RECENT DEVELOPMENTS IN ENVIRONMENTAL LAW

I. COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT

Canadyne-Georgia Corp. v. NationsBank, 183 F.3d 1269 (11th Cir. 1999)

The United States Court of Appeals for the Eleventh Circuit reversed a district court's dismissal of a suit by Canadyne-Georgia Corporation (Canadyne), which claimed that NationsBank (the Bank) was liable under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), Georgia Hazardous Site Response Act (HSRA), and Georgia common law for costs Canadyne incurred in cleaning up its property in Georgia (the

Site). The Bank's predecessor served as co-trustee of a trust consisting of a partnership interest in a chemical company, Woolfolk Chemical Words, Ltd. (WCW), that allegedly contaminated the Site prior to Canadyne's acquisition of the business. The United States District Court for the Middle District of Georgia held that the Bank was not a "covered person" within the meaning of section 107(a)(1) of CERCLA. In addition, since the HSRA incorporates the same definitions and standards for owner and operator liability as CERCLA, the district court dismissed the state claims.

Pursuant to Federal Rule of Civil Procedure 12(b)(6), the Eleventh Circuit reviewed the district court's dismissal *de novo*, determining that the "motion [to dismiss] must be denied unless it is clear the plaintiff can prove no set of facts in support of the claims in the complaint." Canadyne argued that the Bank was liable as an "owner" of the Canadyne property under section 107(a)(2) of CERCLA. That section imposes liability on "any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of." Canadyne claimed that during the time of contamination, the Bank served as a trustee for trusts that included partnership interests in WCW. To determine whether the Bank could be deemed an "owner" under CERCLA, the Eleventh Circuit considered Georgia state law at the time of the release of hazardous substances at the Site. Since the Bank held the partnership interest in trust, the court held that this amounted to holding legal title to and owning the general partnership interest. The facts also indicated that, at the time the Bank held this interest, the individual partners owned the real property of the partnership. The court therefore concluded that, because the Bank owned a general partnership interest that owned the Site, the Bank owned the Site for purposes of CERCLA.

In response, the Bank argued it was exempt from liability under the Asset Conservation, Lender Liability, and Deposit Insurance Protection Act (the Act), even if it is deemed an "owner" under CERCLA. The Act amended section 107 of CERCLA to protect fiduciaries from personal liability for the costs of cleaning up environmental hazards. The amendment limits the liability of fiduciaries to the assets held in a fiduciary capacity. Thus, owners who might otherwise be deemed "owners" under section 107 generally cannot be held personally liable under CERCLA.

Canadyne, however, argued that an exception to the Act, section 2502(n)(3), should be applied in this case. That subsection prohibits the limitation on liability where negligence of a fiduciary causes or

contributes to the release or threatened release of a hazardous substance. Citing to this exception, Canadyne claimed that the Bank's negligence caused or contributed to the release of hazardous substances at the Site. For this exception to apply, the court required that Canadyne prove some action of the Bank, because the Bank had no duty to prevent someone else from releasing hazardous substances. The court rejected Canadyne's contention that CERCLA imposed a duty on the Bank to prevent others from releasing hazardous substances. The court explained that CERCLA does not allocate liability based on fault or negligence; rather it makes those in a prior or current relationship to the polluted property strictly liable. Since CERCLA imposes no duty to act, the court concluded the Bank could not have been negligent in failing to prevent others from polluting.

For purposes of reviewing the dismissal of Canadyne's complaint, the Eleventh Circuit considered the allegations of the Canadyne's complaint as true. Although Canadyne made no allegation of any particular action by the Bank that caused or contributed to the release of hazardous substances, simply asserting that the Bank "negligently released or allowed the release of hazardous substances," the court nevertheless held that the complaint should not have been dismissed. Without implying that the Bank was liable under CERCLA, the court merely stated that Canadyne's complaint satisfied the low threshold of sufficiency prescribed by Federal Rule of Civil Procedure 8(a), which requires that a complaint contain a "short plain statement of the claim showing that the pleader is entitled to relief." Furthermore, the court was bound by prior precedents holding that "it is sufficient against a motion to dismiss to allege that defendant acted negligently thereby causing injury." In closing, however, the court noted that the ruling would not prevent the district court from narrowing the scope of discovery to determine whether the Bank negligently caused or contributed to the release of hazardous substances at the Site.

Ruth Ann Castro

II. RESOURCE CONSERVATION AND RECOVERY ACT

Harmon Industries, Inc. v. Browner, 191 F.3d 894 (8th Cir. 1999)

In November 1987, plaintiff Harmon Industries discovered that, for nearly fifteen years, its workers routinely disposed of volatile solvent residue behind the Harmon plant in Grain Valley, Missouri. Following the discovery, Harmon ceased its disposal practices and voluntarily informed the Missouri Department of Natural Resources (MDNR). The MDNR and Harmon established a voluntary compliance plan whereby Harmon would clean up the disposal area and, in exchange for Harmon's cooperation, the MDNR would not seek civil penalties. However, while Harmon was cooperating with the MDNR, the federal Environmental Protection Agency (EPA) initiated an administrative enforcement action against Harmon in which the agency sought over two million dollars in penalties.

While the EPA's administrative enforcement action was pending, the MDNR and Harmon entered into a consent decree wherein the MDNR acknowledged full accord and satisfaction on the part of Harmon and released Harmon from any claim for monetary penalties. The decree was approved by a Missouri state court judge. Thereafter, Harmon litigated the EPA claim, first before an administrative law judge (ALJ) and subsequently, on appeal of the ALJ's imposition of a $586,716 civil penalty, before a three-person Environmental Appeals Board panel that affirmed the ALJ's monetary penalty. Harmon then challenged the penalty award in federal district court. The district court granted summary judgment in favor of Harmon, finding that the EPA's decision to impose civil penalties violated the Resource Conservation and Recovery Act (RCRA), as well as longstanding principles of *res judicata*. The EPA then appealed the district court's determination to the Eighth Circuit.

On appeal, the Eighth Circuit affirmed the district court's grant of summary judgment. The circuit court reasoned that the clear language of RCRA section 6926 precluded the EPA's duplication of enforcement actions, a process commonly known as "overfiling." Under section 6926, the EPA authorized Missouri to administer and enforce a hazardous waste program. Following the grant of authorization, section 6926 provides that the state's program then operates "in lieu of" the federal government's RCRA program and any action taken by a state under an authorized program has the "same force and effect" as if taken by the EPA under RCRA.

Furthermore, state authorization cannot be freely rescinded by the EPA. Rather, in order to withdraw a state's authorization to administer a hazardous waste program, the EPA must determine that the state program is either not equivalent to or consistent with the federal program, or, most notably, that the state is failing to provide adequate enforcement.

In support of overfiling, the EPA argued that RCRA allows either a state with an authorized hazardous waste program or the EPA to enforce the state's regulations under the program. Specifically, the EPA claimed that RCRA section 6928 expressly provides for EPA enforcement in states with authorized hazardous waste programs. According to the EPA, the only prerequisite to EPA enforcement in such states under section 6928 is that the EPA notify the state in writing if it intends to initiate an enforcement action against an alleged violator. Moreover, the EPA sought to counter the argument that the phrases "in lieu of" and "same force and effect" in section 6926 establish the primacy of state enforcement authority to the exclusion of the EPA. The EPA contended that "in lieu of" only refers to which regulations are to be enforced under an authorized state program rather than who is responsible for enforcing the regulations. Similarly, the EPA argued that the phrase "same force and effect" only refers to permits issued by an authorized state, which permits have the "same force and effect" as if issued by the EPA.

The Eighth Circuit, however, did not adopt the EPA's interpretation of RCRA. Instead, the court held that the plain language of the statute "reveals a congressional intent for an authorized state program to supplant the federal hazardous waste program in all respects including enforcement." The court reasoned that, while the EPA correctly noted that the phrase "in lieu of" refers to the operative hazardous waste program itself, program administration and enforcement are "inexorably intertwined," such that the entirety of the state program, including enforcement, operates "in lieu of" the federal program.

The court reached a similar conclusion with regard to the section 6926 "same force and effect" language, reasoning that this phrase provides additional support for the primacy of states' enforcement rights under RCRA when the EPA has authorized a state to act "in lieu of" the federal agency. The court found that the plain language of the statute did not support the EPA's assertion that the "same force and effect" language is limited to the issuance of permits but not their enforcement. Rather, section 6926 expressly provides that "[a]ny action" taken by an authorized state "shall have the same force and

effect" as if taken by the EPA. "Any action" the court concluded, broadly applies to any action authorized by RCRA, including permit issuance as well as enforcement.

Additionally, the Eighth Circuit concluded that the EPA's reliance on section 6928 as the source of federal enforcement authority was misplaced. While section 6928 allows the EPA to bring enforcement actions against suspected violators in authorized states if the agency gives written notice to the state, the court reasoned that the section 6928 enforcement power was not nearly as broad as the EPA had alleged when that section is interpreted within the context of the entire statute. In an effort to harmonize the seemingly empowering language of section 6928 with the constraints on federal authority provided by the language of section 6926, the court concluded that section 6928 "manifests a congressional intent to give the EPA a secondary enforcement right in those cases where a state has been authorized to act that is triggered only after state authorization is rescinded or if the state fails to initiate an enforcement action." When considered in the context of the statute as a whole, the section 6928 notice requirement serves to provide an authorized state the opportunity to initiate an enforcement action under the state's hazardous waste program. Should the state fail to initiate any action, then, and only then, may the EPA invoke the section 6928 enforcement authority.

Although the court was reluctant to find any ambiguity in the plain language of RCRA, it noted that RCRA's legislative history supports the primacy of states' enforcement rights, even assuming that some ambiguity exists in the statutory language. The court referenced numerous statements in House Report 1491 that indicated a clear legislative intent to vest primary enforcement authority in the states and to allow the federal government merely a secondary right to initiate a RCRA enforcement action only after the state's authorization has been rescinded or the state fails to initiate any enforcement action.

The Eighth Circuit also affirmed the district court's reliance on *res judicata* as an alternative basis to support its grant of summary judgment, finding that the principles of *res judicata* also bar the EPA's enforcement action against Harmon by reason of the Missouri state court consent decree. The Eighth Circuit concluded that under Missouri law the consent decree would be given preclusive effect. The paramount issue in the court's *res judicata* analysis was whether the relationship of the parties, the United States and the State of Missouri, in the enforcement action was nearly identical. Here again, the court relied upon the "in lieu of" and "same force and effect"

language of RCRA section 6926 to conclude that the two parties stood in the same relationship to one another. Because the MDNR acts "in lieu of" the EPA, Missouri's enforcement action had the "same force and effect" as an action initiated by the EPA. Although the enforcement interests of the parties may have been distinct, Missouri, in its dealings with Harmon, advanced the exact same legal right under RCRA as the EPA did in its administrative enforcement action. Accordingly, under Missouri law, the identity of the parties was satisfied, as were the requirements of *res judicata*.

Bryan Moore

III. NATIONAL ENVIRONMENTAL POLICY ACT AND NATIONAL FOREST MANAGEMENT ACT

Shenandoah Ecosystems Defense Group v. United States Forest Service, No. 98-2552, 1999 WL 760226 (4th Cir. Sept. 24, 1999)

Shenandoah Ecosystems Defense Group and other environmental organizations (collectively "SEDG") brought suit against the United States Forest Service for multiple violations of the National Environmental Policy Act (NEPA) and the National Forest Management Act (NFMA). SEDG alleged that the Forest Service's timber harvesting decisions in three areas of the Jefferson National Forest (JNF) were procedurally inadequate and that the timber sales should therefore be enjoined.

The Forest Service proposed to engage in timber sales consistent with the requirements of JNF's Land and Resource Management Plan (the Forest Plan), as mandated by NFMA. The sales from the Arney Groups Project, the Terrapin Mountain Project, and the Wilson Mountain Project were for the purpose of harvesting wood fiber while improving the health of trees, as well as to provide a sustained yield of forest products. An environmental assessment (EA) was prepared for each project, assessing project impacts and discussing alternatives to the proposed actions. The District Ranger ultimately approved all three timber sales, finding each project to be consistent with the Forest Plan and without significant environmental impacts.

SEDG appealed the decisions on the three project areas to the Regional Forester. After consideration, two of the projects were immediately affirmed to proceed. The Arney Groups Project was subsequently approved after a revised EA was prepared to include environmental effects on the Peaks of Otter Salamander, the coal skunk, and the Indian bat. In response, SEDG filed an action in federal district court to enjoin the timber sales projects. The district court, however, granted the Forest Service's motion for summary judgment. In its appeal, SEDG argued that the Forest Service violated both NFMA and NEPA by failing (1) to consider the three projects' cumulative impacts, (2) to address impacts on rare species in the area, and (3) to discuss an adequate range of alternatives. SEDG further contended that the Forest Service violated NEPA by only preparing an EA for each project and not a more rigorous environmental impact statement (EIS).

The court first reviewed SEDG's claim that the Forest Service's failure to consider the combined, cumulative impacts of all three projects violated NEPA. SEDG maintained that the individual environmental impacts, which each project's EA discussed, were insufficient to comply with the statute. Citing the United States Supreme Court in *Kleppe v. Sierra Club*, the court rejected SEDG's argument. The court stated that *Kleppe* stood for the proposition that considering cumulative impacts in a separate document was not an explicit requirement of NEPA. Whether a separate cumulative analysis should be conducted or not depends upon multiple factors, including the interrelationship between the projects and practical feasibility. Here, the court concluded, the Forest Service gave sufficient consideration to cumulative impacts in each individual EA. This analysis encompassed the cumulative impacts on the visual and recreational resources of the Appalachian Trail and the Blue Ridge Parkway, which were SEDG's focus on appeal. The court found that the Forest Service examined visual and recreational resources in each EA and rationally concluded that, as no project would impact resources identical to the Appalachian Trail and Blue Ridge Parkway, a separate cumulative impacts study was not needed. The visual resources which were impacted were listed in each EA, and the court asserted that nothing indicated that these impacts would produce substantial cumulative impacts on the Trail or on the Parkway.

The court also rejected SEDG's argument that the Forest Service failed to address impacts on a rare species, the Peaks of Otter Salamander, within the Terrapin Mountain project. SEDG claimed that the Forest Service lacked adequate population data on the species to identify the range of its habitat. The court stated that the Forest Service properly prepared a biological evaluation as a part of each EA, in conformance with NFMA, considering all available inventories and data on the Peaks of Otter Salamander population. The agency's data was compiled from various field studies as a part of a greater Peaks of Otter Salamander conservation plan, and the timber projects were only approved for areas in which there would not be a significant impact on the species. The court found the agency's data on the Peaks of Otter Salamander both adequate and detailed, and held that the additional population surveys which SEDG requested were unnecessary because such inventories are only mandated where the original data is lacking.

SEDG's claim that the Forest Service violated NEPA by not considering a sufficient range of alternatives to the timber projects was unsuccessful as well. SEDG alleged that the alternatives that the

Forest Service listed were inadequate because the agency did not consider the alternatives of "real forms" of uneven-aged management, natural regeneration, and protecting "de facto" roadless areas. The court disagreed, stating that the five alternatives listed in each of the three EAs were sufficient to fulfill the requirements of NEPA. Furthermore, the court remarked that uneven-aged management techniques were included as proposed alternatives to the projects, and that "natural regeneration," as an equivalent alternative to "no action," was also therefore included in the Forest Service's alternatives discussion. The "*de facto*" roadless area alternative, the court concluded, was not required to be discussed or accepted by the Forest Service. Numerous alternatives had already been considered; moreover, the consideration of an arguably more environmentally sound alternative was inconsequential where the projects had been found to not have any significant environmental impacts.

Finally, the court addressed SEDG's claim that the Forest Service was mandated to prepare an EIS under NEPA, rather than just an EA, for the three project areas. As there were substantial questions about whether the timber sales would "significantly impact the human environment," SEDG asserted, an EIS was required. The court discussed that it was true that the significance of environmental impacts governed whether an agency must prepare an EA or an EIS. However, in this instance, the Forest Service resolved, after preparing and thoroughly examining the EAs, that no significant environmental impacts would result from the three projects. Therefore, an EIS was not warranted. SEDG's supplementary argument, that the voluminous EAs clearly indicated that an EIS was necessary, was found by the court to be without merit. Instead, the court credited the length of the EAs to the Forest Service's dedication to detailed statutory requirements.

On appeal, the United States Court of Appeals for the Fourth Circuit held that the district court properly granted summary judgment in favor of the Forest Service, and affirmed the lower court's decision.

Kristin Reyna

IV. THE OCCUPATIONAL SAFETY AND HEALTH ACT

American Iron & Steel Institute v. OSHA, 182 F.3d 1261 (11th Cir. 1999)

The American Iron and Steel Institute (the Institute) petitioned for judicial review of the revised standards for respiratory protection issued by the Occupational Safety and Health Administration (OSHA), pursuant to the Occupational Safety and Health Act (OSH Act) section 655(a). Specifically, the Institute challenged three different aspects of the new standard. The American College of Occupational and Environmental Medicine joined as a plaintiff, bringing a separate challenge to the revised standards. The United States Court of Appeals for the Eleventh Circuit was deferential to OSHA in reviewing OSHA's factual determinations. Provided that OSHA's determinations were supported by substantial evidence presented to it or produced by it, the court would uphold those determinations. The court determined that OSHA had in fact provided substantial evidence, and therefore denied all challenges.

The Institute first challenged OSHA's retention of the Hierarchy-of-Controls policy, 29 C.F.R. § 1910.134(a)(1), and OSHA's failure to consider revising or abrogating that policy as part of the new standard. The Hierarchy-of-Controls policy allows OSHA to require engineering controls, as opposed to respirators, to reduce or eliminate employee exposure to airborne contaminants. In promulgating its new standards, OSHA did not reconsider this policy. The court held that OSHA had the authority to identify which regulatory requirements to revise. The court reasoned that if OSHA were required to review each issue within the regulation, it would divert resources that could be focused on issues of greater priority.

The Institute's second challenge was to the conditions on the use of respirators, as provided in 29 C.F.R. § 1910.134(d)(2)(iii)(B). Under the revised standards, employers are required to use atmosphere-supplying respirators, as opposed to air-purifying respirators, in workplace atmospheres that are "immediately dangerous to life and health" (IDLH). Furthermore, the regulations required that in non-IDLH workplaces, air-purifying respirators could be used only in compliance with two restrictions. First, air-purification respirators can only be used if equipped with an end-of-service-life indicator. Second, and alternatively, and air-purification respirator may be used if "the employer implements a change schedule for canisters and cartridges" based on objective data. The

Institute challenged this approach in favor of another discussed in the proposed standard, arguing that it automatically favored the more burdensome and expensive atmosphere-supplying respirators. On the record, however, OSHA submitted evidence that the "change schedule" condition in some ways provides wider use of air-purifying respirators.

The Institute's final challenge was to the annual fit test and retraining requirements. Pursuant to these requirements, employers must re-test their employees annually to ensure proper fitting respirators and employee competence in using them. The Institute argued that such measures were wholly unnecessary. They argued first that the percentage of employees who would undergo facial changes was minute. In addition, they argued that employees would not require annual updates on the proper use of respirators.

The court denied all three challenges brought by the Institute. The court held that in each instance, OSHA had provided substantial evidence that the requirements were necessary to further the agencies goals. The court further noted that the Institute had provided no evidence that OSHA failed to make such factual determinations in promulgating the revised standards. As such, the three standards challenged by the Institute were upheld.

In addition to the challenges brought by the Institute, the American College of Occupational and Environmental Medicine (ACOEM) sought review of the revised provision, codified at 29 C.F.R. § 1910.134(b), allowing nonphysicians to administer medical evaluations to employees. The provision allows licensed health care providers to perform evaluations to the extent permitted by state law. The Doctors challenged the provision on several grounds, including whether it was supported by substantial evidence. The court held that because the regulation was subject to state law, and because there was substantial evidence that licensed health care providers were qualified to perform the examinations, the provision was valid. Accordingly, the court denied the ACOEM's petition.

Erik Van Hespen

V. UNDERGROUND CONTAMINATION: TAKINGS, TRESPASS, AND UNJUST ENRICHMENT

Mongrue v. Monsanto Co., No. 98-2531, 1999 WL 219774 (E.D. La. Apr. 9, 1999)

In this decision, the court denied Monsanto's motion to dismiss on the pleadings. The plaintiffs, Roland Mongrue, Claude Gisclair and Sylvia Gisclair, were owners of property adjacent to Monsanto's property in Luling, Louisiana. Monsanto used underground injection wells located on its property to dispose of wastewater. The plaintiffs asserted that the wastewater pumping on Monsanto's property resulted in subsurface migration of the wastewater onto their property. They filed suit in the Civil District Court for the Parish of Saint Charles, Louisiana, in August 1998. Monsanto removed the suit on diversity grounds to the United States District Court for the Eastern District of Louisiana. After removal to federal court, Monsanto moved for judgement on the pleadings. The plaintiffs alleged three causes of action, each of which Monsanto sought to have dismissed by arguing that, even if the plaintiffs proved their allegations, they were not sufficient to maintain a cause of action.

First, the court analyzed the plaintiffs' argument that Monsanto's conduct constituted an unconstitutional taking of their property without just compensation, even though Monsanto is not a government entity. The court noted that the Takings Clause of the Fifth Amendment of the United States Constitution, as applied to the states through the Fourteenth Amendment, and the Louisiana Constitutional provision against takings, which contains similar prohibitions to those found in the federal constitution, are applicable to this case. Discussing the United States Supreme Court's position on takings, the court noted that a permanent physical intrusion by the government is a taking per se regardless of how minor the intrusion may be. The rules against takings are applied to nongovernmental entities, such as Monsanto, when they are acting under the authority of the state in their occupation of an individual's property; therefore, a permanent physical intrusion by such an entity would also be a per se taking.

In this case, Monsanto was acting pursuant to a state-issued permit, and therefore, under the authority of the state. Further, the court stated that the physical invasion of wastewater onto the subsurface of property could be a permanent physical occupation, and therefore a per se taking. The court held that if the intrusion of the

wastewater onto the subsurface of the property were shown at trial to be extensive enough to be a permanent physical intrusion, Monsanto's conduct would be an unconstitutional taking of the plaintiffs' property. The plaintiffs' cause of action was, therefore, supported by the pleadings.

Next, the court addressed the plaintiffs' argument that the subsurface migration of wastewater onto their property was an unlawful trespass. Monsanto argued that under the existing precedent, the migration of wastewater from injection wells does not constitute a legally actionable trespass. Analyzing prior case law, the court held that the existing case law did not stand for the proposition that authorization from the Louisiana Commissioner of Conservation, in the form of a permit or otherwise, in and of itself, makes an unlawful trespass inactionable.

Nunez v. Wainoco Oil & Gas Co., 488 So. 2d 955 (La. 1986) was the first precedent cited by the defendants. The court distinguished Monsanto's actions from the situation in *Nunez* because there was no unitization in the case at hand. Unitization is a mechanism used by the Louisiana Conservation Commission to protect the rights of surface owners in a common hydrocarbon reservoir by creating rights and interests in the reservoir beyond traditional property boundaries. The court noted that where unitization has occurred, the claim is not actionable under *Nunez*, but the court declined to apply the rationale followed in one of its prior decisions which extended the precedent to include cases where there was no unitization. The court held that, contrary to Monsanto's argument, without unitization the trespass claim is not rendered inactionable, and therefore, the plaintiffs' cause of action is, again, supported by the pleadings.

Finally, the court discussed the plaintiffs' claim that the subsurface migration of wastewater gave rise to unjust enrichment for Monsanto. Unjust enrichment is a claim in equity, and therefore requires the court to balance multiple factors including the property rights of the parties and the regulatory interest of the state. All of these factors were in dispute. The court held that it would be improper to make an equitable decision on the pleadings when the facts were not agreed upon.

In sum, the court found that the plaintiffs had made allegations sufficient to support all three causes of action: unlawful taking, trespass, and unjust enrichment. The motion for judgement on the pleadings was, therefore, denied.

Julia E. Gutreuter

VI. *RES JUDICATA*: CERCLA AND THE MICHIGAN ENVIRONMENTAL RESPONSE ACT

Pierson Sand and Gravel, Inc. v. Keeler Brass Co., 596 N.W.2d 153 (Mich. 1999)

The Michigan Supreme Court found that Pierson Sand and Gravel, Inc. (Pierson) was not precluded under the doctrine of *res judicata* from bringing a lawsuit in state court which involved issues similar to those in a previously dismissed federal lawsuit brought by Pierson. Pierson's previous lawsuit in the United States District Court for the Western District of Michigan asserted claims under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). Pierson sought recovery costs for the environmental cleanup of their landfill from Keeler Brass Company (Keeler), Pierson Township, and Chemetron Investments. Pierson's complaint, filed in October of 1992, asserted only federal claims under CERCLA even though a private cause of action was allowed under state law pursuant to the Michigan Environmental Response Act (MERA). The district court granted summary judgment to Keeler, ruling that Pierson could not prevail as a matter of law in proving an essential element of their CERCLA claim. Thereafter, Pierson brought suit in Michigan state court asserting various MERA claims. Pierson admitted that its state claims involved the same transactions as the previous federal claims. Therefore, Keeler moved for summary judgment asserting *res judicata* as a bar to the present suit. The Michigan Court of Appeals found that *res judicata* did not bar the present suit.

Initially, Keeler argued that the court of appeals misinterpreted that application of the doctrine of *res judicata*. As a general rule, the doctrine of *res judicata* states, "If a plaintiff has litigated a claim in federal court, the federal judgment precludes relitigation of the same claim in state court based on issues that were or could have been raised in the federal action, including any theories of liability based on state law." Except in special cases, Michigan courts have sought to apply the doctrine of *res judicata* broadly. The Michigan Court of Appeals found this to be a special case as it was clear that the federal court would have declined to exercise its pendant jurisdiction over state claims after dismissing the federal claims. Thus, before the Michigan Supreme Court, Keeler argued that the court of appeals finding that the instant action was a special case went against its broad application. The supreme court found the appellate court's

application of an exception to be consistent with previous *res judicata* law.

Keeler then argued that an exception to *res judicata* should be limited to "exceptional cases in which it is abundantly clear that the federal court would decline to exercise its jurisdiction over state claims not submitted to it." The court rejected this argument, first noting that the doctrine of *res judicata* is not a constitutional mandate that must be carefully construed, but rather a tool created by the courts. The court then noted that "the goal of *res judicata* is to promote fairness, not lighten the loads of the state court by precluding suits whenever possible." Thus, the court of appeals was correct when it noted a reluctance on the part of federal courts to address solely state matters after disposing of all federal claims before trial. The Michigan Supreme Court stated, "We can confidently surmise that, as a general rule, where, as in the instant case, all federal claims are resolved before trial, federal courts will decline to exercise supplemental jurisdiction over remaining state law claims, preferring to dismiss them without prejudice for resolution in the state courts." Therefore, it was clear that the federal court would have dismissed the state MERA claims had they been asserted in the previous case.

The court based this finding on two factors. First, it concluded that a judicial efficiency argument should not prevail because the state law claims would not have been within the federal court's jurisdiction if not for the federal question involved. Second, there were no factors involved in the case that would have compelled the federal court to retain jurisdiction over the state claims had they been asserted. Keeler noted years of pretrial maneuvering between the parties in attempting to find a reason under which the federal court would have retained jurisdiction. However, the court accepted Pierson's argument that the pretrial maneuvering involved the addition of third-party defendants rather than the expenditure of resources by the parties in preparation for litigation. In so finding, the court noted, "While we would not condone, or intend to encourage, the failure of plaintiffs to include a MERA claim in the federal action that precluded the district court from having the opportunity to decline to exercise jurisdiction, we cannot . . . preclude [the present action] . . . on the basis of *res judicata*."

Darin Flagg