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ENVIRONMENTAL LAW

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I. INTRODUCTION

DURING the Survey period, a significant number of state and federal courts adjudicated environmental disputes. The decisions that followed provide insights for those of us who litigate environmental claims; draft documents and perform due diligence in business transactions; advise clients in regulatory and permitting actions; and otherwise counsel our clients in environmental matters. The cases covered a range of legal issues including criminal environmental prosecution, claims for property damages and cleanup costs, claims concerning endangered species, and the application of administrative and constitutional issues in the context of environmental law.

II. CRIMINAL PROSECUTION UNDER STATE ENVIRONMENTAL STATUTES

Criminal prosecution under environmental statutes continues at a steady pace in Texas. Over the last several years, civil enforcement has waned to some extent, while criminal prosecution has grown and appears to occur more frequently than it did several years ago. This shift may be a result of state and federal prosecutors as well as law enforcement personnel having become better trained and organized to investigate and prosecute environmental "crimes." Prosecutors and law enforcement view violations of the law as "crimes," while environmental agencies see most issues as "civil" problems and see only the worst violations as potentially "criminal."

Houston in particular has a well organized local, state, and federal law enforcement and prosecution task force. Criminal prosecution under environmental laws has risen significantly in the Houston area as a result. The Houston courts, thus, continue to be active in criminal environmental enforcement cases. In *Tarlton v. State*,[1] the appellant sought to overturn his conviction for violating section 7.171 of the Texas Water Code[2] by

1. Tarlton v. State, 93 S.W.3d 168 (Tex. App.—Houston [14th Dist.] 2002, no pet.).
2. The relevant provision of the Water Code follows:

challenging the sufficiency of the indictment, the constitutionality of the statute, and the sufficiency of the evidence. Tarlton had been convicted in a trial to the court on one count for illegally disposing of used oil.[3] The court sentenced him to five years confinement and a $5,000 fine, but then suspended the sentence and placed him on community supervision for five years.[4] The conviction stemmed from a series of inspections. In November 1998, a City of Houston inspector found barrels and vehicles on Tarlton's property and advised him to remove them. In February 1999, an officer of the Houston Police Department found two 55-gallon drums on a road near the appellant's home and an oil trail leading from the drums to the appellant's residence. At the residence, the officer found other leaking drums that had been punctured. When a city inspector returned to Tarlton's residence in October 1999, the vehicles were gone but the barrels remained, and dark liquid that the appellant identified as "automotive fluids" was seeping into the ground.[5]

A. SUFFICIENCY OF THE INDICTMENT

In *Tarlton*, the appellant first challenged the indictment on the grounds that it failed to negate the exceptions to the statute and failed to inform him of the portion of the statute under which he was charged.[6] In response to appellant's first challenge, the court found that, in charging Tarlton with "knowingly dispos[ing] of used oil on land,"[7] the indictment impliedly negated the two exceptions set forth in the statute. The court found that "knowingly" negated the exception for unknowing disposal, and that "dispos[ing] of used oil on land" negated the exception for the mixing of used oil with waste to be disposed of in landfills.[8]

B. CONSTITUTIONAL CHALLENGES

Tarlton also asserted two constitutional challenges, the first of which is rather bizarre. First, Tarlton asserted that because the statute assessed different penalties for corporations (fine only) and individuals (fine or imprisonment) for the same crime, it violated the equal protection clause of the United States Constitution.[9] Not surprisingly, the court found a

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> (a) A person commits an offense if the person:
> (2) knowingly mixes or commingles used oil with solid waste that is to be disposed of in landfills or directly disposes of used oil on land or in landfills, unless the mixing or commingling of used oil with solid waste that is to be disposed of in landfills is incident to and the unavoidable result of the mechanical shredding of motor vehicles, appliances, or other items of scrap, used, or obsolete metals. . . .

TEX. WATER CODE ANN. § 7.176(a)(2) (Vernon 2000).

3. *Tarlton*, 93 S.W.3d at 171.
4. *Id.* at 171-72.
5. *Id.* at 177.
6. *Id.* at 172. The court noted that the Penal Code requires the State to negate the existence of any exception to an offense in the indictment. *Id.* at 173.
7. *Id.*
8. *Id.* at 173.
9. *Id.* at 176.

rational basis for this distinction in that a corporation cannot be imprisoned.[10] Second, Tarlton argued the statute was unconstitutionally vague in that it (1) failed to provide sufficient notice of the prohibited conduct and (2) provided law enforcement officers unbridled discretion in their enforcement of the statute by failing to define "used oil." The court noted that undefined words are given their plain meaning absent clear intent to the contrary. Finding that Webster's defines the term "used" to mean "employed in accomplishing something," the court determined that oil is either used or not and held that the statute, as applied, provided fair warning.[11]

C. MENS REA

In *Shagroun v. State*,[12] another Houston case, the appellant, Shagroun, raised constitutional and evidentiary challenges to his conviction for violating section 365.012(f)(1) of the Solid Waste Disposal Act by dumping the trash-filled contents of a van on private property. Shagroun challenged the constitutionality of the statute on the grounds that it did not require a culpable mental state, or *mens rea*.[13] Although he had failed to properly preserve this complaint, the court applied the *Rabb*[14] rule to address Shagroun's complaint that the statute is facially unconstitutional. The *Rabb* rule requires appellate courts to consider "the constitutionality of a statute upon which a defendant's conviction is based[, whether or not the issue is] raised for the first time on appeal."[15]

Shagroun complained that section 365.012 of the Texas Health and Safety Code was unconstitutional because the information alleging his violation of the statute did not set forth a culpable mental state.[16] The statute states:

> "A person commits an offense if the person disposes or allows or permits the disposal of litter or other solid waste at a place that is not an approved solid waste site, including a place on or within 300 feet of a public highway, on a right-of-way, [or] on other public or private property . . . ."[17]

Section 6.02 of the Texas Penal Code provides that the definition of a crime must require a culpable mental state unless the definition plainly dispenses with it.[18] If the definition neither prescribes nor dispenses with a culpable mental state, then "intent, knowledge, or recklessness will suf-

10. *Id.* at 176-77.
11. *Id.* at 175-76. The court also relied on Webster's to determine the meaning of the term "land" as used in the Solid Waste Disposal Act. *Id.* at 174.
12. Shagroun v. State, No. 01-00-00130-CR (Tex. App.— Houston [1st Dist.] May 30, 2002, no pet.) (not designated for publication), 2002 Tex. App. LEXIS 4001.
13. *Id.* at *4.
14. *Id.* at *5 (citing Rabb v. State, 730 S.W.2d 751, 752 (Tex. Crim. App. 1987)).
15. *Id.*
16. *Id.* at *4.
17. *Id.* at *5 (quoting TEX. HEALTH & SAFETY CODE ANN. § 365.012(a) (Vernon 2002)).
18. TEX. PENAL CODE ANN. § 6.02(b) (Vernon 1994).

fice to establish criminal responsibility."[19] Based on the factors set out in *Aguirre v. State*, the court determined that a culpable mental state is required for a violation of section 365.012.[20] The court reasoned that due to "the relatively minor danger to public health and safety [as compared with] the severity of the punishment, . . . the legislature did not intend the statute to be a strict liability offense."[21] Finding that a culpable mental state is in fact required and that section 6.02 of the Penal Code provides the *mens rea* required for criminal responsibility, the court concluded that the statute is not unconstitutional.[22]

D. Sufficiency of the Evidence

The appellants in both *Tarlton* and *Shagroun* also raised challenges based upon the factual sufficiency of the evidence. The *Tarlton* court found the evidence sufficient to support Tarlton's conviction for knowingly disposing of used oil on land where a police officer found two leaking drums of oil with an "oil trail" that ran from the drums to the appellant's residence and where inspections by the City of Houston in 1998 and 1999 identified leaking drums of black liquid oil on the appellant's property that the appellant identified as automotive fluids.[23]

Likewise, the court in *Shagroun* had no difficulty finding that Mr. Shagroun disposed of at least 500 pounds or 100 cubic feet of waste. The court based its decision on testimony that the interior dimensions of the van were four to five feet high by four feet wide by eight to ten feet long; photographs taken of the van that showed that its interior was full of trash; and an officer's estimate of the volume of trash as 160 cubic feet and the weight as 750 pounds.[24]

III. ENVIRONMENTAL TORTS AND COST RECOVERY CLAIMS

A. Environmental Indemnification

For yet another year, the legal interpretation of indemnities and other environmental provisions of contracts has been adjudicated in a Texas case. Two questions in *El Paso Refining, LP v. TRMI Holdings, Inc.*[25] were (1) whether the relevant indemnity covered environmental liabilities and (2) whether certain parties were covered by that indemnity. Another issue that arose was whether environmental provisions in a sale agreement apply to future landowners.

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19. *Id.* § 6.02(c).
20. Shagroun, 2002 Tex. App. LEXIS 4001 at *7 (citing Aguirre v. State, 22 S.W.3d 463, 477 (Tex. Crim. App. 1999)).
21. *Id.* at *7.
22. *Id.* at *8.
23. *Tarlton*, 93 S.W.3d at 177-78.
24. *Shagroun*, 2002 Tex. App. LEXIS 4001, at *11.
25. El Paso Refinery, LP v. TRMI Holdings, Inc., 302 F.3d 343 (5th Cir. 2002).

The facts involve a sale of an El Paso refinery by TRMI Holdings, Inc., ("TRMI") then a Texaco subsidiary, to El Paso Refinery, Inc., ("Debtor") which subsequently went into bankruptcy.[26] The purchase and sale agreement and the deed for the property on which the refinery is located contained representations and warranties and indemnification regarding environmental conditions at the refinery.[27] As many attorneys now include in such documents, both documents in this case included provisions that attempted to prevent future landowners from asserting claims against the seller, here TRMI, or from attempting to compel TRMI to take remedial action. The deed filed with the county also attempted to prevent claims by future landowners against the seller.

Six years after the purchase, the purchaser, Debtor, then went into bankruptcy. As part of the bankruptcy proceeding, the lenders reached an agreement with Debtor to foreclose on the property and sell it. A term sheet ("Term Sheet") signed by the Debtor and its lenders provided that the acquiring entity would be

> "responsible for all environmental risks associated with the refinery assets from and after the date of foreclosure. The Acquiring Entity shall take the refinery assets subject to all written existing remedial orders. The Acquiring Entity shall not assert any claims for contribution and/or indemnity against the estate for environmental liability."[28]

The lenders were not so kind to TRMI and other previous refinery owners or operators. They foreclosed on the refinery and transferred it to a newly created entity, Refinery Holding Company, LP ("RHC"). RHC then gave notice it would seek recovery from TRMI and other previous owners for environmental cleanup of the refinery. TRMI submitted a claim in the Debtor bankruptcy proceeding for indemnification, which led to a settlement agreement between TRMI and Debtor.

The plot thickened as to the indemnification trail from TRMI to Debtor to RHC. TRMI argued that it was indemnified by Debtor, which was impliedly indemnified by RHC. Thus, RHC had no claim against TRMI. The bankruptcy court agreed and applied the "circuitry of action" doctrine.[29] In contrast, the court held that TRMI and the former refinery owner Texaco were not third-party beneficiaries of the Term Sheet, and that the original purchase and sale agreement did not bind RHC.

Appeal was made to the district court and then to the Fifth Circuit Court of Appeals.

1. Application of the Circuitry of Action Doctrine

The first issue before the court was whether an implied indemnification was created by the Term Sheet between Debtor and RHC. The circuitry

26. *See id.* at 346.
27. *Id.*
28. *Id.* at 347.
29. *See id.* at 347-48.

of action doctrine is applied by Texas courts where one party by virtue of contract or settlement would end up indemnifying another party for its own original claim,[30] here RHC to TRMI to Debtor and back to RHC. TRMI and Debtor did not dispute that Debtor owed indemnification to TRMI for the environmental conditions at the refinery. RHC, on the other hand, did dispute whether it owed indemnification to Debtor for these conditions.

The Fifth Circuit reviewed the bankruptcy court's decision that certain language in the Term Sheet created an implied indemnity. The language was as follows: "The acquiring entity . . . shall not assert any claims for contribution and/or indemnity against the estate for environmental liability."[31] The district court had ruled that no indemnity was clearly expressed. This was in part based on the Texas express negligence rule which provides that parties seeking to indemnify the indemnitee from the consequences of its own negligence must express that intent in specific terms."[32]

The Fifth Circuit agreed with the district court that no implied indemnity was created by the Term Sheet's environmental provision. The Fifth Circuit cited several Texas cases providing that circuitry of action arises where "an affirmative and unequivocal agreement to indemnify and hold the settling defendant harmless from any and all related claims."[33] The court interpreted the language of the Term Sheet as a covenant not to sue, without any language regarding indemnification. As for the covenant not to sue, the court concluded that it did not mention any related claims or claims arising out of or related to the agreement. Apparently the court concluded that the covenant not to sue did not specifically apply to any claims against prior owners or operators. Another important issue was that the settlement agreement between Debtor and TRMI was entered into after the Term Sheet. Thus, the court found that there was no intent to impliedly indemnify TRMI. However, the court did acknowledge that the 1986 purchase and sale agreement between Debtor and TRMI contained an environmental indemnity, but it was not guaranteed until after the post-Term Sheet agreement.[34] It is not clear whether the court would have reached a different result if the matter had been adjudicated outside of a bankruptcy proceeding.

30. *See id.* at 349-50 (citing Phillips Pipe Line Co. v. McKown, 580 S.W.2d 435, 440 (Tex. Civ. App.—Tyler 1979, writ ref'd n.r.e.)). In a footnote, the court also cites to *Palestine Contractors, Inc. v. Perkins*, 386 S.W.2d 764 (Tex. 1964) and *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d. 414, 430 (Tex. 1984). *Id.* at 350 n.5.

31. *Id.* at 350.

32. *Id.* at 350 n.7 (quoting language in Ethyl Corp. v. Daniel Constr. Co., 725 S.W.2d 705, 708 (Tex. 1987)).

33. *Id.* at 351 (citing Moore v. Southwestern Electric Power, 737 F.2d, 496, 501 (5th Cir. 1984); *McKown*, 580 S.W. 2d at 439; Panhandle Gravel Co. v. Wilson, 248 S.W.2d 779, 783-84 (Tex. Civ App.—Amarillo 1952, writ ref'd n.r.e.)).

34. *See id.* at 351 n.9.

2. Assumption of Unknown Environmental Conditions

The next question for the court was whether RHC had assumed all unknown environmental conditions at the refinery. The Term Sheet provided that RHC would be responsible for "all environmental risks associated with the refinery assets from and after the date of foreclosure."[35] The parties differed over the proper interpretation of the phrase "from and after the date of foreclosure." The way the court interpreted the effect of this phrase provides a lesson not only for those litigating over environmental contractual provisions and indemnities but also for those drafting such provisions. The Debtor took the position that the phrase modified the term "all environmental risks" and that RHC therefore assumed the liability for both pre- and post-foreclosure environmental liabilities.[36] The court rejected the argument that this language clarified "all environmental liabilities."

The court decided that if the parties meant "all" then the language "from and after" acquisition would not be necessary. However, such language is common in environmental provisions and other contractual provisions. Redundancy is often meant to clarify what the parties mean. The court then concluded that because the contract specifically stated that a Texas Water Commission order was covered and that the acquirer would take liability for that order, the prior sentence in which "all" was used could not mean pre-acquisition liabilities. The court concluded that there could not be redundancy in a contract.[37] In reality, most practicing lawyers in drafting contracts redundancy is frequently used for the purpose of trying to emphasize intent.

The court then turned to the question of the start date of the assumption of liability. Based on the language of the Term Sheet, "from and after the date of foreclosure," the court determined that the assumption of liability started after foreclosure.[38] This is at least a reasonable interpretation of the language. What was more important, and should be remembered by litigators and drafters alike, is that the court admitted into evidence the drafts negotiated by the parties before a final contract was agreed upon by the parties.[39] One of the drafts of the Term Sheet required RHC to assume all known and unknown environmental liabilities. This language was not adopted in the final draft. The court relied upon this evidence to conclude that the parties did not intend to include past unknown liabilities. The court further noted that the bankruptcy examiner had testified that the term lenders would only assume known environmental liabilities.[40]

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35. *Id.* at 352.
36. *Id.*
37. *Id.*
38. *Id.* at 353.
39. *See id.* at 353 n.14.
40. *Id.* at 353 n.15.

3. Third Party Beneficiary Argument

The next argument made by TRMI was that it was a third party beneficiary to the Term Sheet. The court rejected this argument because of the lack of any clear evidence that the parties intended to benefit TRMI.[41] Citing Texas law, the court concluded that the presumption that parities contract to benefit only themselves was not overcome by any evidence presented by TRMI and that the contract made no reference to TRMI or related parties directly or indirectly.

4. Ability to Bind Future Landowners to Releases

The next question the court faced was whether the release from the Debtor to TRMI and related parties ran with the land and was binding upon future landowners. The parties had included language regarding the release in the deed conveying the property. The deed contained covenants by which future landowners would be prevented from seeking contribution from TRMI and related parties for remediation costs and from attempting to compel TRMI and related parties to remediate the refinery. TRMI argued that the language creates either a covenant running with the land or an equitable servitude.[42]

In determining whether the covenant runs with the land, the court applied the test in Texas.

> Under Texas law, a covenant runs with the land . . . when it: (1) touches and concerns the land; (2) relates to a thing in existence, or specifically binds the parties and their assigns; (3) is intended by the original parties to run with the land; and (4) when the successor to the burden has notice.[43]

The court concluded that the only issue the parties disputed was whether the covenant "touches and concerns" the land at issue. The court cited *Westland Oil Development Corp. v. Gulf Oil Corp.*, for the proper test.[44] In that case, the Texas Supreme Court laid down the rule that "a covenant touches and concerns [land] when it affects the 'nature, quality or value of the thing demised, independently of collateral circumstances, or if it affect[s] the mode of enjoying it.'"[45] The parties disagreed on the test to use. Older Texas cases look to whether there was a benefit and burden, while newer cases look only at whether the land was burdened. The Fifth Circuit agreed the test in Texas was the latter.

In applying this test, the court concluded that the land was not itself burdened, but rather the burden or benefit created by the deed affected TRMI, not the land. The owner of the refinery property could take reme-

41. *Id.* at 354.
42. *Id.* at 355.
43. *Id.* (quoting Inwood N. Homeowner's Ass'n v. Harris, 736 S.W.2d 632, 635 (Tex. 1987)).
44. *Id.* at 356 (citing Westland Oil Dev. Corp. v. Gulf Oil Corp., 637 S.W.2d 903 (Tex. 1982)).
45. *Id.* (quoting *Westland Oil Dev. Corp.*, 637 S.W.2d at 911).

dial action or not, pollute the land or not. What the owner could not do was seek contribution for what it did from TRMI. The court concluded that there was no restriction on the use of the land and that TRMI could not enter and take action on the land.[46] The court viewed the agreement as a covenant to pay an encumbrance, which does not run with the land.[47]

TRMI argued that the *Westland Oil* case was on point. In that case, once a test well was drilled on the land, one party was required to assign the oil and gas leases.[48] The Fifth Circuit was unconvinced. It concluded that in *Westland Oil* the covenant was triggered once an act on and affecting the land had occurred. The court decided that the act of payment was an act taken on the land, but the prohibition of suing once cleanup took place at the refinery was too tenuous. The court did not explain how it reached this conclusion. It would appear to be the same: in one case, an action is required, and another is prohibited, once the activity on the land occurs.

The court would not enforce a prohibition on a cost recovery or contribution claim in a deed against future landowners. This decision imposes a dilemma for those representing defendants in environmental litigation: How does one who is settling with a current landowner bind future landowners from filing tort or statutory claims in suits to require cleanup, to seek damages, or to recover cleanup costs? If the Fifth Circuit ruling is adopted by Texas courts, this may prove hard to accomplish.

B. Cost Recovery and Contribution Claims Under Environmental Statutes

1. Right of Cost Recovery Under CERCLA Without First Being Sued

The ability of private parties to conduct investigation and remediation of their property and then to recover the costs of those actions from other liable private parties has been a mainstay of environmental law for many years. These "cost recovery claims" as they have been called have frequently been brought under section 113 of the federal Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA").[49] The ability to file such federal claims was questioned in a panel opinion issued by the Fifth Circuit Court of Appeals.[50] In that case, the court concluded that the statutory language permits the plaintiff to file such a claim only during or following a federal CERCLA action against it.[51] The full en banc panel reversed this holding, and held that the plaintiff need not be a current or former defendant in a CERCLA action to file a suit against other responsible parties to recover the costs it has ex-

46. *Id.* at 356-57.
47. *Id.* at 357.
48. *Id.* (citing *Westland Oil*, 637 S.W.2d at 907).
49. 42 U.S.C. § 9613 (2000).
50. *See* Aviall Servs., Inc. v. Cooper Indus., Inc., 263 F.3d 134 (5th Cir. 2001) [hereinafter *Aviall Servs. I*].
51. *Id.* at 138.

pended to remediate a contaminated site.[52]

Section 113(f)(1) of CERCLA in pertinent part provides:

> Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of this title. . . . Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 9606 of this title or section 9607 of this title.[53]

In affirming the holding of the United States District Court for the Northern District of Texas, a divided panel of the United States Court of Appeals for the Fifth Circuit held that "a party can seek a § 113(f)(1) contribution claim only if there is a prior or pending federal § 106 or § 107(a) action against it."[54] With respect to the first sentence of section 113(f)(1), the panel majority understood the term "contribution" to require that a tortfeasor first face judgment before seeking contribution from other parties[55] and the term "may" as meaning shall or must thereby creating an exclusive cause of action.[56] The panel majority viewed the final sentence (the "savings clause") only as an affirmation of a party's right to bring contribution actions based on state law.[57]

The Fifth Circuit, sitting en banc, first reviewed the statutory text and then the legislative history of section 113 of CERCLA.[58] The court found that it would not have made sense for Congress to expressly endorse a contribution action under the original terms of the act but then to cut off that cause of action unless the plaintiff was a current or past defendant in a CERCLA suit. The court read the language of section 113 to be permissive, rather than exclusive, because the term "may" was used instead of the term "only."

The Fifth Circuit cited a list of opinions issued after the enactment of section 113 of CERCLA in 1986. A U.S. Supreme Court decision had reviewed the ability to bring a cause of action under section 113 and concluded that it was specifically allowed.[59] Other Fifth Circuit opinions and other circuit court of appeals had similarly ruled a contribution claim was allowed by parties without first being a defendant in a CERCLA proceeding.

Finally, the court reviewed the policy implications of the panel's ruling. The court believed the ruling would have impeded the successful imple-

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52. Aviall Servs., Inc. v. Cooper Indus., Inc., 312 F.3d 677, 679 (5th Cir. 2002) [hereinafter *Aviall Servs. II*].

53. *Id.* at 679-80 (quoting 42 U.S.C. § 9613(f)(1) (2000)).

54. *Aviall Servs. I*, 263 F.3d at 137.

55. *Id.* at 138.

56. *Id.* at 138-39.

57. *Id.* at 139.

58. *See Aviall Servs. II*, 312 F.3d at 683-84 & 686-87.

59. *Id.* at 685 & 687 (citing Key Tronic Corp. v. United States, 511 U.S. 809, 816 (1994)).

mentation of CERCLA by allowing certain responsible parties to not only move forward with remediation without first being sued, and but also to then seek to allocate those costs among other responsible parties. The voluntary reporting and remediation of sites would have been seriously discouraged. The court reversed and remanded the case back to the district court to decide if the proper notice had been given to the U.S. Environmental Protection Agency and the U.S. Attorney General, and whether the plaintiff had complied with the National Contingency Oil and Hazardous Substance Pollution Plan.[60]

2. Federal Question and Removal Issues

In *MSOF Corp. v. Exxon Corp.*, the United States Court of Appeals for the Fifth Circuit reviewed de novo the question of the district court's jurisdiction (i) based on federal question jurisdiction pursuant to CERCLA and (ii) by means of the All Writs Act.[61] In 1994, MSOF Corporation and Jay Paul Leblanc, the plaintiffs, who own land in the Devil's Swamp area in the Parish of East Baton Rouge, Louisiana, filed suit against Exxon Corporation and others on behalf of themselves and all other similarly situated landowners, in Louisiana state court. Plaintiffs alleged that the defendants, who were generators of hazardous waste that was disposed at the PPI facility in Devil's Swamp, were responsible for contaminating plaintiffs' land with toxic chemicals that emanated from the PPI facility. The defendants removed the case to the United States District Court for the Middle District of Louisiana. The plaintiffs filed a motion to remand, asserting that the district court did not have subject matter jurisdiction; the district court denied their motion. The defendants moved for summary judgment, and the district court granted their motion.

a. Federal Question Jurisdiction

The court relied on several provisions of the United States Code to make its decision. Title 28 of the United States Code states that "[a]ny civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties."[62] Further, "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."[63] CERCLA also provides that "the United States district courts shall have exclusive original jurisdiction over all controversies arising under [CERCLA] without regard to the citizenship of the parties or the amount in controversy."[64]

60. *Id.* at 691.
61. MSOF Corp. v. Exxon Corp., 295 F.3d 485, 489 (5th Cir. 2002).
62. *Id.* (quoting 28 U.S.C. § 1441(b) (2000)).
63. *Id.* (28 U.S.C. § 1331).
64. *Id.* at 489-90 (quoting 42 U.S.C. § 9613(b) (2002)).

When a federal question appears on the face of a plaintiff's well-pleaded complaint, a federal court has original or removal jurisdiction.[65] Conversely, a federal court generally does not have original or removal jurisdiction if a plaintiff properly pleads only a state law cause of action.[66] However, "the 'artful pleading' doctrine is an 'independent corollary to the well-pleaded complaint rule . . . [that] allows removal where federal law completely preempts a plaintiff's state law claim'" even if the plaintiff fails to plead necessary federal questions.[67]

In this case, the plaintiffs alleged negligence and strict liability under Louisiana law. The only reference to federal law in the plaintiffs' complaint was an allegation that the PPI facility was maintained in violation of federal regulations as well as in violation of state and local regulations. The defendants argued that, notwithstanding the plaintiffs' state law allegations, they were actually seeking relief under CERCLA. Citing CERCLA's saving clauses, which preserve parties' rights arising under state law, the court concluded that "CERCLA does not completely preempt the plaintiffs' claims under Louisiana state law."[68] The court held that no federal question jurisdiction arose and that the artful pleading doctrine does not apply, thereby entitling the plaintiffs to rely exclusively on state law causes of action.[69]

b. Removal Jurisdiction under the All Writs Act

In 1980, the United States Department of Justice, on behalf of the Environmental Protection Agency, sued the defendants in the United States District Court for the Middle District of Louisiana under CERCLA. The defendants entered into a consent decree in that case in which they agreed to investigate and remediate contamination from the former PPI facility. The consent decree also provided that the defendants monitor the site under the continuing supervision of the judge for thirty years after the completion of the remediation. The defendants therefore argued that the All Writs Act conferred jurisdiction because of the potential for interference with the court's earlier consent decree.[70]

"The All Writs Act . . . provides: 'The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.'"[71] The court noted that "[t]he Supreme Court has held that the All Writs Act may authorize a federal court to issue orders 'as may be necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction other-

65. *Id.* at 490 (citing for example, Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1 (1986)).
66. *Id.*
67. *Id.* (citing Rivet v. Regions Bank, 522 U.S. 470 (1998)).
68. *Id.* at 491.
69. *Id.*
70. *Id.* at 488-89.
71. *Id.* at 492 (quoting 28 U.S.C. § 1651(a) (2000)).

wise obtained.'"[72] The All Writs Act, however, "is not an independent grant of jurisdiction."[73] The Fifth Circuit had previously held that the All Writs Act could not be a vehicle for removal except under "extraordinary circumstances."[74]

The court concluded that "[t]he circumstances of this case do not 'indisputably demand' that removal is 'absolutely necessary to vouchsafe the central integrity' of the consent decree."[75] None of the plaintiffs' Louisiana law claims or demands for compensatory damages posed an actual threat to the consent decree at the time of the decision. However, the court opined that should an actual threat to the consent decree arise as the case proceeds in state court, circumstances might permit the federal district court to enjoin proceedings. The court held that the All Writs Act does not confer federal jurisdiction in this case.[76]

The court questioned whether the All Writs Act can ever serve as the sole basis for removal jurisdiction. The United States Supreme Court has denied certiorari on this issue.[77]

C. Tort Claims for Environmental Contamination

1. *Statutes of Limitations and the Effect of CERLA Provision on Accrual Dates*

In *Achee v. Port Drum Co.*, the United States District Court for the Eastern District of Texas assessed the issue of whether the plaintiffs' claims for injuries from the use of hazardous material at a barrel cleaning plant were barred by the applicable limitations periods.[78] In the case, the plaintiffs sued, among others, a company that cleaned and recycled metal barrels, alleging several state law claims and federal law claims under Title VI of the Civil Rights Act of 1964, and Title VII of the Fair Housing Act.[79]

In their motion, the defendants argued that summary judgment was proper because the plaintiffs were barred by limitations from asserting both their state and federal claims. The defendants contended that the absolute latest accrual date for the plaintiffs' claims was when the company ceased operations and closed its plant in 1990, roughly six years before suit was filed. On the other hand, the plaintiffs contended that their causes of action accrued as late as 1995 or 1996 pursuant to doctrines extending the accrual date.[80] Moreover, the plaintiffs argued that they timely filed their claims because the wrongful acts committed by the

72. *Id.* (quoting United States v. New York Tel., 434 U.S. 159 (1977)).
73. *Id.* (citing *In re* McBryde, 117 F.3d 208, 220 (5th Cir. 1997)).
74. *Id.* (citing Texas v. Real Parties in Interest, 259 F.3d 387, 395 (5th Cir. 2001)).
75. *Id.* at 493 (quoting *Real Parties in Interest*, 259 F.3d at 395).
76. *Id.*
77. NPC Servs., Inc. v. MSOF Corp., 123 S. Ct. 623 (2002).
78. Achee v. Port Drum Co., 197 F. Supp. 2d 723, 725-27 (E.D. Tex. 2002).
79. *Id.* at 726.
80. *Id.* The Texas discovery rule and the federally required commencement date set forth in CERCLA. *Id.*

defendants constituted continuing torts and because the defendants fraudulently concealed environmental problems in and around their facility, thereby tolling the applicable statute of limitations. Lastly, the plaintiffs asserted that their claims were not time barred based on the open courts provision of the Texas Constitution.[81]

The court rejected all of the plaintiffs' arguments and granted summary judgment to the defendant based on limitations.[82] With regard to the plaintiffs' state law claims, the court concluded that all of the claims were barred, regardless of whether the period was two years or four, since the state law claims accrued when the company closed the barrel plant in 1990, nearly six years before the individuals filed suit.[83] Likewise, the court concluded that the plaintiffs failed to file their Title VI claims within the applicable two-year limitations period dictated by state law in the Texas Civil Practices and Remedies Code,[84] and that the Title VIII claims were barred by the applicable two-year limitations dictated by federal law.[85]

Furthermore, the court concluded that the plaintiffs' claims were not saved by various tolling doctrines. First, the Texas discovery rule was inapplicable "because [the] alleged wrongful acts and the resulting injuries were not 'inherently undiscoverable.'"[86] The court ruled that the "federally required commencement date" in CERCLA did not help the plaintiffs.[87] That provision may be used to preempt state accrual dates so that accrual occurs when the plaintiffs "knew or reasonably should have known" that injuries were caused by hazardous substances.[88] But the court concluded that even if that provision applied in a non-CERCLA lawsuit, such as the subject case, the plaintiffs knew that their injuries were caused by the hazardous substance used at the barrel plant at least fifteen years before filing suit.[89] Next, the court concluded that the continuing tort doctrine did not apply because the defendants' alleged tortious conduct ceased when the barrel plant was closed in 1990.[90] The court concluded that there was no evidence that fraud delayed discovery of the plaintiffs' claims, so the doctrine of fraudulent concealment did not toll the limitations period.[91] Finally, the court held that the application of the appropriate statutes of limitations did not violate the plaintiffs' rights under the Texas Open Courts Provision.[92]

81. *Id.* at 726-27.
82. *Id.* at 725.
83. *Id.* at 729-30.
84. *Id.*
85. *Id.* at 730 (citing 42 U.S.C. § 3613(a)(1)(A)).
86. *Id.* at 731.
87. *Id.* at 735.
88. *Id.* at 734-35.
89. *Id.* at 735.
90. *Id.*
91. *Id.* at 739.
92. *Id.* at 740.

Thus, the court granted summary judgment to the defendants having concluded that the summary judgment evidence indicated "no genuine issues of material fact regarding whether the plaintiffs' claims [were] time-barred."[93]

In another case, *Walton v. Phillips Petroleum Co.*, the court similarly ruled that the plaintiff's action was barred by limitations.[94] The plaintiff had sued several parties, including several oil companies for groundwater contamination, asserting that the operation of open saltwater pits, which had been covered over and were no longer in operation, had contaminated the groundwater.[95]

Phillips Petroleum Co. ("Phillips") filed a no evidence motion for summary judgment, and offered evidence that it had operated only one well in the area and had not operated any saltwater disposal pits.[96] The court ruled that the trial court had erred in granting summary judgment because a Texas Railroad Commission employee had testified that when Phillips had wells in the area in the 1960s, it was common to dispose of salt water in pits and that a pit had been present in the area. With respect to the same motion against Pioneer Natural Resources Company, the court ruled that the evidence provided was only that Pioneer currently operated wells in the area. Because there was no evidence of improper disposal, summary judgment was properly granted against the plaintiff.

With respect to the motions for summary judgment on limitations, three issues were presented: (1) whether a permanent or temporary injury to land had occurred, (2) whether a fraudulent concealment had occurred, and (3) whether the request for injunctive relief and continuing tort doctrine had been properly addressed.[97] The court addressed the history of several Texas cases on the first issue—the question of permanent injury to property. In the present case, Phillips had presented evidence that the pits had been filled in many years ago and that the contamination from the pits did not occur after backfilling because the pits no longer contained standing water to dissolve and transport the contaminants into the groundwater below.[98] The court concluded that "the activity which caused the initial contamination of the groundwater, namely, the operation of the open pits, was a continuous source of pollution rather than the type of sporadic activity or injury at issue in those cases finding a temporary injury."[99] The court found that although "the degree of contamination varies, [it does not ever become] non-existent or significantly diminished due to a change in circumstances."[100] Thus, the

93. *Id.*
94. Walton v. Phillips Petroleum Co., 65 S.W.3d 262, 276 (Tex. App.—El Paso 2001, pet. denied).
95. *Id.* at 267.
96. *Id.* at 269.
97. *Id.* at 270.
98. *Id.* at 273.
99. *Id.* at 274.
100. *Id.*

court found the injury to the land to be permanent.

The court concluded that the plaintiff knew about the contamination but did not file suit until many years later, so the plaintiff's claims for groundwater contamination were barred by the statute of limitations and none of the exceptions pleaded by the plaintiff avoided this defense. The state environmental agency at the time, the Texas Water Commission, had informed the plaintiff about the discovery of contamination; thus, the plaintiff was on notice to conduct further investigation. The court ruled that since the plaintiff did not bring his cause of action for trespass, nuisance, and negligence within two years from that point, his claims were barred by limitations. The court did not apply the continuing tort doctrine to permanent injury to land. The court ruled that the claim of fraudulent concealment (the second issue) did not prevent the application of the limitations bar because when the plaintiff discovered the contamination any tolling effect ended.[101] With respect to the request for an injunction, (the third issue) the court ruled that it was not a separate claim, rather it was a type of relief that could be granted for a nuisance cause of action.[102]

The court did not appear to deal with a situation in which the release of contamination had occurred in the past, and releases were still occurring. An example of such a situation would be if one of the oil companies were still dumping or releasing salt water to the surface or to the same or new pits. The question is whether a party gains a license to continue polluting in a situation of a permanent injury to land. Once the two-year statute of limitations has run, does the plaintiff have any judicial recourse to prevent the ongoing actions of the defendant who continues to dump pollutants into the soil, a river or creek, or the groundwater? This issue leaves open a question for the courts to determine.

Similarly, in *White Oak Bend Municipal Utility District v. Robertson*, a Texas Court of Appeals upheld the dismissal of a suit based on the statute of limitations.[103] The issue before the court was whether the trial court erred in dismissing the negligence claims of White Oak Municipal Utility District ("White Oak") against Guy J. Robertson and Douglas L. Mulvaney ("Robertson and Mulvaney"), the co-trustees of a liquidating trust for the liabilities of Isabella Enterprises, Inc., formerly known as Pilgrim Enterprises, Inc. ("Pilgrim"), a dissolved corporation.[104] The trial court held that the two-year statute of limitations barred this action.[105]

Pilgrim had operated a dry-cleaning store in White Oak from 1985 until 1996. "As early as 1988, White Oak knew that Pilgrim was discharging

101. *Id.* at 276.

102. *Id.*

103. White Oak Mun. Util. Dist. v. Robertson, No. 14-00-00155-CV (Tex. App.—Houston [14th Dist.] Feb. 21, 2002, pet. denied) (not designated for publication), 2002 Tex. App. LEXIS 1315.

104. *Id.* at *1, *4.

105. *Id.* at *4, *6-7.

dry-cleaning solvents into [its] sewer pipes."[106] "[In] September of 1992, certain manhole covers in the White Oak sewer system and parts of the sidewalks above the sewer pipes began to visibly sink." In September and October of 1995, White Oak arranged for smoke testing and videotaping of the sewer pipes respectively, which confirmed that the sewer pipes had been damaged. In a letter from White Oak's engineers to the Texas Water Development Board, White Oak's engineers described the videotape of the sewer pipes as evidence that the sewer pipe damage was likely caused by exposure to dry cleaning solvents.[107] White Oak filed suit against Robertson and Mulvaney in April 1999.

The parties agreed that the discovery rule applies. "The discovery rule[, however, would toll the] limitations only until White Oak [had] knowledge of facts that would cause a reasonably prudent person to make an inquiry that would lead to the discovery of White Oak's claims for damage to its sewer pipes."[108] White Oak argued that the discovery rule tolled limitations until October 27, 1995, when its engineers advised the Texas Water Development Board of the probable connection between the sinking of the manhole covers and the dry cleaning solvent damage to its sewer pipes. "White Oak [further] argue[d that] its claims were therefore not barred by limitations on September 1, 1997, when a new statute took effect that abolished the two-year limitations as a defense against claims made by municipal utility districts like White Oak."[109]

The appellate court concluded that Robertson and Mulvaney "conclusively proved that, long before September 1, 1995, White Oak had knowledge of the sinking manhole covers and sidewalks and that this knowledge would cause a reasonably prudent person to make an inquiry which would have led to the discovery of damage to White Oak's sewer pipes" before that date.[110] Presuming that the new statute that abolished the two-year statute of limitations as a defense against claims made by municipal utility districts like White Oak is not retroactive, the appellate court further concluded that it did not apply to White Oak's claims because they were already barred when the statute took effect on September 1, 1997.[111] The appellate court, therefore, affirmed the trial court's judgment.[112]

106. *Id.* at *1.
107. *Id.* at *2-3.
108. *Id.* at *9-10 (citing White v. Bond, 362 S.W.2d 295, 295-96 (Tex. 1962); Cornerstones Mun. Util. Dist. v. Monsanto Co., 889 S.W.2d 570, 576 (Tex. App.—Houston [14th Dist.] 1994, writ denied)).
109. *Id.* at *6 (citing TEX. CIV. PRAC. & REM. CODE ANN. §§ 16.003, 16.061 (Vernon 1997)).
110. *Id.* at *15.
111. *Id.* at *17.
112. *Id.*

2. Preemption of State Law Claims by Federal Statutes

In *Dow AgroSciences, LLC v. Bates*, the U. S. District Court for the Northern District of Texas addressed the preemption of state claims by the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA").[113] In this case, the plaintiff herbicide manufacturer, Dow AgroSciences ("Dow"), brought a declaratory judgment action against a group of peanut growers concerning the growers' demand letters regarding one of Dow's products, a herbicide used to control weeds in peanuts.[114] Through the demand letters, the growers demanded payment for damages claiming that the herbicide failed to work as advertised. The growers also contended that the manufacturer's misrepresentation of the product constituted false, misleading, and deceptive acts and practices. Dow brought suit seeking declaratory judgment that the growers' claims were preempted by FIFRA.[115]

The court began its analysis of the issue by describing FIFRA and its preemption clause. The court discussed how "FIFRA creates a comprehensive regulatory scheme for pesticide and herbicide labeling."[116] "Under its provisions, all herbicides sold in the United States must be registered with the Environmental Protection Agency ("EPA"),"[117] and herbicide labels must be approved by the EPA.[118] Next, the court described FIFRA's preemption clause, which "provides that states 'shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under' FIFRA."[119] The court concluded that FIFRA's preemption clause expressly preempted state laws, including tort claims, that imposed different or additional labeling requirements from those approved through the regulatory process.[120] In applying the law, the court found that the growers' implied and express warranty claims were preempted because they challenged the herbicide label.[121]

Likewise, the growers' other claims were preempted. The growers argued that their Texas Deceptive Trade Practices Act ("DTPA") and fraud claims were not preempted because they arose from statements made by Dow's representatives. But the court noted "that FIFRA preempts claims that rely on advertising and marketing materials as the basis for their DTPA practices and fraud claims,"[122] and concluded "that FIFRA preemption cannot be avoided 'simply because [a party] challenge[s] alleged misrepresentations that were made separately from the label.'"[123]

113. Dow AgroSciences, LLC v. Bates, 205 F. Supp. 2d 623, 625 (N.D. Tex. June 2002).
114. *Id.* at 624-25.
115. *Id.* at 625.
116. *Id.*
117. *Id.* (citing 7 U.S.C. § 136a(a)).
118. *Id.* (citing 7 U.S.C. § 136a(c)).
119. *Id.* at 626 (quoting 7 U.S.C. § 136v(b)).
120. *Id.*
121. *Id.*
122. *Id.* at 627.
123. *Id.* (quoting Andrus v. AgrEvc USA Co., 178 F.3d 395, 400 (5th Cir. 1999)).

The court noted that some of the representatives' statements merely repeated information contained on the label. For this reason, the court held that FIFRA preempted the growers' DTPA claims.[124] The court also concluded that because the growers' negligence claims concerned a failure to warn, those negligence claims were also preempted by FIFRA.[125] Because all claims were deemed preempted, the court granted Dow's motion for summary judgment.

The Texas Supreme Court addressed the issue of FIFRA preemption in *American Cyanamid Co. v. Geye*.[126] In that case, farmers brought suit against a herbicide manufacturer, American Cyanamid Company ("ACC"), claiming that one of its products stunted root growth and inhibited foliage development resulting in severe reduction in the farmers' peanut crop yield. ACC sought summary judgment on the grounds that FIFRA preempted the farmers' claims under breach of warranty, strict liability, and DTPA.[127]

The Texas Supreme Court concluded that the claims were not preempted by FIFRA.[128] In reaching that conclusion, the court explained the scope of FIFRA's preemption.[129] First, the court noted that Congress expressly provided that state actions regarding product labeling are preempted to the extent that the content of the product label is regulated.[130] But, as the court explained, Congress permitted the EPA to elect not to regulate product labeling with respect to a product's "efficacy," which is "how well a product works."[131] After considerable analysis, the court concluded that the EPA did not regulate herbicide labels on the issue of whether the product will be toxic to the crops that the product was intended to assist.[132] Thus, without federal EPA regulation on this issue, the court reasoned that the farmers' crop damage claim was not preempted by FIFRA.[133]

3. *Property Damages*

In *Waste Disposal Center, Inc. v. Larson*, the Corpus Christi Court of Appeals addressed the adequacy of testimonial evidence in a case brought "against numerous defendants," including Waste Disposal Center, Inc. ("Waste Disposal"), "who owned, operated, or transported waste to a landfill."[134] The case was a limited appeal from a jury judgment rendered in favor of the plaintiffs, Soila Valdez and Michelle Lar-

124. *Id.*
125. *Id.* at 628.
126. American Cyanamid Co. v. Geye, 79 S.W.3d 21 (Tex. 2002).
127. *Id.* at 23.
128. *Id.*
129. *Id.* at 23-24.
130. *Id.*
131. *Id.* at 25.
132. *Id.* at 28.
133. *Id.* at 29.
134. Waste Disposal Ctr., Inc. v. Larson, 74 S.W.3d 578, 582 (Tex. App.—Corpus Christi 2002, pet. denied).

son.[135] The plaintiffs had sought damages for personal injury and property damages based on multiple causes of action that included negligence, trespass, and nuisance.[136]

The jury found that the defendants' negligence had proximately caused the plaintiffs' property damage. "It also found [that the defendants] committed a willful trespass and created a nuisance on Valdez's property." It awarded 1) damages to Valdez and Larson "for diminution of the market value of their respective properties," 2) damages to Valdez "for mental anguish arising as a result of the willful trespass and the nuisance," and 3) exemplary damages to Valdez.[137] On appeal, Waste Disposal argued that there was no evidence to support the jury's award of actual damages and, therefore, exemplary damages should not have been recovered.[138]

First, the court addressed Waste Disposal's contention that there was no evidence of a diminution in market value of either plaintiffs' property. Waste Disposal argued that the only evidence on this issue, testimony given by Valdez and Larson themselves, "reflect[ed] only their personal, subjective feelings, and [did] not quantify market value or any reduction [of market value]."[139] Citing the Texas Supreme Court's opinion in *Porras v. Craig*, the appellate court stated that "[a] property owner [may] provide opinion testimony regarding diminution in market value resulting from permanent damage to land, but the testimony must show that the diminution refers to market value rather than intrinsic value or some other value."[140] The court held that Valdez satisfied that standard with her testimony that "her property was not worth what she originally paid for it[,] and that nobody would buy the place as it is."[141] Similarly, the court concluded that Larson's testimony regarding the value of her property before the waste disposal and current value for the contaminated land was legally sufficient to establish a diminution in market value. Thus, Waste Disposal's first issue was overruled.[142]

Next, the court addressed Waste Disposal's argument that "there [was] no evidence to support the jury's award of mental anguish damages to Valdez as a result of the alleged property damage."[143] The appellate court sustained Waste Disposal's second issue because it concluded that Valdez's general testimony about her health concerns "provide[d] no evidence of the nature, duration, or severity of [her] mental anguish, nor does it establish a substantial disruption in her daily routine."[144]

In its third argument, Waste Disposal argued that "the award of exemplary damages to Valdez [could not] stand absent an award of actual dam-

135. *Id.* at 581.
136. *Id.* at 582.
137. *Id.*
138. *Id.* at 581-82.
139. *Id.* at 582.
140. *Id.* at 583 (citing Porras v. Craig, 675 S.W.2d 503, 504 (Tex. 1984)).
141. *Id.*
142. *Id.* at 584.
143. *Id.*
144. *Id.* at 585.

ages."[145] Having already concluded that "the evidence was legally sufficient to support an award of property damages based on willful trespass and/or nuisance," the court overruled this issue.[146]

In *Bates v. Schneider National Carriers, Inc.*, the appellate court addressed the issue of temporary versus permanent damages in the context of a nuisance claim.[147] In *Bates*, the appellants, a group of neighbors who resided near the defendant companies' manufacturing plants, alleged that they were subject to nuisance conditions over a period of years caused by noise, light, chemicals, dust, odors, and various other substances from the companies' operations.[148] The district court granted the companies' motion for partial summary judgment as to certain neighbors based on a limitations defense.[149]

The issue before the appellate court was "whether the facts as asserted in [the neighbors'] affidavits raise[d] a fact issue as to whether their damages result[ed] from a permanent nuisance or a temporary nuisance."[150] That distinction was critical because the issue of whether the two-year period of limitations for nuisance had passed depended on whether the nuisance was temporary or permanent. "An action for permanent damages to land must be brought within two years from the time of discovery of the injury. Damages for temporary injuries may be recovered for the two years prior to filing suit."[151] The court described permanent injuries to land as "constant and continuous, not occasional, intermittent, or recurrent."[152] On the other hand, the court described temporary injuries to land as "not continuous, but . . . sporadic and contingent upon some irregular force such as rain."[153] The court also noted that another characteristic of a temporary injury is the ability of a court of equity to enjoin the injury-causing activity, unlike a permanent injury, which cannot be terminated.[154]

The companies argued that the injuries were permanent and therefore barred by limitations. They argued that several of the neighbors filed affidavits describing their injuries using terms such as "ongoing," "constant," and "continuous."[155] Moreover, the companies noted that the affidavits established that the neighbors had lived in the area for more than two years before the lawsuit's filing date. Conversely, the neighbors argued that (1) "whether a nuisance and the resulting damages are temporary or permanent . . . is a fact question;" (2) "nowhere in their affidavits

145. *Id.*
146. *Id.* at 585-86.
147. Bates v. Schneider Nat'l Carriers, Inc., 95 S.W.3d 309 (Tex. App.—Houston [1st Dist.] 2002, pet. denied).
148. *Id.* at 311.
149. *Id.* at 310.
150. *Id.* at 311-12.
151. *Id.* at 312 (citing Bayouth v. Lion Oil Co., 671 S.W.2d 867, 868 (Tex. 1984)).
152. *Id.*
153. *Id.* (citing *Bayouth*, 671 S.W.2d at 868).
154. *Id.* at 314 (quoting Kraft v. Langford, 565 S.W.2d 223, 227 (Tex. 1978)).
155. *Id.* at 313.

did they describe the alleged nuisance as being 'continuous,' 'constant,' or 'continuing;'" and (3) "according to the affidavits, the complained of acts occur only when the wind is blowing from a certain direction."[156] Thus, the neighbors argued that the contradiction within the affidavits established an issue of fact regarding whether the alleged nuisance is temporary or permanent.[157] The neighbors also argued that the injuries were temporary in nature because they could be enjoined, and a permanent injury cannot be terminated.[158]

"After making every reasonable inference in [the neighbors'] favor regarding [the frequency of the injuries] and the feasibility of an injunctive remedy, [the appellate court] conclude[d] that a genuine issue of material fact existe[d] as to whether the nuisance alleged [was] permanent or temporary."[159] Thus, the appellate court reversed the trial court's grant of summary judgment and remanded the case.[160]

4. Evidence of Causation

In *JNC Enterprises, Ltd. v. Hutson Industries*, JNC Enterprises, Ltd. and Preston Road Commercial Partners, Ltd. (collectively "JCN Enterprises") sued Hutson Industries, Inc. ("Hutson") for trespass, negligence, negligence per se, and nuisance.[161] JCN Enterprises claimed that regulated volatile organic compounds from Hutson's manufacturing plant contaminated JNC Enterprises' property.[162] Following discovery, Hutson moved for no-evidence summary judgment, alleging, among other things, that JNC Enterprises presented no evidence that any act or omission by Hutson in the past two years caused the contamination.[163] The trial court granted Hutson's motion.[164]

On appeal, JNC Enterprises challenged the granting of the no-evidence summary judgment on two grounds. First, it argued that the no-evidence summary judgment was improper because causation of injury is not an element of trespass or negligence per se.[165] The court rejected that argument, stating that "it is elementary that causation of injury is an essential element of negligence per se [and trespass]."[166] As a second argument, JNC Enterprises contended that "there [was] compelling summary judgment evidence that Hutson caused injury" to JNC Enterprises' property by allowing contamination from Hutson's property to flow to JNC Enter-

156. *Id.* at 313-14.
157. *Id.* at 314.
158. *Id.*
159. *Id.*
160. *Id.*
161. JNC Enters. Ltd. v. Hutson Indus., No. 05-01-01711-CV (Tex. App.—Dallas Aug. 2, 2002, no pet.) (not designated for publication), 2002 Tex. App. LEXIS 5651, at *1.
162. *Id.*
163. *Id.*
164. *Id.*
165. *Id.* at *2.
166. *Id.* at *3.

prises' property.[167] In support, JNC Enterprises cited a number of environmental reports and documents demonstrating that JNC Enterprises' property was contaminated, that Hutson's property was the source, and that remediation may take up to five years.[168] But, the appellate court was unpersuaded that the evidence raised an issue of fact regarding "any action Hutson [had] failed to take to prevent the contamination."[169] To the contrary, the court believed that issue was resolved by the testimony of Hutson's expert that "any acts of remediation prior to the completion of the investigation would be premature."[170] Consequently, the appellate court affirmed the trial court's granting of summary judgment in Hutson's favor.[171]

This opinion is cryptic at best. How the court viewed the elements of the plaintiff's causes of action and the burden of proof on these elements is unclear. The case raises some interesting points for defendants in these cases to raise, but the legal analysis and arguments to support these points are not elucidated in this opinion.

5. *Standing and Duty to Restore Properties*

In *Exxon Corp. v. Pluff*,[172] the appellate court considered (1) whether David Pluff ("Pluff"), the current owner of certain property that Exxon Corporation ("Exxon") had formerly leased and on which Exxon had drilled oil wells, had standing to assert a cause of action for injury to the property against Exxon for not removing the abandoned oilfield materials from the property, and (2) if Pluff had such standing, whether Exxon had a contractual duty under the lease to remove the abandoned oilfield materials from the property. Based on a jury's verdict, the trial court entered judgment against Exxon for $30,000. This appeal followed.[173]

a. Standing

As standing is a necessary component of subject matter jurisdiction, the appellate court conducted a *de novo* review of the trial court's determination of standing. The fundamental rule of law with respect to standing is that "only the person whose primary legal right has been breached may seek redress for an injury."[174] "The right to sue is a personal right that belongs to the person who owns the property at the time of the injury,"[175] and thus, does not pass to a subsequent purchaser of the property without

167. *Id.* at *2.
168. *Id.* at *4-5.
169. *Id.* at *5-6.
170. *Id.* at *6.
171. *Id.*
172. Exxon Corp. v. Pluff, 94 S.W.3d 22 (Tex. App.—Tyler 2002, pet. denied).
173. *Id.* at 24.
174. *Id.* at 26-27 (citing Nobles v. Marcus, 533 S.W.2d 923, 927 (Tex. 1976)).
175. *Id.* at 27 (citing Abbott v. City of Princeton, 721 S.W.2d 872, 875 (Tex. App.—Dallas 1986, writ ref'd n.r.e.); Lay v. Aetna Ins. Co., 599 S.W.2d 684, 686 (Tex. App.—Austin 1980, writ ref'd n.r.e.)).

express provision.[176]

In the present case, "Exxon's drilling and production activities on the property ceased prior to Pluff's purchase of the property in 1992."[177] Further, Pluff's deed contained no assignment of any cause of action. The court concluded that the facts in *Senn v. Texaco* are indistinguishable from the case before it.[178] In *Senn*, "the injuries occurred before [the Senns] acquired the land and they did not obtain an assignment of any cause of action belonging to their predecessors in title."[179] The court in the *Senn* case concluded that the Senns did not have standing to assert a cause of action against Texaco for injury to their property.[180] For the same reasons, the *Exxon Corp.* court concluded that Pluff lacked standing to assert a cause of action against Exxon for injury to his property.[181]

b. Duty to Restore Property

Even if Pluff had standing to assert a cause of action against Exxon for injury to the property, the court found that Exxon had no duty to restore the property.[182] Under the lease, Exxon had an express right, but not an express duty, to remove oilfield materials on the expiration of the lease.[183] The court disagreed with Pluff's argument that such express right constituted an express duty or an implied obligation of Exxon to remove oilfield materials on the expiration of the lease.[184]

IV. THE ENDANGERED SPECIES ACT AND THE NATIONAL ENVIRONMENTAL POLICY ACT

A. DECLARATORY JUDGMENT ACTION REJECTED WHERE INDIVIDUAL NOT SPECIFICALLY THREATENED WITH SUITS

In *Sheilds v. Norton*, the Fifth Circuit Court of Appeals heard an appeal by a landowner who had lost a summary judgment motion in a declaratory judgment action challenging the constitutionality of certain provisions of the Endangered Species Act ("ESA").[185] Because letters sent out by the Sierra Club to other parties, including a partnership in which he was a partner, alleged violations of the ESA, the landowner felt threatened that he would be sued individually as a result of his pumping water from the Edwards Aquifer.

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176. *Id.*
177. *Id.*
178. *Id.* (citing Senn v. Texaco, Inc., 55 S.W.3d 222 (Tex. App.—Eastland 2001, no. pet.)).
179. *Id.* (citing *Senn*, 55 S.W.3d at 226).
180. *Id.* at 28 (citing *Senn*, 55 S.W.3d at 226).
181. *Id.*
182. *Id.*
183. *Id.* at 29. "Paragraph six of the lease provides that: 'Exxon shall have the right at any time during or after the expiration of this lease to remove all property and fixtures placed by Exxon on said land including the right to draw and remove all casing.'" *Id.*
184. *Id.*
185. Shield v. Norton, 289 F.3d 832, 833-34 (5th Cir. 2002), *cert. denied*, 123 S. Ct. 663 (2002).

The Fifth Circuit, rather than addressing the lower court's decision to uphold the challenged provisions of the ESA, focused on the question of whether the case was ripe for adjudication. The district court had said that the case was a close call on the ripeness question, but concluded a sufficient case or controversy existed.[186] The Fifth Circuit focused on the litigation threat that the plaintiff asserted had been made against him. The Sierra Club had in fact sent out three letters regarding alleged violations of the ESA. These three letters had been sent in 1990, 1994, and 1998. The Fifth Circuit and the district court both viewed such letters as the pre-suit notice required under the ESA and as "sent to induce the recipient to modify his actions so to avoid violation of the ESA."[187] The district court relied on the 1990 and 1994 letters, which threatened litigation if necessary to address the alleged violations of the ESA. The 1998 letter was sent solely to the Edwards Aquifer Authority ("EAA").[188]

The court of appeals, however, did not find these letters to provide a sufficient threat of litigation to permit a declaratory judgment action. Although the plaintiff was a member of the Edwards Aquifer Authority Board at the time, the plaintiff agreed he had no authority to sue on behalf of that board.[189] The 1990 letter listed the plaintiff's partnership as an addressee or potential violator of the ESA, but it did not list him individually. The 1994 letter did not list him, his partnership, or the EAA. Because the plaintiff had not received a letter individually and his partnership had not received a letter for eight years or more, the court concluded that the threat of litigation against him was not sufficient to raise a ripe controversy. The court remanded the case to the district court for dismissal for lack of jurisdiction.[190]

B. Incidental Take Permit Issued to Developer Upheld as a Result of Land Purchased to Preserve More Significant Habitat for the Relevant Species

In another ESA case decided within the Survey period, the federal District Court in San Antonio upheld the decision of the U.S. Fish and Wildlife Service ("Fish and Wildlife") to issue an incidental take permit of three endangered species. In *Center for Biological Diversity v. U.S. Fish & Wildlife Service*, the court, after a rather philosophical preamble to its opinion in which it delved into religious duties to protect creation, upheld the Fish and Wildlife decision.[191] The challenges were made under the ESA and the National Environmental Policy Act ("NEPA"). The decision challenged involved the issuance of an incidental take permit to La Cantera Development Company ("Developer") under section 10 of the

186. *Id.* at 835.
187. *Id.*
188. *Id.* at 836.
189. *Id.*
190. *Id.* at 836-37.
191. Ctr. For Biological Diversity v. U.S. Fish & Wildlife Serv., 202 F. Supp. 2d 594, 596-98 (W.D. Tex. 2002).

ESA.[192] The ESA allows incidental take permits to be issued if the take, which in this case, meant death, harm, or disturbance of an endangered species,[193] is incidental to the project at issue.[194] Here, Developer did not intend to harm the species involved, but the harm arose as a result of the construction, operation, and management of the activities on the property.[195] The basis for the challenge was threefold: (1) Fish and Wildlife "failed to ensure that the 'applicant [for the take permit would], to the maximum extent practicable, minimize and mitigate the impacts of . . . taking;'" (2) Fish and Wildlife's decision that "the development would 'not appreciably reduce the likelihood of the survival and recovery of the species in the wild,'" and (3) Fish and Wildlife violated NEPA by concluding there would be "no significant impact" and, thereby, not preparing an environmental impact statement.[196] Fish and Wildlife and Developer argued that the provisions of the ESA and NEPA had been met by Fish and Wildlife.

C. Minimization and Mitigation of Impact on the Species

The argument on this aspect of the ESA focused largely on statements by a particular scientist that had submitted comments and objections to the action.[197] The plaintiff argued that Fish and Wildlife had not focused on the expense necessary to further reduce the impact of the development, but acquiesced in the action. The Fish and Wildlife Habitat Conservation Planning Handbook provides that where the minimization and mitigation program of the applicant can be shown to provide "substantial benefit to the species," then less emphasis will be placed on the question of the maximum practicable effort the applicant can exercise.[198] After an exhaustive review in the text and footnotes, the court came to the conclusion that since Developer instituted a one-acre set back for the caves on the property to be developed, purchased land nearby that had much more substantial caves, and planned to spend $4 million to implement the actions, Fish and Wildlife's decision that the mitigation program was sufficient could not be overturned as being arbitrary and capricious.[199]

D. Appreciable Reduction of the Likelihood of the Survival and Recovery of the Species

The second argument of the plaintiff was that the plan decision of Fish Wildlife that the taking would not appreciably reduce the likelihood of the survival and recovery of the species was arbitrary and capricious. The court further ruled that the Habitat Conservation Plan did not have to

192. *Id.* at 598.
193. *See id.* at 599 n.5.
194. *See* 16 U.S.C. § 1539(a)(2)(B)(i) (2002).
195. *Ctr. For Biological Diversity*, 202 F. Supp. 2d at 598-99.
196. *Id.* at 601.
197. *Id.* at 607-09.
198. *Id.* at 609.
199. *See id.* at 618, 620-22.

serve as a species recovery plan, but the court considered the biological opinion issued by Fish and Wildlife to support the preservation and even the recovery of the species because of the purchase and preservation of the additional land. The plaintiff argued that the Habitat Recovery Plan did not appreciably reduce the recovery of the species because the meaning of conservation in the ESA is the implementation of methods and procedures such that the protection of the species is no longer needed.[200]

Again, after an exhaustive review of the arguments made by the plaintiff, the arguments of the single scientist that the plaintiff relied upon, and Fish and Wildlife's decision process, the court concluded that Fish and Wildlife's decision in approving the plan was not arbitrary and capricious.[201] Having reviewed the ESA, the regulations promulgated under the Act and case law, the court concluded that "the Service must develop its biological opinion based upon the best scientific and commercial data available regardless of the 'sufficiency' of that data."[202] The court believed Fish and Wildlife had done so. More importantly, it concluded that section 10 of the ESA authorized incidental take permits to reduce the impact on the species, but did not require mandatory actions to recover endangered species.[203] The court ruled that it must defer to the agency and that it could not find support for the plaintiff's contentions that "the [Habitat Conservation Plan] contained major flaws in terms of technical data relied upon, procedures employed, and conclusions reached."[204]

E. Finding of No Significant Impact under the National Environmental Policy Act

The final argument of the plaintiff was that Fish and Wildlife violated NEPA by finding that the development would not have a significant impact on the on the environment, which allowed Fish and Wildlife to avoid issuing an Environmental Impact Statement under NEPA.[205] After reviewing Fifth Circuit precedent, the district court ruled that the proper standard of review is whether a "finding of no significant impact" ("FONSI") was arbitrary and capricious.[206] Four criteria were enumerated for this judicial review: (1) "the agency must have accurately identified the relevant environmental concern;" (2) "once the agency has identified the problem it must have taken a 'hard look' at the problem in preparing the [environmental assessment];" (3) "if a finding of no significant impact is made, the agency must be able to make a convincing case for its finding;" and (4) "if the agency does find an impact of true significance, preparation of an EIS can be avoided only if the agency finds that

200. *Id.* at 625 (quoting 16 U.S.C. § 1532(3) (2002)).
201. *Id.* at 646.
202. *Id.* at 632 (quoting Nat'l Wildlife Fed'n v. Babbitt, 128 F. Supp. 2d 1274, 1286-87 (E.D. Cal. 2000)).
203. *Id.*
204. *Id.* at 646.
205. *See id.* at 646.
206. *Id.* at 647-48.

changes or safeguards in the project sufficiently reduce the impact to a minimum."[207] In conducting this review the court concluded that it must defer to the agency and not substitute its judgment for the agency's if the agency has arrived at a reasoned judgment and considered the relevant factors in making this decision.[208]

The court looked at the following factors raised by the plaintiff: (1) the significance of the ecological area that was to be disturbed, (2) the controversial impacts and unknown risks to the species, (3) the precedential nature of the action, (4) the cumulative impacts of this action when added to past, present and reasonably foreseeable future actions, and (5) the destruction of significant scientific resources and the adverse effect on the endangered species.[209] In reviewing all of these factors, the court concluded that despite the concerns raised by one scientist, Fish and Wildlife had adequately considered each of these factors and discharged its duties under NEPA.[210] It also concluded that the finding of any significant impact was "reduced to a minimum" by the mitigating actions of Developer contained in the Environmental Assessment and the Habitat Conservation Plan.[211] In the final words of the opinion, the court seemed reluctant to find for Developer, concluding the following: "[T]he law and standard of review which the Court is bound to apply are on the side of the developers and shoppers. [The developer has] hit a stand-up triple and the real estate magnates are winning thus far. But Mother Nature bats last."[212]

F. Sufficiency of an Environmental Impact Statement and Appropriate Use of Motions for Summary Judgment in Reviewing Agency Decisions

Texas Committee on Natural Resources v. Van Winckle considered cross motions for summary judgment regarding the sufficiency of the environmental impact statement ("EIS") prepared by the United States Army Corps of Engineers ("Corps") for its proposed construction of the Dallas Floodway Extension ("DFE").[213] The court noted the three standards that guide its review: the summary judgment standard, the Administrative Procedure Act ("APA") standard, and the NEPA standard. Unlike "typical" summary judgment motions, in cases such as this one where the court is reviewing the decision of an administrative agency the entire factual predicate is before the court in the form of the administrative record.[214] Thus, rather than employ the Rule 56 standard,[215] the relevant standard was whether the agency could reasonably have found the facts as it did

207. *Id.* at 648.
208. *Id.* at 649-50.
209. *Id.* at 650-63.
210. *Id.* at 663.
211. *Id.*
212. *Id.*
213. Tex. Comm. on Natural Res. v. Van Winkle, 197 F. Supp. 2d 586 (N.D. Tex. 2002).
214. *Id.* at 595.
215. Fed. R. Civ. P. 56.

and whether the evidence permitted the agency to make the decision that it did.[216] The agency's action was also subject to review under section 702 of the APA, where the relevant inquiry was whether the agency considered the relevant factors and whether there was a clear error of judgment.[217] The burden of proof was on the party seeking to overturn the decision.[218] "Because NEPA does not contain judicial review provisions, compliance with NEPA is reviewed under the APA[, and] an agency's EIS may only be reversed or remanded if it is arbitrary, capricious, or an abuse of discretion."[219] NEPA does not mandate particular results, but rather prescribes the process under which agencies must take a hard look at the environmental consequences of a proposed action.[220]

The court looked to the three criteria established by the Fifth Circuit for determining the adequacy of an EIS:

> (1) whether the agency in good faith objectively has taken a hard look at the environmental consequences of a proposed action and alternatives; (2) whether the EIS provides detail sufficient to allow those who did not participate in its preparation to understand and consider the pertinent environmental influences involved; and (3) whether the EIS explanation of alternatives is sufficient to permit a reasoned choice among different courses of action.[221]

Due to the technical expertise required to analyze the EIS, the courts grant the responsible agency considerable discretion.[222]

The plaintiffs raised four challenges to the EIS. In their first count, the plaintiffs claimed that the computer models used by the Corps were manipulated to create nonexistent economic benefits for the proposed DFE project. Finding a factual disagreement between the plaintiffs and the Corps, the court advised that it is not a tie-breaking technical expert and would defer to the informed discretion of the Corps on this issue.[223]

In their second count, the plaintiffs claimed that the Corps violated NEPA by failing to fully disclose environmental impacts and discuss alternatives. The court rejected the plaintiffs' claim that the Corps failed to disclose cumulative impacts of the DFE and past actions on water elevation, finding that NEPA does not require that an EIS address past cumulative impacts.[224] The court rejected the plaintiffs' claim that the EIS failed to discuss the flooding that would occur in downtown Dallas if the DFE were not constructed.[225] The court found that the Corps had considered and rejected the "no action" alternative, and was required only to

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216. *Id.* at 595.
217. *Id.* at 596.
218. *Id.*
219. *Id.* at 597.
220. *Id.*
221. *Id.* at 598 (quoting Miss. River Basin Alliance v. Westphal, 230 F.3d 170, 174 (5th Cir. 2000)).
222. *Id.*
223. *Id.* at 599-600.
224. *Id.* at 605.
225. *Id.* at 606-07.

discuss briefly its reasons for eliminating that alternative.[226] The plaintiffs also claimed that the Corps violated NEPA by failing to consider alternative means for protecting downtown Dallas from flooding, such as the much more cost-efficient alternative of raising the existing Dallas Floodway by two feet.[227] The court found that the stated purpose of the DFE was to expand flood protection to areas downstream from the Dallas Floodway.[228] Therefore, it was not unreasonable for the Corps to not include raising the existing Floodway as an alternative because it did not satisfy the purpose of the project.

In their third count, the plaintiffs claimed that the Corps "violated NEPA by failing to analyze other foreseeable future projects that are connected to the DFE project" and their cumulative impacts.[229] The court found that the DFE project was not "connected to" the Elm Fork Levee, the Trinity Corridor Transportation Improvements, the Great Trinity Forest, Trinity Parkway, the Woodall Rogers Bridge or the Chain of Lakes.[230] The court based its holding on the facts that there was no evidence that building the DFE would trigger any of the other projects, approval of the other projects by voters in bond elections does not mean they will all be constructed, there was no evidence that the DFE could not proceed unless the other projects are built before or contemporaneously with the DFE project, and there was no evidence that the DFE is interdependent with any of the other projects.[231] However, the court agreed with the plaintiffs that the EIS violated NEPA with respect to consideration of cumulative impacts of the foreseeable future projects.

The Corps claimed the future projects were not included in the EIS because they were not "proposals" and the Corps had insufficient detail to present a cumulative impacts discussion.[232] The court clarified that the statute does not limit a discussion on cumulative impacts of foreseeable future projects to only those that have been "proposed."[233] Rather, the EIS must include a cumulative impacts analysis of foreseeable future actions that are not proposed actions to ensure that an agency does not divide a project into multiple actions that, though individually insignificant, would collectively have a substantial impact.[234] Finding a reasonable basis to believe that some or all of the other projects would be implemented, the court ruled that the Corps's failure to discuss the cumulative impacts of any of the projects in the EIS violated NEPA and remanded the matter to the Corps "for further consideration of the cumulative impacts of other similar, reasonably foreseeable future

226. *Id.*
227. *Id.* at 609.
228. *Id.* at 610.
229. *Id.* at 611-12.
230. *Id.* at 612-14.
231. *Id.* at 614.
232. *Id.*
233. *Id.* at 616-19.
234. *Id.* at 617.

projects in the same geographic area of the DFE project."[235]

V. ADMINISTRATIVE LAW, CONSTITUTIONAL, AND SOVEREIGN IMMUNITY ISSUES

A. AGENCY RULE-MAKING AUTHORITY

In *Bragg v. Edwards Aquifer Authority*, the Supreme Court of Texas held that the Edwards Aquifer Authority need not prepare "takings impact assessments" (TIA) before adopting well-permitting rules and applying those rules to well permit applications.[236] The Braggs filed an action to have declared void the Authority's proposed actions on their permit applications for their two pecan orchards.[237] In applying its well-permitting rules, the Authority's general manager proposed capping the number of acre feet of water that the Braggs could withdraw for the Braggs' first orchard, and denying the application for a well permit for the Braggs' second orchard.[238] This recommendation was based upon historical use data supplied by the Braggs in their permit applications.[239]

Before the Authority acted on the recommendation of its general manager, the Braggs filed suit against the Authority seeking to invalidate the recommended action on their applications and the Authority's rules as they pertained to the Braggs' application, for failure to prepare TIAs under the Texas Property Rights Act.[240] The Texas Property Rights Act provides a cause of action for real property owners based on governmental action taken without preparing a TIA, if the Act requires a TIA.[241] The district court ruled in the Braggs' favor, and the Authority appealed.[242]

Affirming the court of appeals' reversal of the district court's ruling, the supreme court determined that the Authority's actions are generally subject to the Property Rights Act's requirements unless an exception to the Act applies.[243] The supreme court reasoned that the Authority's adoption of well-permitting rules is not covered by the Act.[244] The Authority's act of adopting well-permitting rules was taken under its statutory authority to prevent waste or to protect the rights of owners of interest in groundwater, which exempts it from the Act.[245] Furthermore, under the Act's plain language, well-permitting is not an action subject to

235. *Id.* at 618-20. The plaintiffs' fourth count, which alleged that the Corps violated the APA by failing to follow a 1988 record of decision, was decided on the basis that the plaintiffs did not meet their burden to show defendants violated the APA. *Id.* at 620-22.
236. Bragg v. Edwards Aquifer Auth., 71 S.W.3d 729, 737 (Tex. 2002).
237. *Id.* at 730-32.
238. *Id.* at 732.
239. *Id.*
240. *Id.* at 732-33.
241. TEX. GOV'T CODE ANN. §§ 2007.021, 2007.044 (Vernon 2000).
242. *Bragg*, 71 S.W.3d at 733.
243. *Id.* at 735.
244. *Id.*
245. *Id.* at 736-37.

the TIA requirement.[246] Accordingly, the Braggs' challenges to the Authority's rules and its proposed actions to their permit applications were ultimately denied.[247]

B. RIPENESS

In *City of Waco v. Texas Natural Resource Conservation Commission*, the Austin Court of Appeals addressed the ripeness of a challenge of the Texas Natural Resource Conservation Commission's ("TNRCC") authority to issue permits to confined animal feeding operations ("CAFOs") in the Bosque River watershed, after the TNRCC withdrew a February 2000 order regulating future CAFO permits.[248] The City of Waco sought a declaratory judgment that the TNRCC's "interim policy" of issuing CAFO permits in the Bosque River watershed violated state regulations.[249] After the district court dismissed the suit for lack of subject matter jurisdiction due to ripeness, the City appealed the district court's decision.[250]

Erath County, which is in the Bosque River watershed, is a leading county in Texas for milk production and contains many large-scale, clustered dairy operations.[251] Runoff containing dissolved agricultural waste from those dairy operations is discharged to the Bosque River, which forms Lake Waco near the point of confluence with the Brazos River.[252] High levels of pollutants from the Bosque River watershed have adversely affected the water quality of Lake Waco, the sole source of drinking water for 150,000 Waco residents and a source of recreational activity.[253] As required under the Clean Water Act, the TNRCC listed two segments of the Bosque River as having adversely affected water quality and identified phosphorus, a nutrient found in animal waste, as the primary source of pollution.[254] Several years after the TNRCC listed the Bosque River watershed, the agency finally met the requirement of submitting a Total Maximum Daily Load ("TMDL") plan for assimilating the pollutants present in the Bosque River water.[255] The TMDL confirms that the dairy farms concentrated in the Bosque River watershed produce a major controllable source of phosphorus and recommends a

246. *Id.* at 737.
247. *Id.* at 738.
248. City of Waco v. Tex. Natural Res. Conservation Comm'n, 83 S.W.3d 169, 172 (Tex. App.—Austin 2002, no pet.). On September 1, 2002, the TNRCC began conducting business under its new name, the Texas Commission on Environmental Quality. *See* 27 Tex. Reg. 8340 (Aug. 30, 2002).
249. *Id.*
250. *Id.*
251. *Id.* at 173.
252. *Id.* at 172.
253. *Id.*
254. *Id.* at 174.
255. *Id.* Although the TMDL has now been submitted to the U.S. Environmental Protection Agency for approval, no TMDL had been approved by TNRCC when the City filed its action or when it filed its brief on appeal. *Id.*

large reduction in phosphorus loadings.[256] The City contended that the TNRCC's "interim policy" of continuing to issue CAFO permits to new applicants for additional discharges of waste into the Bosque River violated regulations that require the TNRCC to implement measures to achieve compliance with state water quality standards.[257]

On appeal, the City argued that the Austin Court of Appeals was presented with a pure question of law regarding the impact of section 122.4(i) of the EPA rules, which is incorporated into the TNRCC rules, on the TNRCC's discretion to issue new permits for CAFOs that discharge into the listed segments of the Bosque River.[258] The City interpreted the language of section 122.4(i) as prohibiting the TNRCC from issuing CAFO permits to new dischargers until the TNRCC promulgates TMDL regulations for the contaminated Bosque segments.[259] Under the TNRCC's policy, the City argued, every new permit to discharge into the listed Bosque River segments violates section 122.4(i).[260] The TNRCC, on the other hand, interpreted section 122.4(i) to merely limit the TNRCC's ability to issue permits that cause or contribute to water quality violations, without limiting the TNRCC's discretion to issue permits that maintain the environmental status quo. According to the TNRCC, whether a particular permit would cause or contribute to violations of water quality standards depends in any given case on the specific conditions and terms of that particular permit.[261] Thus, the City's injury was merely hypothetical and its claim would not become ripe until the agency approved a permit that would cause or contribute to a violation of water standards.[262]

The doctrine of ripeness addresses when an action can be brought and generally requires a concrete injury, rather than a hypothetical injury, in order to create a justiciable claim.[263] For a declaratory judgment action, the facts must show the presence of "ripening seeds of a controversy," but an actual injury need not have occurred.[264] A court's ripeness inquiry involves two prongs: (1) the fitness of the issues for judicial decision, and (2) the hardship occasioned to a party by the court's denial of judicial review.[265] In evaluating the first prong, the court agreed with the City that the issue presented was a purely legal inquiry and would not benefit from the development of additional facts in connection with a particular

256. *Id.*
257. *Id.*
258. *Id.* at 173 (discussing 30 TEX. ADMIN. CODE § 305.538 (West 1999); 40 C.F.R. §122.4 (2000)).
259. *Id.* at 176.
260. *Id.*
261. *Id.*
262. *Id.*
263. *Id.* at 175 (citing Waco Indep. Sch. Dist. v. Gibson, 22 S.W.3d 849, 851 (Tex. 2000); Tex. Ass'n of Bus. v. Tex. Air Control Bd., 852 S.W.2d 440, 444 (Tex. 1993)).
264. *Id.* (citing Texas Dep't of Banking v. Mount Olivet Cemetery Ass'n, 27 S.W.3d 276, 282 (Tex. App.—Austin 2000, pet. denied)).
265. *Id.* at 177 (citing Office of Pub. Util. Counsel v. Publ. Util. Comm'n, 843 S.W.2d 718, 724 (Tex. App.—Austin 1992, writ denied)).

permit.[266] For the second prong, the court noted that the denial of judicial review would allow newly issued permits to become final and remain in effect even during pending appeals.[267] The court recognized that without judicial review, the City would suffer harm because it would be forced to make the same legal argument in multiple appeals.[268] Accordingly, the court held that the case was ripe for adjudication and remanded the matter to the trial court for consideration of the City's claim.[269]

C. Service Requirements

In *Texas Natural Resource Conservation Commission v. Sierra Club*, the Supreme Court of Texas ruled that, when appealing a TNRCC order under the Texas Solid Waste Disposal Act, the appellant need only serve *citation* on the TNRCC.[270] The appellant does not have to serve each party of record to the agency proceeding with citation.[271] Rather, the appellant need only serve the parties with a copy of the *petition* filed in district court.[272] The supreme court determined that although the Texas Solid Waste Disposal Act requires service of citation for an appeal pertaining to a TNRCC order, only the proper defendant enforcing the state's regulatory scheme, the TNRCC, need be served.[273] The supreme court further determined that the plain language of section 2001.176(b) of the Texas Administrative Procedure Act only requires service of the petition of the parties to the agency proceeding.[274] Reading the Texas Solid Waste Disposal Act and the Texas Administrative Procedure Act together, the supreme court concluded that service of citation on the TNRCC alone is sufficient.[275]

D. Constitutional Issues

1. *Asbestos Work Practice Standards Are Valid Exercise of Commerce Clause Authority*

In *United States v. Ho*, the United States Court of Appeals for the Fifth Circuit upheld the Clean Air Act's asbestos work practice standard and requirement for providing notice of intent to remove asbestos as a valid exercise of Congress's Commerce Cause Authority.[276] In that case, Eric Ho had undertaken the renovation of a hospital building that contained asbestos in the fireproofing.[277] Although the project involved asbestos

266. *Id.*
267. *Id.* at 178.
268. *Id.*
269. *Id.*
270. Tex. Natural Res. Conservation Comm'n v. Sierra Club, 70 S.W.3d 809, 814 (Tex. 2002).
271. *Id.*
272. *Id.*
273. *Id.* (discussing Tex. Health & Safety Code Ann. § 361.321(c) (Vernon 2001)).
274. *Id.* at 814 (quoting 30 Tex. Gov't Code Ann. § 2001.176(b) (Vernon 2000)).
275. *Id.*
276. United States v. Ho, 311 F.3d 589, 591 (5th Cir. 2002); *see* 42 U.S.C. § 7413(c).
277. *Ho*, 311 F.3d at 591-92.

removal, Ho did not hire licensed asbestos abatement professionals or take required precautions to protect workers who were unaware of the presence of asbestos.[278] Ho was convicted of criminal violations for failure to give notice of intent to renovate a facility involving removal of asbestos and failure to comply with asbestos work practice standards.[279] On appeal, Ho contended that the Clean Air Act provisions under which he was convicted exceeded Congress's authority under the Commerce Clause of the United States Constitution.[280]

The asbestos work practice standard regulates the handling of asbestos at building demolition and renovation sites where the buildings contain certain amounts and specific kinds of asbestos.[281] For example, the asbestos work practice standard requires that asbestos-containing material be wetted during removal and stored in leak-tight containers until properly disposed.[282] In addition, a manager trained in complying with the work practice standards must be present at the site before workers handle asbestos-containing materials.[283] Ho admitted that he did not comply with those requirements or other requirements under the asbestos work practice standards.[284] Ho also admitted that he failed to give the EPA notice of intent to remove asbestos, as required under applicable federal regulations.[285] Consequently, criminal penalties were imposed against Ho for knowingly violating requirements of the asbestos work practice standard and knowingly failing to provide the required notice of asbestos removal.[286]

Ho argued that the requirements of the asbestos work practice standard and the notification requirement for asbestos removal were unconstitutional exercises of Commerce Clause authority as applied to him.[287] Specifically, Ho contended that the government did not prove that asbestos was released into the ambient air, therefore asbestos from the hospital could not have polluted interstate air.[288] Reviewing the constitutionality of the statutes at issue *de novo*, the court recognized that although the conviction was based entirely on intrastate activities, Congress has authority to regulate intrastate activities that substantially affect interstate commerce.[289] Thus, the limited question addressed by the court was whether the aggregation principle, under which a wholly intrastate commercial activity can substantially affect interstate commerce when aggregated with similar and related activity, extends to violations of the

278. *Id.*
279. *Id.* at 593 (citing 42 U.S.C. § 7413(c)(1), (c)(2)(B) (2002)).
280. *Id.* at 594.
281. *Id.* at 595 (discussing 40 C.F.R. §§ 61.145, 61.150 (2000)).
282. *Id.* (discussing 40 C.F.R. § 61.145(c)).
283. *Id.* (discussing 40 C.F.R. § 61.145(c)).
284. *Id.*
285. *Id.* (citing 40 C.F.R. § 61.145(b)).
286. *Id.* (discussing 42 U.S.C. § 7413(c)(1), (c)(2)(B) (2000)).
287. *Id.* at 594, 596.
288. *Id.* at 601.
289. *Id.* at 601-02.

asbestos work practice standard.[290]

In analyzing the issue presented, the court first noted that the regulated activity, asbestos removal, is a commercial activity and that Ho's activities were motivated by commercial considerations.[291] Second, the court found that the reach of the asbestos work practice standard was not limited by any type of jurisdictional element.[292] Third, no congressional findings or legislative history could be cited regarding the substantial effects that asbestos removal could have on interstate commerce.[293] The court determined that use of the aggregation principle was justified in this case because a direct and apparent relationship exists between Ho's violation of the asbestos work practice standard and interstate commerce. Ho had gained an economic advantage by violating the asbestos work practice standard, which injured the national market for asbestos removal services.[294] Once aggregated with similar activities, Ho's activities threatened the interstate commercial real estate market by potentially reducing the number of asbestos removal companies and increasing the cost of asbestos removal services.[295] The court held that Congress did not exceed its authority by aggregating violations of the asbestos work practice standard to find a substantial effect on interstate commerce.[296] For that reason, the court upheld the asbestos work practice standard and the Clean Air Act provision that authorizes the asbestos work practice standard.[297] That holding, however, does not extend to other sections of the Clean Air Act or to other environmental laws, and it is limited by applying only to commercial activities for which a national market exists.[298]

With regard to the requirement for notice of intent to remove asbestos, Ho argued that criminal penalties could be imposed only if knowledge of the Clean Air Act's notice requirement is established.[299] The Clean Air Act states that criminal penalties may be imposed "on '[a]ny person who knowingly fails to notify or report as required.'"[300] Citing the maxim that "[i]gnorance of the law is no defense," the court held that criminal penalties could be imposed without a showing that the person had knowledge of the notice requirement.[301] The government only needed to show that Ho had knowledge of the underlying facts, meaning the presence of asbestos, and did not need to show knowledge of the law.[302]

290. *Id.* at 599, 602.
291. *Id.* at 602.
292. *Id.* at 603.
293. *Id.* at 604.
294. *Id.*
295. *Id.*
296. *Id.*
297. *Id.*
298. *Id.*
299. *Id.* at 605.
300. *Id.* (quoting 42 U.S.C. § 7413(c)(2)(B)(2000)).
301. *Id.*
302. *Id.* at 605-06.

In agreement with the government's contention on appeal, the court held that the district court erred by declining to add "a six-level sentence enhancement for an 'ongoing, continuous, or repetitive discharge, release, or emission of a hazardous or toxic substance or pesticide into the environment.'"[303] The district court concluded that "into the environment" meant that the government was required to prove that asbestos was discharged outside the hospital and that such proof had not been established.[304] The Fifth Circuit, however, found that the government had sufficiently proved a discharge outside the hospital.[305] Numerous facts, including trial testimony of several witnesses and photographs of the scene, supported the conclusion that asbestos must have escaped the unsealed hospital continuously and repeatedly during the asbestos removal.[306] An explosion at the hospital, which blew a hole in an exterior hospital wall, and Ho's failure to seal the hole created by the explosion had undoubtedly caused asbestos to be released from the hospital.[307] Because the government proved an asbestos discharge by preponderance of the evidence, the court vacated Ho's sentence and remanded the case for re-sentencing.[308]

Similarly, the court held that the district court erred by declining to add "a four-level sentence enhancement for Ho's status as 'an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive.'"[309] The district court's interpretation of "otherwise extensive" as referring to the nature of the criminal organization ignored Fifth Circuit precedent, which directs that the number of participants and persons involved in the offense be considered.[310] The court remanded the case for re-sentencing consistent with the proper interpretation of the phrase "otherwise extensive."[311]

2. *Taking of Private Property*

The term "Taking" in environmental law has two meanings. One arises under the Endangered Species Act and is the killing, disturbing or harassing of an endangered or threatened species. These issues were discussed in a prior case summary above. The other arises under the U.S. Constitution and under state constitutions and embodies the concept that the government may not take private property away from citizens without providing just compensation. Taking of private property in environmental cases typically arises not from the government completely taking over

303. *Id.* at 608 (quoting U.S.S.G. § 2Q1.2(b)(1)(A) (1987)).
304. *Id.*
305. *Id.*
306. *Id.* at 608-609.
307. *Id.* at 609.
308. *Id.* at 610.
309. *Id.* (quoting U.S.S.G. § 3B1.1(a) (1987)).
310. *Id.* at 610-611.
311. *Id.* at 611.

property, but from the limitation of the property's use through legislative or regulatory restrictions.

In *Maguire Oil Co. v. City of Houston*,[312] the Court of Appeals for Austin decided a case in which the plaintiff oil company asserted that private property rights to explore for oil and gas were taken as a result of the City's revocation of a permit to drill an oil well within a certain distance of Lake Houston. The City claimed that the permit had been issued in error citing an ordinance that prohibited an oil well within 1000 feet of the lake within the City's extraterritorial jurisdiction.[313] The oil company had already expended funds to acquire leases for drilling and to prepare the site for drilling.

The oil company asserted that the ordinance was unreasonable, that the City was engaging in selective enforcement, and that the City's actions resulted in a taking without just compensation in violation of the Fifth Amendment of the U.S. Constitution and the Due Course of Law provision of the Texas Constitution. Cross motions for summary judgment were filed by both parties.[314]

The City's argument that the statute of limitations had passed was denied because the ordinance actually only applied to the extraterritorial jurisdiction of the City, and the well was found within the City's city limits. The City's no-evidence motion on economic damages was also refused because the court found that the oil company had presented sufficient evidence of market value reduction. The court ruled that the City in this case may be subject to an estoppel defense because of its behavior and the prejudicial reliance by the oil company, so summary judgment was not appropriate for the City. However, the court ruled that summary judgment was appropriate with respect to the oil company's negligent misrepresentation claim.[315]

The oil company also asserted a selective enforcement claim. The test was whether the individual prosecuted was selected out of others who committed the same acts and whether the motivation of the government was purposefully discriminating on the basis of an impermissible consideration such as race, religion, or the desire to exercise constitutional rights.[316]

E. Sovereign Immunity

In *City of Corpus Christi v. Absolute Industries*, the court of appeals clarified that, in determining whether a city has sovereign immunity or may be sued in tort for its actions, the focus is on whether the actions

312. Maguire Oil Co. v. City of Houston, 69 S.W.3d 350 (Tex. App.—Texarkana 2002, pet. denied).

313. *See id.* at 356.

314. *Id.*

315. *Id.*

316. *See id.* at 370 (citing State v. Malone Serv. Co., 829 S.W.2d 763 (Tex. 1992)); United States v. Rice, 659 F.2d 524, 526 (5th Cir. 1981); Wolf v. State, 661 S.W.2d 765, 766 (Tex. App.—Fort Worth 1983, writ ref'd n.r.e.)).

giving rise to the claim are proprietary or governmental functions, rather than on the context of those actions.[317] Here, Absolute Industries ("Absolute") had contracted with area refineries to collect and transport their garbage to a private landfill for disposal. Absolute claimed that the City threatened to retaliate against the refineries if they did not use garbage collection services that would dispose of their garbage at the City's landfill.[318] In response, one refinery, Valero, capitulated to the City's threats and cancelled its contract with Absolute. Absolute filed suit, claiming that the City intentionally interfered with its contract with Valero.[319]

Absolute Industries was an interlocutory appeal of the trial court's denial of the City's plea to the jurisdiction. The City first claimed that, under the doctrine of sovereign immunity, it could not be sued in tort for its governmental functions and the legislature recognizes that the removal, collection, and disposal of garbage is a governmental function.[320] The court noted, however, that Absolute's claim centered on intentional interference with contracts rather than on garbage collection. The remote relationship between the City's act and garbage collection was insufficient to make the City's act a governmental function. Because the City allegedly undertook the act to avoid monetary loss, the court held it was a proprietary function.[321] The court also rejected the City's claim that it could not be held liable for intentional torts committed in its proprietary capacity, citing more than one hundred years of cases holding municipalities to the same liabilities and duties as individuals and corporations with regards to their proprietary functions.[322]

In *Maguire Oil Co.*, the oil company asserted an equal protection argument. In a so-called "class of one" case, the test asserted by the court was that "the defendant deliberately sought to deprive [the plaintiff] of the equal protection of the laws for reasons of a personal nature unrelated to the duties of the defendant's position."[323] The court ruled that the oil company had raised sufficient factual questions about these issues and denied the City's motion for summary judgment. The matter was remanded back to the trial court for further proceedings.

317. City of Corpus Christi v. Absolute Indus., No. 13-01-311-CV, 2001 Tex. App. LEXIS 7581 (Tex. App.—Corpus Christi Nov. 8, 2001, pet. denied).
318. *Id.* at *1-2.
319. *Id.*
320. *Id.* at *4-6.
321. *Id.* at *6-7.
322. *Id.* at *7-9 (citing City of Galveston v. Posnainsky, 62 Tex. 118, 127 (1884); Gates v. City of Dallas, 704 S.W.2d 737, 739 (Tex. 1986)).
323. *Maguire Oil Co.*, 69 S.W.3d at 371 (citing Hilton v. City of Wheeling, 209 F.3d 1005, 1008 (7th. Cir. 2000)).

VI. INSURANCE COVERAGE FOR ENVIRONMENTAL CLAIMS

During the Survey period, the federal courts and state courts decided several Texas cases that involved claims under insurance policies for environmental contamination or remediation.

A. COVERAGE UNDER AN ENVIRONMENTAL IMPAIRMENT LIABILITY POLICY FOR RSR LEAD SMELTER REMEDIATION

Two environmental insurance cases arose from disputes over a long running clean up of lead smelting facilities in West Dallas and elsewhere under an Environmental Impairment Liability policy ("EIL") issued to RSR Corporation ("RSR"). The first case was *International Insurance Co. v. RSR Corp.* ("*RSR I*").[324] The pollution problems at the West Dallas smelting facility began in earnest in 1983, when RSR notified its insurers, including the predecessor of International Insurance Company ("International"), of numerous environmental claims from adjacent landowners.[325] In 1993, the EPA notified RSR of potential liability for the West Dallas site under federal environmental laws.[326] The coverage issues in *RSR I* and *RSR II* involve EPA-mandated cleanup at the Dallas site and a site in Washington ("Harbor Island Site"). The EIL policy covers cleanup costs, property damage, litigation, and certain other liabilities involving property not owned by the insured.[327]

The primary issues in *RSR I* were whether: (1) the EIL policy covers environmental cleanup and associated litigation costs with respect to any portion of the impaired sites; (2) RSR waived coverage by not obtaining the insurer's consent before entering a tolling agreement with the EPA; (3) the insured timely asserted a claim under the claims-made coverage for the Harbor Island facility; and (4) the insurer violated Texas Insurance Code article 21.21 by making material misrepresentations regarding the EIL policy. The court concluded that the policy covered cleanup costs for one portion of the West Dallas facility and associated litigation costs.[328] However, International asserted that the insured had waived coverage by entering a tolling agreement with the EPA without the insurer's consent.[329] The court agreed but held that the insurer could not show that it had been prejudiced by a material breach of the policy's con-

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324. Int'l Ins. Co. v. RSR Corp., No. 3:00-CV-0250-P, 2001 U.S. Dist. LEXIS 16569 (N.D. Tex. Oct. 11, 2001) [hereinafter *RSR I*].

325. In 1993, International assumed runoff coverage for the EIL policies, and RSR agreed to the transfer of coverage from the predecessor insurer. *See* Int'l Ins. Co. v. RSR Corp., No. 3:00-CV-0250-P, 2002 U.S. Dist. LEXIS 5337, at *4-5 (N.D. Tex. March 27, 2002) [hereinafter *RSR II*].

326. The EPA had first notified RSR in 1982 that EPA was placing RSR's facility in Harbor Island Washington on the Superfund list. *RSR I*, 2001 U.S. Dist. LEXIS at *39.

327. *Id.* at *14. Actually, International's coverage was controlled under an 1885 escrow agreement between RSR and its insurers, which International argued should be terminated because the insurer's obligations had been discharged. *Id.* at *7.

328. *Id.* at *16.

329. *Id.* at *18.

sent requirement.[330]

The insurer also argued that the insured had not timely notified the insurer of a claim for the Harbor Island facility in 1983 when the pollution was first discovered, but had instead waited until the 1992 EPA superfund claims were asserted.[331] The court noted that the EIL policy provided claims-made coverage and that timely notification was a condition precedent for coverage.[332] However, based on evidence that RSR had discussed the Harbor Island facility with its insurer in 1983, the court found that a material question of fact existed on the notice issue and allowed RSR to pursue the claim.[333]

Finally, the court granted summary judgment against the insured's insurance code claims. The insured alleged that International's failure to inform RSR that International was a "runoff company," whose function was to handle existing claims and then go out of business, constituted a material misrepresentation under article 21.21 because a runoff company would not have sufficient incentive to properly defend and indemnify the insured.[334] The court determined that because RSR could not point to a provision of the policy that the insurer misrepresented and held that the article 21.21 claim was not supported by substantial evidence.[335]

The second case, *International Insurance Co. v. RSR Corp.* ("*RSR II*"), primarily concerned whether the costs of cleaning up battery chips originating from the West Dallas facility and used by area residents as fill material were excluded from coverage. The costs would be excluded if they had arisen from the following, which was excluded from coverage under the policy: "Any commodity, article or thing supplied, repaired, altered or treated by the insured and happening elsewhere than at the insured's premises after the insured has ceased to own or exercise physical control over that commodity, article or thing supplied, repaired, altered or treated."[336]

International argued that the exclusion was unambiguous because the discarded battery chips were clearly articles or things supplied or treated by the insured and that the impairment happened elsewhere after the insured had ceased to own the chips.[337] RSR countered that the drafting history of the provision clearly showed that the exclusion was intended only as a "products hazard" exclusion that excluded coverage only for

330. *Id.* at *24 (relying on Hernandez v Gulf Group Lloyds, 875 S.W.2d 691, 693-94 (Tex. 1994)).

331. *Id.* at *30.

332. *Id.* at *31.

333. *Id.* at *41.

334. *Id.* at *42 (discussing TEX. INS. CODE ANN. art. 21.21, § 4(11)(a)) (Vernon 2001) which prohibits "misrepresenting an insurance policy by (a) making an untrue statement of material fact.").

335. *Id.* at *43-44.

336. *RSR II*, 2002 U.S. Dist. LEXIS at *14-15.

337. *Id.* at *23.

RSR's products sold in the course of its business.[338] The court found that the plain language of the exclusion was clear and the cleanup costs were excluded.[339] The court held that RSR had "supplied, repaired, altered or treated" the battery chips when it took apart the batteries at the West Dallas facility and stockpiled the chips, thus making them available to residents as fill material.[340] The court also found that the policy did not cover cleanup costs on the landfill facility itself because of an exclusion not covering liability or costs in connection with: "Upgrading, monitoring, neutralizing, restoring, land filling, cleaning up or inactivating in any waste disposal sites used directly or indirectly by the Insured or for which they may be otherwise be responsible."[341]

However, the court rejected the insurer's argument that the residential area where the battery chips were found was a "waste disposal site."[342]

B. Coverage Under Comprehensive General Liability Policies for Arsenic Releases from a Cotton Gin

Chickasha Cotton Oil Co. v. Houston General Insurance Co.,[343] involved the following issues: (1) coverage under lost policies; (2) a "sudden-and-accidental" pollution exclusion; (3) Texas Insurance Code, art. 21.21 § 4(10); and (4) choice of law. Chickasha Cotton Oil Company ("Chickasha") or its predecessors operated a cotton gin in Commerce, Texas from the mid 1950s until approximately 1969. In 1995, hundreds of claimants in counties surrounding the cotton gin sued Chickasha for allegedly releasing arsenic into the atmosphere, causing property damage and personal injuries.[344] Chickasha claimed that it had purchased primary liability insurance from Houston General Insurance Company ("Houston General") from at least 1944 through 1972 and had purchased both primary and umbrella policies from Houston General from 1972 through 1986. However, Chickasha could find no policies before 1972. Instead, the insured provided the affidavit of an employee who had worked for Chickasha from 1937 until 1984, whose duties included the purchase of general liability insurance purchased from Houston General.[345] Chickasha also produced mandatory insurance forms from the Department of Insurance, specimen policies from Houston General, and

338. *Id.* at *24 The court engaged in a lengthy examination of a Delaware case that had examined the same language, Monsonto Co. v. Aetna Cas. Sur. Co., NO. 88C-JA-118, 1994 Del. Super LEXIS 191 (Del. Sup. Ct. April 15, 1994), *rev'd by* 652 A.2d 36 (Del. 1994). *RSR II*, 2002 U.S. Dist. LEXIS 5337, at *17-22. The primary issue in those cases however depended on the application of Missouri law, which permits extrinsic evidence to determine if a policy is ambiguous.

339. *RSR II*, 2002 U.S. Dist. LEXIS 5337, at *29.

340. *Id.*

341. *Id.* at *30.

342. *Id.* at *31.

343. Chickasha Cotton Oil Co. v. Houston Gen. Ins. Co., No. 05-00-01789-CV (Tex. App.—Dallas Aug. 6, 2002) (not designated for publication), 2002 Tex. App. LEXIS 5692.

344. *Id.* at *2-3.

345. *Id.* at *9-10.

ledgers reflecting amounts paid for "PL" insurance.[346]

1. Lost Policies

The court concluded that this evidence constituted some evidence of the existence of the policies and the policy terms for the relevant period in question. Accordingly, the court held that Houston General had a duty to defend the underlying lawsuits. However, because the insured could not establish any evidence to determine the policy limits, the court held that Houston General had no duty to indemnify the insurers under any of the lost policies.[347]

2. Sudden and Accidental Exclusion

For post 1972 umbrella policies, Houston General asserted that the "sudden and accidental" type pollution exclusion excluded all coverage.[348] The court held that, although the pollution exclusion barred coverage for the bodily injury or property damage claims, the umbrella policies also covered "personal" injury, which included coverage for "bodily injury, sickness, disease, disability or shock, including death arising from therefrom, or if arising out of the foregoing, mental anguish and mental injury."[349] The court noted that the claimants in the underlying litigation had alleged injuries for severe emotional distress, fear of adverse health consequents, mental anguish, skin irritations, cancer, tumors, birth defects and other physical disorders. These "personal injuries" were not subject to the pollution-exclusion clause.[350]

3. Bad Faith Claims

Chickasaw also asserted bad-faith claims alleging that Houston General had engaged in unfair settlement practices in violation of Texas Insurance Code.[351] Chickasaw asserted that Houston General's denial of coverage for the pre-1972 period constituted a material misrepresentation

346. *Id.* at * 10-12.
347. *Id.* at *13.
348. The pollution exclusion provided:
> It is agreed that this policy does not apply to *bodily injury or property damage* arising out of discharge, dispersal, release or escape of smoke, vapors, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste material or other irritates, contaminates or pollutants into or on land, the atmosphere or any water course or body of water; this exclusion does not apply to such discharge, dispersal, release or escape if sudden or accidental.

Id. at *16.
349. *Id.* at *17.
350. *Id.*
351. *Id.* at *21 (citing TEX. INS. CODE ANN. art. 21.21, § 4(10) (Vernon 2001)). Although the court determined that Chickasaw's art. 21.21 claims actually pre-dated the addition of § 4(10) to the insurance code, the identical provision was contained in Art. 21.21-2, § 2(b)(4), which defined in unfair practice as "'not attempting in good faith to effectuate prompt, fair, and equitable settlements of claims submitted in which liability has become reasonably clear.'" *Id.* at *24-25. Art. 21.21, § 4(10) now defines an unfair to include "'failing to attempt good faith to effectuate a prompt, fair, and equitable settlement of a claim with respect to which the insurer's liability has become reasonably clear.'" *Id.* at *25.

that violated section 4(10).[352] The court rejected Houston General's argument that, under *Crawford v. Ace Sign, Inc.*, a misrepresentation that a party will fulfill its duty under contract is not a violation of the Texas Deceptive Trade Practices-Consumer Protection Act.[353] The court found that the representation that Houston General did not sell policies during a certain period is not a mere failure to perform its contract and, therefore, reversed summary judgment for the insurance company.[354]

Chickasha had asserted that Arizona law should govern the bad-faith claims. The court applied the most-significant-relationship test described in the RESTATEMENT (SECOND) CONFLICTS OF LAWS, section 6 and 145 (1971).[355] Chickasha is a Delaware corporation whose primary place of business is Arizona. Houston General is a Texas insurance company with its primary place of business in Texas. Houston General's alleged misrepresentations about coverage emanated from its Fort Worth office in Texas.[356] Chickasha argued that the applicable law was the law of the state where the policyholder was affected by the alleged bad-faith acts.[357] The court held that *SnyderGeneral Corp.* did not mandate that the policyholder's state law would govern the bad faith claim, but rather held only that the policyholder's location was one of the applicable factors. The court determined both Texas and Arizona had a significant interest in matters relating to the violation of the insurance laws and concluded that the underlying court had not erred in determining that Texas had the more significant relationship to Chickasha's bad-faith claims.[358] The court also upheld the trial court's rejection of Chickasha's assertion of regulatory estoppel holding that the insurer waived argument on this point by failing to cite sufficient argument of authorities.[359]

C. COVERAGE FOR MOLD CLAIM

At issue in *Lexington Insurance Co. v. Unity/Waterford-Fair Oaks, Ltd.*,[360] was coverage for mold damage to first and second floor apartment units and other damage to second floor units caused by severe rain and flooding. The property policy at issue contained a "Pollution and Contamination Exclusion" providing the following:

> This policy does not cover loss or damage caused by, resulting from, contributed to or made worse by actually, alleged or threatened re-

352. *Id.* at *23 (citing TEX. INS. CODE ANN. Art. 21.21 § 4(10)(b)0.
353. *Id.* at *28 (citing Crawford v. Ace Sign, Inc., 917 S.W.2d 12 (Tex. 1996)).
354. *Id.* at *28-29.
355. *Id.* at *29 (Citing Gutierrez v. Collins, 583 S.W.2d 312, 318 (Tex. 1979), which adopted the most-significant-relationship test for tort cases.)
356. Id. at * 30.
357. *Id.* at *32 (citing SnyderGeneral Corp. v. Great Am. Ins. Co., 928 F. Supp. 674 (N.D. Tex. 1996) (holding that Texas law applied to bad faith claims although Minnesota law governed the interpretation of the policy)).
358. *Id.* at *33.
359. *Id.* at *34-36.
360. Lexington Ins. Co. v. Unity/Waterford-Fair Oaks, Ltd. No. 3:99-CV-1623-D, 2002 U.S. Dist. LEXIS 3594 (N.D. Tex. Mar. 5, 2002).

> lease, discharge, escape or dispersal of CONTAMINANTS or POLLUTANTS, all whether direct or indirect, proximate or remote or in whole or in part caused by, contributed to, or aggravated by any physical damage insured by this policy.[361]

The definition of "contaminants or pollutants" includes "bacteria, fungi, virus, or hazardous substances as listed in the Federal Water Pollution Control Act, and other state and federal laws." Lexington asserted that the mold damage that had developed in the first and second floor units after a large rain storm fell within the exclusion because mold spores that caused the damage are "fungi," which was listed as a contaminant.[362] The insured countered that the mold had not "escaped," nor had been "released, discharged, or dispersed."[363] The insured argued the mold was already present and simply thrived because of the moisture.

The court disagreed and held that the evidence established that safe levels of fungal mold spores existed in virtually all homes and businesses but, due to the influx of water, the mold spores in this case proliferated, "giving off reproductive spores that are dispersed via the air and the surrounding environment."[364] The court also noted that the testimony of Lexington's expert that some spores actually shot out of the organism itself and some floated away because they were very buoyant.[365] The court held that the mold that caused the damage was dispersed within the covered properties and therefore the damage was excluded.[366]

The *Lexington* court also rejected the insured's argument that damage to second floor unit was caused by roof leaks (not mold) and should be covered. Lexington asserted an "anti-concurrent clause" that excludes damage caused in part by "faulty, inadequate or defective planning, . . . remodeling or maintenance of part or all of the property."[367] Lexington's expert testified that the roof showed lack of maintenance including ineffective patching, improper repairs to flashing, the existence of debris on the roof and ponding in numerous areas.[368] The court found that Lexington met its burden of proving that inadequate maintenance was a contributing cause of the damage.[369]

D. Coverage Under a Comprehensive General Liability Policy for Rupture of Salt Water Disposal Pipeline

In *American Equity Insurance Co. v. Castlemane Farms, Inc.*,[370] the court held that alleged property damage arising out of the accidental rup-

361. *Id.* at *4.
362. *Id.* at *5.
363. *Id.* at *6-7.
364. *Id.* at *8.
365. *Id.*
366. *Id.* at *9.
367. *Id.* at *11-12.
368. *Id.* at *14.
369. *Id.* at *16.
370. Am. Equity Ins. Co. v. Castlemane Farms, Inc., 220 F. Supp. 2d 809 (S.D. Tex. 2002).

ture of a salt water disposal pipeline by a landscape company was excluded under a general liability policy pollution exclusion because salt water is a "contaminant" when introduced on property. The insured in this case, K-Bar Service, Inc. ("K-Bar"), was hired by the Texas Department of Transportation to landscape the right-of-way to a highway and allegedly ruptured a salt-water disposal pipeline owned by Exxon-Mobil Production Company causing the discharge of salt water onto adjacent land.[371] The property owner sued and K-Bar requested defense and indemnification from American Equity.

The insurance policy in question contained a "total pollution exclusion," providing that the policy: "[did] not apply to . . . 'bodily injury' or 'property damage' which would not have occurred in whole or in part but for the actual, alleged or threatened discharge, dispersal, seeping, migration, release or escape of 'pollutants' at any time."[372] The policy defined "pollutants" as "'any solid, liquid, gas or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste.'"[373]

The insured argued the phrase "irritant or contaminant" was ambiguous but failed to present any alternative meaning for these terms.[374] The court noted that the parties did not dispute that the contents of salt water disposal pipeline fell within the category of "liquid waste."[375] Accordingly, the court held that salt water was a "contaminant" and held that the insurer had no duty to defend or indemnify the insured in the underlying lawsuit.[376]

VII. CONCLUSION

As promised, this Survey of Texas environmental cases for the past year provides a glimpse into many of the varied types of environmental disputes that reach our federal and state courts. A great variety of issues were presented in last year's cases that will provide useful precedent for the environmental law practitioner.

371. *Id.* at 810.
372. *Id.* at 813.
373. *Id.*
374. *Id.* at 814.
375. *Id.*
376. *Id.* at 815.