as Second and Eight Circuits, the court holds that a PRP has an implied right of contribution under CERCLA §107.

United States v. Simon Wrecking, Inc., 2007 U.S. LEXIS 1759 (E.D.PA. 3/14/07)

The United States through the EPA is allowed to file a cost recovery action under §107 even though three federal agencies were PRPs.

BASF Catalysts LLC v. U.S., 2007 U.S. Dist. LEXIS 21712 (D.Mass. 3/26/07)

The plaintiff contracted with the Department of Defense for nuclear fuel fabrication and development services at its Plainville facility. The government retained ownership of the materials. During the fabrication, a variety of hazardous substances were released into the environment.

The plaintiff entered into a RCRA §3008 corrective action order with EPA in 1993. The order reserved EPA's right to bring further actions under RCRA and CERCLA §106, as well as providing that the plaintiff was not released from any liability for costs of any response actions taken by EPA. The plaintiff spent approximately $15 million implementing the cleanup and $971,00 purchasing five nearby homes that had been impacted with contaminants.

In 2005, the plaintiff sought contribution from the United States on the grounds that the §3008 corrective action order was an administrative settlement under CERCLA §113(f)(B). The court denied the plaintiff's motion for summary judgment, ruling that the RCRA order did not resolve CERCLA liability with the United States or a state as required under §113(f)(B). The court also noted that §113(g)(3) did not provide a statute of limitations for RCRA settlements.

Emhart Industries Inc. v. New England Container Co., No. 06-218S, (D.R.I., 3/20/07).

A PRP is allowed to pursue a contribution action under CERCLA §107.

Gurley v. West Memphis**,** No. 04-148, (E.D. Ark. 6/13/07)

A city settlement with PRPs does not confer contribution protection under §113(f)(2) since the settlement was not with a state or the federal government. As a result, the plaintiff may proceed with a contribution action for expenses incurred while cleaning up a site in West Memphis.

CERCLA Petroleum Exclusion

Cariddi v. Consolidated Aluminum Corp.**,** 478 F.Supp.2d 150 (D.Mass. 3/30/07)

The current owner of a property formerly occupied by an aluminum tubing business filed a motion for a summary judgment and declaration that the defendant was responsible for response costs. The former operation used large quantities of lubricating oil that dripped onto the floors. The employees used mineral spirits to thin the oil and push it through cracks and holes in the floor, where it accumulated in the earthen basement. The defendant argued it was not liable under CERCLA because the contamination at the site consisted of petroleum that was excluded from the definition of CERCLA hazardous substances. The magistrate concluded that the defendant had met its burden of establishing the petroleum exclusion by showing it had only used light oil, heavy oil, mineral spirits and kerosene. The plaintiff asserted that the contamination did not fall within the petroleum exclusion because the defendant had added mineral spirits to the oil used in its manufacturing process. However, the court held that since the mineral spirits were distilled from petroleum, the resulting mixture did not fall outside the petroleum exclusion. The court granted summary judgment to the defendant on the CERCLA count but granted summary judgment to the plaintiff under the Massachusetts Chapter 21E count since some of the petroleum became waste oil after it was released and waste oil was covered by Chapter 21E.

Corporate Liability

State of Maine v. KerrAmerican, Inc., 2007 U.S.Dist. LEXIS 16258, 2007 U.S. Dist. 16260 (D.Me. 3/6/07)

The plaintiff filed a complaint involving the release of heavy metals from mining operations by the Blue Hill joint venture (JV) of defendants KerrAmerican and Black Hawk Mining, Ltd (Black Hawk). Pursuant to the 1970 joint venture agreement, KerrAmerican's predecessor would serve as the manager of the JV and receive a 60% interest while Black Hawk would retain 40% interest in the JV. Representatives of KerrAmerica and Black Hawk met several times a year to discuss the status of the JV operations, approve budgets and review expenses and profits. When mine operations ceased in 1977, the site was placed in a care and maintenance program with the hope that operations would resume. In 1980, though, the JV commenced mine closure activities under the oversight of the Maine Department of Environmental Protection (MDEP). In 2004, the MDEP filed an action seeking reimbursement of

past costs, implementation of the approved remedial plan and payment of damages for natural resources. KerrAmerican entered into a consent decree with MDEP in 2006 to implement the remedy that was estimated to cost $9 million.

KerrAmerican moved for summary judgment against Denison Mines, Inc. (Denison) on grounds that it was liable as an operator because it exercised pervasive control over the operations of the site in the 1960s, including directing disposal of waste rock that was the principal cause of the contamination. Denison also filed for summary judgment, arguing that it was not an owner or operator of the mine site based on its minority ownership interest (43.7%) in Black Hawk and financing of Black Hawk operations.

Denison acknowledged that some of its employees served as directors, officers or employees of Black Hawk, but that it had no involvement in the operation of the site during mining and processing operations. The company also admitted that one of its geologists performed a preliminary appraisal of the mine, including conducting exploratory drilling work, but that Black Hawk employees were in charge when the mine sinking began and waste rock/ore was removed from the mine shaft. Defendants KerrAmerican and Black Hawk suggested that Denison had substantially understated its involvement at the site. The court held that the test for imposing liability on parent companies as articulated in *U.S. v. Bestfoods* was whether Denison's control over the site was "eccentric under accepted norms of parental oversight of a subsidiary's facility." Because the precise roles of Denison employees and whether certain employees were acting on behalf of Denison or Black Hawk was unclear, the court ruled that there was a material question of fact that precluded summary judgment.

Contract Interpretation

Oxy USA Inc. v. Borden, Inc., 2007 U.S. App. LEXIS 694 (6th Cir. 1/8/07)

The defendant purchased certain assets of a division of a predecessor of plaintiff/appellant in January 1974. The asset purchase agreement provided that the seller was conveying all assets free and clear of all liabilities and obligations except for those assumed by the buyer. The contract further provided that the buyer assumed all obligations relating to the purchased assets except for obligations arising out of events occurring prior to the closing date.

In 1997, Dow Chemical filed a contribution action against the plaintiff and 80 other parties in connection with the remediation of the Skinner Landfill. The plaintiff then sought indemnification from the defendant. The district court initially ruled the contract was ambiguous and denied the plaintiff's motion for summary judgment. Following trial, the district court ruled in favor of the defendant, finding that the closing date was the "demarcation line" for determining liability. The court rejected the plaintiff's claim that the event leading to liability could not have been the waste disposal because CERCLA had not yet been enacted. Since the waste disposal activities at the Skinner Landfill occurred prior to the closing and the disposal was the event that led to liability, the district court found the plaintiff retained liability. On appeal, the Sixth Circuit affirmed, finding

that the plaintiff had not met its burden of clear error on the part of the district court.

Westlake Vinyls, Inc. v. Goodrich Corporation, 2007 U.S. Dist. LEXIS 24469 (W.D. Ky. 3/30/07)

The defendant owned and operated an industrial complex in Calvert City for over 40 years and used unlined ponds to treat, store and dispose of hazardous wastes. In 1986, the defendant began to close the ponds pursuant to an interim status closure plan. In particular, the defendant excavated materials from one pond (#4) and placed them in a lined RCRA hazardous waste closure cell. Pond #4 was backfilled to level ground and received a closure certification from the state in 1989. Also in 1989, the facility was issued a post-closure permit that provided for a 36 year old operation and monitoring program. In 1996, the defendant submitted a clean closure equivalency demonstration (CCED) for pond #4 to remove this area from the post-closure requirements. In 1997, the defendant sold one of the plants at the facility as well as the area where pond #4 was formerly located to the plaintiff. The contract provided that the plaintiff was entitled to indemnity for losses that equal or exceeded $100,000 or that exceeded $25,000 for losses relating to environmental conditions existing at the time of the closing.

In 2000, the defendant withdrew the CCED application and in 2004, the state Environmental and Public Protection Cabinet (Cabinet) requested that the plaintiff submit a post-closure permit application for pond #4. The plaintiff challenged this administrative action and also filed its lawsuit seeking indemnity from the defendant for the costs of defending the administrative action and any closure costs it might incur. However, because the plaintiff had not yet incurred losses that exceeded the triggers set forth in the 1997 agreement, the court denied plaintiff's motion for a partial summary judgment.

Olivarez v. J.A.C. Even Resources, Inc., 2007 Cal. App. Unpub. LEXIS 222 (4th App. 1/11/07)

The owner of property containing a car wash and a former gas station entered into an amendment of a master lease in 1994 with the defendant whereby the owner agreed to remediation of contamination associated with abandoned USTs at the car wash. The lease amendment established a 10-year Environmental Remediation Term (ERT) in which the owner was to complete corrective action in accordance with the steps outlined in the state corrective action regulations and the Orange County Health Care Agency (OCHCA) certified that the remediation was completed. Once OCHCA determined the remediation was complete, the 30-year lease term would commence. The owner also agreed to indemnify the tenant during the ERT and term of the lease. The former service station was excluded from the scope of the ERT.

In April 2000, the district attorney filed an enforcement action against the owner and tenant to compel remediation and sought $52 million in damages and penalties. The defendant/tenant ceased paying rent and sought indemnity from the plaintiff/landlord, who in turn brought an unlawful detainer seeking eviction and back rent. Prior to the start of the trial, the trial court issued an Interlocutory Order in 2001 requiring the

defendant pay the landlord/plaintiff $5,000 per month, which was the amount of the rent he was receiving from a sub-tenant operating the car wash. The defendant/tenant ceased paying the rent when the trial started.

The plaintiff/landlord removed the USTs from the car wash in 2002. Since significant soil contamination was detected, OCHCA did not require additional assessment or corrective action and issued two closure letters in 2003 for the car wash and car rental agency parcels of the leased premises. The defendant argued that the plaintiff had not complied with its lease obligations because the closure letters only applied to two of the six parcels, and no follow-up assessment and corrective action had been performed at those parcels. Moreover, the defendant claimed that the plaintiff was required to remediate two other parcels impacted by contaminated groundwater migrating from the excluded gas station site. The trial court found for the defendants and ruled the plaintiff had not complied with its obligations under the amended lease despite the closure letters from the OCHCA. As a result, the court held that the 30-year lease had not commenced and awarded $322, 729 in damages to the defendant.

The appeals court ruled that the OCHCA letter did satisfy the requirements of the lease even though the plaintiff had not complied with all corrective action set forth in the lease since the county did not require these actions. The appeals court also ruled that the tenant did not have the right to withhold rent on the ground that the amount of the landlord's indemnity exceeded the rent due because a tenant's covenant to pay rent was independent of a landlord's covenant to repair, which in this case was the landlord's obligation to complete remediation of the property. However, because the tenant's right to indemnity had been decided before the landlord's unlawful detainer action had been commenced, the court ruled that the amount of the rent due could be used to reduce the amount of indemnity obligation.

RCRA

Nadist, LLC v. The Doe Run Resources Corp., 2007 U.S. Dist. LEXIS 4722 (E.D. Mo. 1/23/07)

The plaintiff brings a RCRA citizen suit charging that the defendant's abandonment of ore concentrate has impacted the plaintiff's property and created imminent and substantial endangerment. The court denies the defendant's motion to dismiss, arguing that concentrated ore is not a solid waste but virgin material because it contains metal ores that may become a source of raw materials, or because it is from the beneficiation of ores and minerals.

Envirowatch, Inc. v. Fukino, 2007 U.S. Dist. LEXIS 14140 (D.Hawaii 2/28/07)

The plaintiffs sought order from the court requiring the state Department of Health (DOH) to allow them to participate in settlement discussions with the landfill operator resolving various violations of state permits. The court held that the plaintiffs did not establish how DOH's had violated the minimum guidelines for public participation action under RCRA and dismissed the complaint.

Oil Pollution Act

U.S. v. Burlington Resources Oil and Gas Company L.P., 2007 U.S.Dist. LEXIS 17184 (W.D. LA. 3/9/07)

The plaintiff seeks approximately $1.4 million in removal costs associated with the cleanup of a oil production pit that was last used in 1971. At the time of the cleanup, the defendants held mineral rights formally known as a mineral servitude, and the plaintiff alleged that the defendant was a responsible party under the Oil Pollution Act as an owner of a facility.

As a mineral servitude owner, the defendant had a limited right to use the property to explore and produce minerals over only so much land as reasonably necessary. Despite the fact that the defendant or its predecessors never used the pit, the plaintiff alleged that as a mineral servitude owner, the defendant was obligated to restore the surface of the land to its original condition and that this obligation extended to the pit. However, the court held that under state law, a holder of mineral rights would not be considered an owner of the pit, and granted summary judgment that the defendant was not an owner under OPA.

INSURANCE

Technology Square, LLC v. United National Insurance Company, 2007 U.S.Dist. LEXIS 14030 (D.Mass. 1/4/07)

The plaintiff purchased a former industrial property in June 1998 that was previously occupied by a soap and hose manufacturer as well as a gas station. Prior to the acquisition, the general counsel of Beacon Capital Partners, LP (Beacon), the sole member of the plaintiff, reviewed an October 1997 Phase I ESA provided by the broker that had been ordered by the seller of the site. Beacon requested permission to conduct sampling because the Phase I ESA identified former uses and because the site contained urban fill. After the seller refused to allow sampling, the plaintiff retained another consultant to review the Phase I ESA and to provide a cost estimate for environmental costs based on the assumption that the plaintiff would demolish the existing structures and construct a new building. The consultant provided a draft letter to Beacon in May 1998 indicating that there was no documented release and that groundwater remediation was not anticipated. The letter also suggested that future construction could result in cleanup costs and that a future buyer might want potential environmental issues addressed. The draft letter estimated that possible future environmental remediation costs could be as high as $1.6 million.

Beacon then retained an insurance broker to solicit proposals for an environmental insurance policy. The broker provided a copy of the Phase I ESA but not the May 1998 letter report. The defendant was provided the lowest bid and the plaintiff submitted an application for a pollution liability policy. The application required the plaintiff to provide copies of any environmental reports or assessments completed within the past three years. The application also requested any other information that the applicant was aware of that might reasonably be expected to result in a claim under the policy. In response, the broker provided the 1997 Phase I ESA. The defendant then issued its policy in June 1998. The policy included coverage for losses resulting from pollution conditions

discovered as a result of capital expenditures or improvements on the property.

In September 1999, the plaintiff collected soil samples during pre-development planning that revealed elevated levels of petroleum and PAHs in the soil and groundwater. The plaintiff notified the MADEP and the agency determined that the plaintiff was responsible for investigating and remediating the contamination. The plaintiff incurred approximately $750,000 addressing the contamination and filed its complaint after defendant denied coverage.

The defendant sought summary judgment because the plaintiff was aware that contamination was present at the site at levels sufficient to trigger cleanup obligations under the Massachusetts Contingency Plan (MCP). The defendant also claimed that the plaintiff had misrepresented material facts by not disclosing the existence of its own due diligence documents, by not disclosing its plans to construct a new building and that the seller had refused access to collect Phase II sampling. Alternatively, the insurer argued that the contamination was not covered under the known conditions and owned property exclusions. The plaintiff, in turn, asserted that the Phase I contained all of the material facts about pollution conditions and that the insurer should have been capable of deriving the same conclusions that the plaintiff's consultant had reached.

The defendant's underwriter testified that the company guidelines would have precluded him from providing a quote for coverage or would have required a quote pursuant to a cost cap policy. However, the magistrate court found that the Phase I had been sufficient to influence two other insurers and would have been sufficient to alert the insurer about the environmental conditions at the property.

Since there was a genuine dispute on the question of whether all of the material facts were disclosed to the company, the court ruled that summary judgment in favor of the defendant was inappropriate on the known conditions exclusion. However, because the plaintiff conceded that there was no coverage under the Owned Property exclusion, the magistrate recommended granting summary judgment on the breach of contract count of the complaint.

On the plaintiff's claim of unfair or deceptive practices, the magistrate recommended denying summary judgment because the insurer had provided conflicting and inconsistent reasons for denying coverage. The court noted that the defendant initially denied coverage because there was "no indication that the problem was of recent origin", but then later conceded in a deposition that this was irrelevant because the policy did not have a retroactive date. In addition, the defendant denied coverage because the source of the contamination was urban fill, but then acknowledged at deposition that urban fill mixed with pollutants would be covered.

Thomas Steel Strip Corporation v. American International Specialty Lines Insurance Co., 2006 U.S. Dist. LEXIS 94623 (N.D. Ohio 1/11/07)

The insured sought coverage under a claims-made policy that went into effect December 2003 relating to the costs of implementing a RCRA closure plan approved in April 2005 by Ohio EPA (OEPA). In 1984, EPA and

OEPA conducted a RCRA inspection and filed a complaint requiring the insured to comply with various RCRA requirements, including preparing a closure plan. The insured submitted a closure plan in 1986 that was unacceptable and obtained a series of extensions for submitting an amended closure plan. The plaintiff asserted that it was not legally obligated to cleanup its facility until the closure plan was approved. However, the court held that when EPA and OEPA notified the insured in 1984 it was legally obligated to implement closure. The fact that the insured was unable to comply with those obligations did not change the fact that the insured's legal obligation arose in 1984, 19 years before the start of the policy. Likewise, while the policy did cover pre-existing conditions, the court ruled that the claim first arose in 1984 and not during the policy period. Accordingly, the court denied the plaintiff's motion for summary judgment.

American International Specialty Lines Insurance Company v. NWI-I, Inc., f/k/a Fruit of the Loom et al**,** 2007 U.S.Dist. LEXIS 3025 (N.D. Ill. 1/16/07)

The plaintiff issued a $100,000,000 pollution legal liability policy to Fruit of the Loom, Inc. (Old FTL) in 1998 that covered seven properties formerly owned by FTL or its affiliated corporations. In December 1999, Old FTL and its affiliates filed a chapter 11 bankruptcy petition. EPA and other state agencies filed proofs of claim. In 2002, a bankruptcy court approved a joint plan of reorganization whereby the apparel business assets, which consisted of substantially all of the business operations of Old FTL, were conveyed to Berkshire Hathaway who formed a new subsidiary, Fruit of the Loom (New FTL). The seven properties with environmental claims were transferred to a Custodial Trust (CT) that was responsible for managing and funding remedial obligations. The Successor Liquidation Trust (SLT) was also formed to hold certain assets of Old FTL and distribute the assets to provide funding to CT. The assets held by SLT consisted of equity interests in old FTL and certain insurance policies.

The plaintiff filed a declaratory action seeking a ruling that the defendants were not entitled to coverage and the defendants filed a counterclaim asserting that the plaintiff was obligated to pay full policy limits for the remediation costs of the seven properties. In 2006, the plaintiffs served subpoenas seeking 38 categories of documents. The counsel for CT and STL asserted privilege claims on behalf of Old FTL. The court ruled that since control of the business of Old FTL was transferred to New FTL, CT and STL did not succeed to attorney-client or other privileges associated with Old FTL.

Invensys Systems, Inc. v. Centennial Insurance Co.**,** 2007 U.S. Dist. LEXIS 5131 (D. Mass. 1/17/07)

The plaintiff, Invensys Systems (Invensys), sold industrial property in 1978 and was issued a notice of responsibility by the then Massachusetts Department of Environmental Quality ordering Invensys to implement certain remedial actions. In 1990, the current owner of the property, One Wheeler Associates, sought reimbursement of its remediation costs. Following a bench trial, the court found Invensys liable for TCE-contaminated groundwater in the northeastern portion of the site, but not for soil contamination. The final judgment required Invensys to pay

approximately $1.2 million and complete certain remedial activities. The parties' respective remedial obligations were memorialized in a settlement agreement under which Invensys paid a total of $502,000 to One Wheeler Associates.

Invensys sought coverage from an excess liability policy issued by the defendant for the period 1972 to 1975. The defendant argued that the settlement agreement addressing how payment for remedial costs would be structured was a voluntary payment that barred coverage. However, the court ruled that the final judgment did not specify the exact amounts to be paid for future remediation and that the settlement agreement was simply an extension of the final judgment. Since the payment by Invensys was involuntary, the court ruled that the defendant was required to indemnify the plaintiff for its ultimate net loss, including unreimbursed indemnity costs arising from the Wheeler Road litigation and future remediation costs.

Deniham Ownership Company, LLC v. Commerce and Industry Insurance Co., 2007 N.Y. App. Div. LEXIS 1923 (App. Div-1st Dept 2/20/07)

In May 2001, the plaintiff retained an environmental consultant to perform an environmental investigation and remediation prior to selling the property. The plaintiff purchased a Cost Cap Coverage (CCC) policy from the defendant as well as a Pollution Legal Liability Select (PLLS) policy. The PLLS policy contained an exclusion for cleanup costs or liability arising from pollution conditions discussed in the documents prepared by the environmental consultant.

In 2002, a contractor for the purchaser discovered previously unknown and unidentified contamination as well as several USTs that had been overlooked by the plaintiff's consultant. The defendant declined coverage on the basis of the exclusion for pollution conditions contemplated in the referenced reports of the consultant. The trial court granted the defendant's motion for summary judgment and the appellate division affirmed, finding that the additional contamination and USTs discovered by the purchaser's contractor were connected with the prior known conditions in the consultant's documents. Moreover, the court noted, the environmental consultant's documents contemplated such future discovery.

Mechanic Laundry & Supply, Inc. of Indiana Shareholders Liquidating Trust et al v. American Casualty Company of Reading, Pa., 2007 U.S.Dist. LEXIS 24369 (S.D. IND. 3/30/07)

The plaintiffs owned and operated four uniform rental and cleaning facilities that released PCE into soil and groundwater at the sites. During the 1980s, the defendant sold a series of comprehensive general liability policies to the plaintiff related entities. Prior to the 1998 merger and corporate reorganization, the plaintiffs performed environmental due diligence that uncovered soil and groundwater contamination at the facilities and incurred approximately $420,000 in costs to investigate and begin remediation of these sites under the Indiana and Illinois voluntary cleanup programs.

The defendant filed motion for summary judgment, asserting that the voluntary payment provision of the policies precluded coverage. The

plaintiffs responded that Indiana law interpreted this provision using a two-step analysis that required examining if notice was tendered in a reasonable amount of time and if the insurer suffered prejudice. The court noted that the plaintiffs' notices ranged from eight months to four years. The court noted that other state courts had found delays excusable if the insureds did not know that they were responsible parties or if there were other insurers that might have owed coverage; however these circumstances did not exist since the plaintiff did not claim it had any doubt that it was a responsible party at any of the sites. The court held that the delays were unreasonable as a matter of law and that the plaintiff had the burden of rebutting the presumption that the insured was prejudiced by these delays.

The defendant argued she was denied opportunities to influence negotiations with the state agencies regarding the proposed remedies, to select the environmental consultants and to participate in the selection of the attorneys. However, the plaintiffs relied on the deposition testimony of the defendant's claims consultant that she expected the insureds to initiate the steps of hiring environmental consultants to address environmental problems and that it was rare for her to select attorneys. She was also unable to identify ways in which the company was prejudiced.

The court found that the testimony and facts showed that the insureds may need to take action to protect their interests months before an insurer can make a coverage decision and cannot refuse to meet or work with environmental agencies. The court also noted that since the claims were tendered, the defendants had not criticized or tried to change the plaintiff's approach to its defense or remediation, nor had it questioned the work of the plaintiffs' attorneys. The court also observed that the plaintiffs were spending their own money and had a strong incentive to use its funds wisely. Based on the foregoing, the court ruled that the record would easily allow a reasonable jury to find that the plaintiffs used competent and experienced attorneys and environmental consultants to deal with the problem. The court acknowledged that it can be difficult to prove the absence of prejudice but that Indiana law provided for a rebuttable presumption and concluded that the plaintiffs had produced sufficient evidence to avoid summary judgment.

Wetlands

National Association of Home Builders v. Army Corps of Engineers, No. 01-0274 (D.D.C. 1/30/07)

The revised "Tulloch" rule addressing circumstances when incidental fallback resulting from use of mechanized earth-moving equipment requires wetlands permit under the Clean Water Act (CWA) is invalidated because the regulation focuses on absolute volume of material re-deposited. The court ruled that in defining incidental fallback, the Corps must take into consideration the relative volume of material re-deposited as well as the time held before being re-deposited and the distance from original excavation.

Daubert Challenges

Jazari v. Royal Oaks Apartment Associates, L.P., 2007 U.S. App. LEXIS 3501 (11th Cir. 2/13/07)

The plaintiff moved into an apartment in May 2002 and observed mold growth on the walls and floors two months later. The local health department found evidence of water intrusion and ordered the defendant to abate the mold in accordance with the EPA mold guidance. In August, the plaintiff visited an emergency room complaining of memory loss, fatigue and malaise, and was subsequently diagnosed with interstitial fibrosis scarring of lung tissue between the air sacs. The plaintiff subsequently vacated the apartment and initially lived in a tent on an undeveloped property before relocating to another apartment.

In October 2002, the plaintiff complained of shortness of breath, coughing and chest pains. After a series of tests, her treating physician found no evidence of fungal growth and while not ruling out an allergic reaction to mold known as hypersensitive pneumonities (HP), concluded that her symptoms were suggestive of chronic bronchitis from 20 years of smoking. Instead of filling a prescription to ease breathing from the interstitial fibrosis, the plaintiff visited Dr. Eckhardt Johaning who specialized in mold-related illnesses. He tested her for sensitivity for specific mold species and determined she was allergic to Termoactinomyces, a bacterium. He also found antibodies in her bloodstream consistent with exposure to bacteria. On another visit, he found that her interstitial fibrosis had almost cleared up. He diagnosed her with resolved or resolving HP caused by exposure to mold and bacteria. He also determined that she was too young for smoking-related symptoms and that her x-ray findings were more consistent with allergic lung problem than asthmatic bronchitis.

The plaintiff then filed a personal injury action against the defendant. The defendants sought to exclude Dr. Johaning's affidavit under *Daubert v. Merrel Dow Pharmaceuticals*, 509 U.S. 579 (1993). The district court ruled that Dr. Johnaning's diagnosis was not scientifically acceptable because he failed to "rule-in" mold as the source of plaintiff's symptoms, failed to rule out smoking or other common allergens, and over relied on the temporal proximity between the mold exposure and onset of plaintiff's symptoms. Without the affidavit, the court ruled that there was no issue of material fact about causation and granted summary judgment to the defendant.

On appeal, the court said that a plaintiff must show a probability rather than mere possibility that the alleged negligence caused the injury. The court noted that HP was an allergic reaction that occurs when a hypersensitive individual is exposed to high dosages of mold spores. The court also observed that Dr. Johaning found that the plaintiff did not have any mold allergies and was unable to link her symptoms to any of the molds that were present in the apartment. The court went on to say that there was no evidence that Termoactinomyces was present in the apartment and since the bacteria was usually found in straw, hay and grain, there was no evidence that would allow a reasonable inference that the bacteria was present in the apartment. Since Dr. Johaning was only prepared to link her symptoms to mold based on the short amount of time between the exposure to mold and onset of symptoms, the court felt it was within its discretion to exclude

this evidence and affirmed the summary judgment in favor of the defendant.

Miller v. Mandarin Homes, Ltd., 2007 U.S. Dist. LEXIS 15193 (D.Md. 2/28/07)

After purchasing a home from defendants in 2003 the plaintiffs noticed a punctured pipe and yellow staining in the basement. Soon thereafter, the plaintiffs began suffering a variety of health complaints. Several investigations did not reveal unusual levels of molds or VOCs.

Nevertheless, the plaintiffs filed a complaint in 2005 asserting that the defendants failed to disclose that the house had been built on or near a former waste dump and had caused a release of hazardous substances during grading activities. The plaintiffs sought to introduce the testimony of a hydrogeologist, Dr. Lorne Everett, who had reviewed environmental reports and historical photographs. Dr. Everett's opinion was that the photographs revealed a pattern of land disturbance that was "consistent with a dump or landfill". The court concluded that Dr. Everett's opinion about the landfill was speculative. The court said that Dr. Everett did not declare to a reasonable degree of scientific certainty that there was a landfill in the past, simply that the photographs were consistent with a landfill. Thus, his opinion was premised on the existence of a landfill or dump without pointing to any evidence to support the premise. Thus, the court concluded, his testimony would not be sufficient to help a jury determine if a landfill had been located on the property.

Likewise, Dr. Everett had indicated that marshland to the west of the property that "would indicate a shallow depth to groundwater exacerbating the human health risk associated with contaminated water and vapors intruding the building." He also said that the detection of VOCs and SVOCs in water from the sump at the property was indicative of groundwater contamination under the property. The court said he was unable to conclude that the groundwater was contaminated and that the plaintiffs were exposed to toxic chemicals as a result of the contamination.

Since the plaintiffs had failed to produce any evidence establishing elevated levels of contaminants in the house, the court granted summary judgment to the defendants.

Reichold, Inc. v. United States Metals Refining Company**,** 2007 U.S. Dist. LEXIS 14000 (D.N.J. 2/22/07)

In a contribution action brought under CERCLA and the New Jersey Spill Compensation and Control Act, the court admits and excludes certain opinions and expert testimony relating to what contamination was subject to a settlement agreement between the parties.