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Environmental Law - The Year of the Courts

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ENVIRONMENTAL LAW—THE YEAR OF THE COURTS

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Professor Polelle examines last year's decisions of the Pollution Control Board and the judicial review of the Board's numerous decisions. He surveys the recent relevant constitutional and statutory interpretations and delves into the possibility and nature of legislative action. Also included is a stimulating discussion of the potential growth of a common law tort theory to eliminate defectively designed products that harm the environment, a theory that might have far-reaching consequences.

INTRODUCTION

THREE years have elapsed since the innovative Illinois Environmental Protection Act became effective in July of 1970.[1] The Act brought into existence three completely new administrative agencies: The Illinois Pollution Control Board, to adjudicate and issue regulations under the Act; the Environmental Protection Agency, to prosecute violations under the Act; and the Illinois Institue for Envionmental Quality, to research environmental technology. During the first few years after the Act became effective, there were only administrative decisions to guide the profession over this totally new legal terrain. Although the Environmental Protection Act still remains the cornerstone of environmental reform in Illinois, legislative action during the last year has been largely confined to relatively minor modifications of the Act.[2] This year, however, has been marked by the inevitable commencement of judicial activity as the first generation of controversial Board decisions now confront judicial review. This initial stream of appellate cases is likely to continue since all decisions of the Illinois Polluton Control Board are

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1. ILL. REV. STAT. ch. 111½, §§ 1001 *et seq.* (1971).

2. As of January 1, 1973, it has become a class A misdemeanor under the Unified Code of Corrections not only to violate the Act or any regulations issued thereunder but also to submit any false information under the Act. P.A. 77-2830, art. 89, § 1, *amending* ILL. REV. STAT. ch. 111½, §§ 1034, 1044 (1971).

appealable directly to the Illinois Appellate Court without any intermediate judicial review by the circuit courts.[3]

CONSTITUTIONAL DEVELOPMENTS

Three environmental decisions during the last year were of constitutional dimensions even though they did not concern the Environmental Protection Act. Both the Chicago Sanitary District Act[4] and the Industrial Waste Control Ordinance,[5] which directly involve the Metropolitan Sanitary District of Greater Chicago in environmental regulation, were upheld against constitutional attack.[6] The Sanitary District Act prohibits any industrial or manufacturing plant from discharging industrial waste exceeding 3,650,000 gallons into the sewage system of the Sanitary District. The ordinance, however, allows for an excess discharge provided that a surcharge is paid and that the firm involved maintains certain sampling equipment at its own expense. The Sanitary District Act was held not to violate equal protection because, as the court found, industrial wastes created a special burden on the sewage system which rationally permitted separate legal restraint. Likewise, the ordinance was found to be within the police power of the state since the subject concerned public health and welfare.

The next significant constitutional decision was one rendered by the federal district court.[7] The court struck down a Chicago ordinance which made it a criminal offense to sell detergents containing phosphates within city limits. Applying a balancing test, the court concluded that the ordinance was an unconstitutional burden on interstate commerce. The court found that phosphate detergents were not dangerous to human health and that neither the Mississippi River system nor Lake Michigan were significantly endangered by phosphate detergents. Any effects of the phosphate dis-

3. ILL. REV. STAT. ch. 111½, § 1041 (1971). A pending bill would transfer initial judicial review powers from the appellate courts to the circuit courts, *see* H.B. 364, 78th Ill. Gen. Assembly (1973).

4. ILL. REV. STAT. ch. 42, §§ 320 *et seq.* (1971).

5. CHICAGO, ILL., MUN. CODE art. III, §§ 17-3.1 *et seq.* (1973).

6. Chicago Allis Mfg. Corp. v. Metropolitan Sanitary Dist., 52 Ill. 2d 320, 288 N.E.2d 436 (1972).

7. Soap and Detergent Ass'n v. City of Chicago, No. 71C1054, 5 E.R.C. 1120 (N.D. Ill. 1973).

charge were declared to be outweighed by the harm wrought to producers through increased shipping costs and disrupted manufacturing and distribution channels. This decision concerning phosphates is akin to an earlier decision which also invoked the interstate commerce clause to strike down an attempt by Cook County to regulate flight patterns and plane weights at a privately owned airport in an unincorporated area of the county.[8] However, without applying the balancing test established by the federal court in the phosphate decision, the Illinois circuit court concluded that flight patterns and air space have been within the exclusive sovereignty of the federal government ever since the Federal Aviation Act of 1958.

Board Penalities: Constitutional or Not?

Title 12, section 42 of the Environmental Protection Act provides that in the event of a violation of the act or any rule promulgated thereunder by the board the violator becomes liable for a "penalty" of not over $10,000 for the violation plus an additional penalty not to exceed $1,000 for each day the violation continues.[9] The State's Attorney or the Attorney General is empowered to bring a "civil action" to recover the penalties.[10] Although there appears to be some hesitation in acting to recover such penalties, the prevailing view, given the statutory text, is that these penalties fall due regardless of fault or lack of fault in the traditional legal or moral sense.[11] Title 8, section 33(b) then authorizes the Illinois Pollution Control Board to issue cease and desist orders and to impose money penalties in accordance with title 12 of the Act.[12] It should be noted that these penalties are not fixed within any narrow limits but are completely discretionary with only an upper limit prescribed. Title 8, section 31(c) places the "burden" on the prosecuting

8. County of Cook v. Priester, No. 71CH402, 3 E.L.R. 20183 (July 13, 1972).

9. ILL. REV. STAT. ch. 111½, § 1042 (1971).

10. *Id.*

11. *See, e.g.*, Bath, Inc. v. Pollution Control Bd., 10 Ill. App. 3d 507, 510, 294 N.E.2d 778, 781 (1973): "We hold that knowledge, intent or scienter is not an element of the case to be established by the Environmental Protection Agency at the hearing before the Pollution Control Board upon the issue of burning." *But cf.* McIntyre v. Pollution Control Bd., 8 Ill. App. 3d 1026, 291 N.E.2d 253 (1972).

12. ILL. REV. STAT. ch. 111½, § 1033(b) (1971).

authority to prove the violation but nowhere is the degree or nature of this "burden" defined.[13]

In an attempt to preserve meaning for both sections 42 and 33(b), the Illinois Pollution Control Board has taken the position that both sections simply provide alternate ways by which the prosecuting authority can obtain penalties: either before the Board under section 33(b) or before the civil courts under section 42.[14] Apparently the choice is entirely within the discretion of the enforcing authority. Thus it is theoretically possible for the Environmental Protection Agency to commence a civil penalty action before the Board under section 33(b) and for the State's Attorney or Attorney General to commence the same action for the same case before the civil courts under section 42. Besides taking this position of concurrent jurisdiction, the Board has unequivocally held that its statutory authority to assess money penalties is constitutional under the law of Illinois.[15] The issue has now come before the Illinois appellate court and has caused a split in the ranks of the judiciary.

In *Ford v. Environmental Protection Agency*[16] the Illinois Appellate Court for the Third District squarely faced the constitutionality of the Board's practice of assessing penalties during the course of administrative enforcement proceedings. The court necessarily conceded the basic premise that an administrative agency may not impose criminal penalties. However, the court concluded that the statutory penalties imposed by the Board were not an unconstitutional delegation of judicial power. The rationale for upholding the penalties as only civil in nature was threefold: the legislature intended civil penalties; the penalties were necessary for efficient government; and the penalties were only incidental to the administration of the Act. The court, therefore, attempted to justify Board penalties by three different approaches that do not provide a single solid foundation for the administrative power to fine. The Third Appellate District also concluded that the right to a jury trial was not violated under the state

13. *Id.* § 1031(c).

14. Environmental Protection Agency v. Modern Plating Corp., Nos. 70-38 and 71-6, 2 E.R.C. 1885 (May 3, 1971).

15. *Id.* at 1887-89.

16. 9 Ill. App. 3d 711, 292 N.E.2d 540 (1973). The *Ford* decision was followed by the third appellate district in City of Monmouth v. Environmental Protection Agency, 10 Ill. App. 3d 823, 825, 295 N.E.2d 136, 138 (1973) (dictum).

constitution because administrative proceedings under the Environmental Protection Act were unknown to the common law and thus not protected by the jury trial provision of the constitution. To avoid the discriminatory possibility of some enforcement cases being tried in a civil action under section 42 before a jury in a common law court and others being tried before the Board without any right to a jury, the court simply held that all enforcement actions are within the exclusive non-jury jurisdiction of the Board under section 33(b) of the Act.[17] The court in effect rejected the analysis of the Board which suggested that concurrent jurisdiction rested both in the Board or in a common law court to impose the statutory penalties.

Three months later, in May of 1973, the Second District Appellate Court came to a diametrically opposite conclusion in *City of Waukegan v. Environmental Protection Agency*.[18] The appellate court held that the Board had no constitutional authority to levy discretionary penalties under the Environmental Protection Act because the assumption of such authority was an unlawful delegation of judicial powers under the state constitution. The court found that a thorough review of Illinois case precedent failed to support the position advanced by the *Ford* decision. The majority in *City of Waukegan* rejected the position that judicial review was an adequate protection for penalties imposed by the Board. In rejecting the *Ford* argument tendered by the dissent, the majority properly pointed out that under the doctrine of judicial review a court must uphold the finding of an administrative tribunal as prima facie correct. In fact, other cases have upheld Board decisions precisely on the narrow basis that there was at least substantial evidence in the record to support the Board's findings.[19] Thus, theoretically, the limited scope of review does not require that the state sustain its burden of proof by even a preponderance of the evidence so long as there is some substantial evidence to support the state's position. The Second District Appellate Court opinion does not necessarily

17. *Accord*, People *ex rel.* Scott v. Janson, 10 Ill. App. 3d 787, 295 N.E.2d 140 (1973). This view of the third appellate district appears to deprive section 42 of any independent meaning.

18. 11 Ill. App. 3d 189, 296 N.E.2d 102 (1973).

19. *See, e.g.*, Rhodes v. Pollution Control Bd., 8 Ill. App. 3d 74, 77, 289 N.E.2d 61, 63 (1972) and Rauland Div., Zenith Radio Corp. v. Metropolitan Sanitary Dist., 9 Ill. App. 3d 864, 874, 293 N.E.2d 432, 440 (1973).

extend to non-discretionary penalties that are simply the result of a predetermined mathematical computation mandated by the legislature. Whether the Board has the constitutional power to assess discretionary penalties in enforcement proceedings is a far-reaching decision that undoubtedly will have to be resolved by the Illinois Supreme Court in the near future.[20] One way out of this constitutional impasse might be to find that section 33(b) simply authorizes the Board to impose proposed penalties that must be confirmed de novo by an action filed in a circuit court.

In any case, the appellate court has consistently rejected the power of the Board to condition the grant of a variance upon the payment of a penalty for prior disregard of envionmental standards.[21] The court has carefully avoided the constitutional issue by simply holding that the Environmental Protection Act does not explicity grant such power to condition a variance upon the payment of a penalty in the variance proceeding for past derelictions. However, the reason why the statute must be strictly construed even though it allows the Board to "impose such conditions as the policies of this Act may require"[22] is patent. The statutory authority to impose penalties is one that should be strictly construed. This same reasoning stands ready to be invoked in construing the less than perfectly clear enforcement penalty powers of the Board under section 33(b). Therefore, the Board must either file a separate enforcement action independent of the variance proceeding in order to punish for past offenses or at least file a proper enforcement complaint in a consolidated enforcement-variance hearing.

STATUTORY INTERPRETATIONS

Most of the judicial activity in the last year concerned first-impression statutory interpretations of a procedural nature that involved not only the Environmental Protection Act but also the relationship of the Act to other Illinois legislation. In *Roth-Adam Fuel Co. v.*

20. The matter may become judicially moot if H.B. 44, 78th Ill. Gen. Assembly (1973) is passed. This pending bill would remove penalty powers from the Board without affecting the right of the Attorney General to sue for penalties in court.

21. Citizens Utilities Co. v. Pollution Control Bd., 9 Ill. App. 3d 158, 289 N.E.2d 642 (1972); Molex, Inc. v. Pollution Control Bd., 9 Ill. App. 3d 1032, 293 N.E.2d 731 (1973); City of Mattoon v. Environmental Protection Agency, 11 Ill. App. 3d 259, 296 N.E.2d 383 (1973).

22. ILL. REV. STAT. ch. 111½, § 1036(a) (1971).

Pollution Control Board,[23] the First District Appellate Court reversed a temporary injunction which prevented the Board from holding further hearings on the possible adoption of a proposed rule to ban the use of coal as a fuel source for residential and commercial space heating in the Chicago area. The court held that the trial court had no jurisdiction to issue the temporary injunction because the matter was not ripe for adjudication inasmuch as it was uncertain whether the Board would adopt the rule. Furthermore, there was no present economic loss occasioned by the proposed rule. Prior to this decision a federal appellate court upheld the refusal of a lower federal court to enjoin the Chicago Coal Merchants Association and Roth-Adam Fuel Company from proceeding with their injunction suit in the state circuit court.[24]

A basic challenge to the authority of the Board was posed in *Staley Manufacturing Co. v. Environmental Protection Agency*.[25] There the Board had ordered a processing plant to adequately treat its discharged contaminants in its own private sewers before allowing the effluent to find its way into the municipal water system of Decatur. The company contended that the Environmental Protection Act only authorized the Board to exercise jurisdiction over discharges that were made directly into the state water system. In upholding the decision of the Board, the appellate court declined to follow the company's interpretation of the statute on the ground that there is a realistic and practical nexus between what flows into a municipal sewer treatment plant and what flows out. The economic burden on the company of updating its own private sewer system was found to be normal in a modern society where the police power sometimes requires citizens to spend their own resources for public health and welfare. Moreover, the court has given the green light to experimental environmental technology which is attempting to transfer sludge from urban sanitary districts for use as fertilizers on nutrient-poor agricultural land. This experimental endeavor was per-

23. 10 Ill. App. 3d 756, 295 N.E.2d 321 (1973). *Accord*, Gromer Supermarket, Inc. v. Pollution Control Bd., 6 Ill. App. 3d 1036, 287 N.E.2d 1 (1972).

24. Clean Air Coordinating Comm. v. Roth-Adam Fuel Co., 465 F.2d 323 (7th Cir. 1972). The Seventh Circuit held that the trial court should have dismissed the case for want of federal jurisdiction rather than merely staying its hand until further notice of an implied claim of concurrent federal jurisdiction.

25. 8 Ill. App. 3d 1018, 290 N.E.2d 892 (1972).

mitted by the Third District Appellate Court in *County of Grundy v. Soil Enrichment Materials Corp.*[26] wherein the court upheld a 2.5 million dollar project to remove digested sludge from the Calumet sewage treatment plant for use as a liquid organic fertilizer on selected farms in Grundy County. The corporation did this under an experimental permit issued by the Environmental Protection Agency by negotiating individual contracts with the farmers involved. Even through a state statue exempts land used for agricultural purposes from zoning regulations, the county argued that its prohibitory zoning regulations were controlling since the principal purpose of the activity was sludge disposal rather than fertilization of farm land for an agricultural purpose. The argument failed because the appellate court concluded that the experimental application of such sludge under the control of the Environmental Protection Agency was clearly different from mere storage or dumping of sludge even though the corporate purposes might be broader than simple agricultural fertilization. In *Illinois State Toll Highway Authority v. Karn*[27] the judiciary also had to decide whether eminent domain proceedings to acquire land for the east-west extension of the Illinois Toll Highway would have to cease for failure of the highway authority to submit its plans and specifications to the Environmental Protection Agency before the highway authority began those proceedings. The court held that even if section 47 of the Environmental Protection Act did apply, the submission of plans and specifications was not a condition precedent to construction. Additionally the court reasoned that certain vehicles on the highway would cause pollution and not the highway itself. To hold otherwise, the court feared, would mean that all new road building in Illinois would come to a standstill.

The Illinois Appellate Court for the Second District rendered two decisions that interpret what is meant by the "arbitrary or unreasonable hardship" that must be shown under the Environmental Protection Act before a variance may be granted from any rule or regulation is-

26. 9 Ill. App. 3d 746, 292 N.E.2d 755 (1973). County government also sustained another set-back in O'Connor v. City of Rockford, 52 Ill. 2d 360, 288 N.E.2d 432 (1972), which held that a permit issued by the Environmental Protection Agency was sufficient authority for the City of Rockford to maintain a 160 acre sanitary landfill in an unincorporated area of Winnebago County without the necessity of satisfying county zoning regulations.

27. 9 Ill. App. 3d 784, 293 N.E.2d 162 (1973).

sued by the Board. Both decisions stem from the Board order of March 31, 1971[28] banning further sewer connections to the facilities of the North Shore Sanitary District until such time as the Board found that the sanitary treatment plants were capable of handling additional effluents. In one case the petitioner for variance had already constructed nine apartment buildings pursuant to a valid building permit before the sewer ban was issued.[29] Nonetheless, the Board denied the petitioner a variance even though the buildings were amost fully occupied and the petitioner lost about $48,000 in expenses, including the installation of septic tanks. Though variances are generally allowed where a substantial investment is made before a prohibitory Board regulation, the Board opined that since the septic tanks solved the sanitation problem, no present hardship was shown. In reversing the refusal of the Board to grant a variance, the appellate court found that the denial was against the manifest weight of the evidence; otherwise, the petitioner would have been penalized for its laudable efforts to mitigate a hardship that was not substantially alleviated even with the installation of septic tanks. In a similar case subdividers were denied a variance from the North Shore Sanitary District even though $70,000 had previously been invested after the state Sanitary Water Board—a predecessor to the Illinois Pollution Control Board—had granted a sewer connection permit to both the subdivider and the Village of Gurnee.[30] Shortly after oral argument on the issue of judicial review was heard by the appellate court, the clerk of the court was informed that the necessary sewer connection permits finally had been issued. The appellate court refused to dismiss the case as moot on the ground that a substantial public issue was involved. The substantial public issue was the holding that the principle of equitable estoppel would be applied in appropriate circumstances against subordinate public bodies. The court determined that the action of the predecessor Sanitary Water Board in causing the petitioners to justifiably rely on the issuance of sewer

28. League of Women Voters v. North Shore Sanitary Dist., No. 70-7, 12, 13, 14, 1 P.C.B. 369 (March 31, 1971).

29. Seegren v. Environmental Protection Agency, 8 Ill. App. 3d 1049, 291 N.E.2d 347 (1972).

30. Wachta v. Pollution Control Bd., 8 Ill. App. 3d 436, 289 N.E.2d 484 (1972).

connection permits equitably estopped the Board from rescinding such permits after a substantial investment had been made.

SELECTED BOARD DECISIONS

While the appellate courts were busy reviewing the first generation of Board decisions, the Board decided some new cases during this last year that may well find their way onto the appellate court docket.[31] Relatively few of the Board's decisions are reported by the national research services. One of these is *Citizens for a Better Environment v. Glenview Air Station.*[32] In this case the Board denied a motion to dismiss filed by the Glenview Naval Air Station. The motion was based on the premise that as a facility of the Department of the Navy it was protected by sovereign immunity from the prohibitions of the Environmental Protection Act and any regulations issued thereunder relating to the discharge of contaminants into neighboring waters. The Board decided that the definition of "person" under the Act was not only broad enough to include the naval air station, but that section 313 of the Federal Water Pollution Control Act Amendments of 1972[33] specifically provided that each department of the federal government should comply with state and local pollution controls.

Several slip decisions have been written by the Board that merit attention. The Board has decided that odors emitted by a rubber plant, either alone or in combination with contaminants from other sources, constitute a direct violation of section 9(a) of the Environmental Protection Act without resort to specific air pollution regulations.[34] Section 9(a) simply prohibits the emission of any contaminant into the environment so as to cause air pollution. Contami-

31. The failure of the Illinois Senate to confirm several Board nominations, together with the resignation of Chairman David P. Currie, left the Board temporarily without the necessary quorum to render final decisions in pollution matters. P.C.B. Newsletter No. 58 (Dec. 20, 1972). Four variances were automatically granted by operation of law due to the lack of a quorum. P.C.B. Newsletter No. 60 (Feb. 2, 1973).

32. No. 73-93, 3 E.L.R. 30007 (Feb. 16, 1973). By its rules the Board must publish its decisions and orders and may mail these documents to regular subscribers at a reasonable cost. P.C.B. Procedural Rules § 107 (1970).

33. 33 U.S.C.A. § 1323 (Supp. 1973).

34. Environmental Protection Agency v. Midwest Rubber Reclaiming Co., No. 72-318, — P.C.B. — (March 8, 1973).

nants include odors under the Act and air pollution includes contaminants that unreasonably interfere with the enjoyment of life or property. The Board was undaunted by the realization that odor control would lead the Board into a subjective thicket. The Board did warn, however, that there is no absolute right to an odor-free atmosphere in industrial areas. The Board decision seems like the beginning of a statutory balancing analysis that courts have traditionally used in common law nuisance suits. Contrariwise, the Board came to the conclusion that section 9(a) was not self-enforcing against charges of noise pollution in the absence of noise regulations adopted by the Board.[35] As a result, the $7,500 penalty assessed by the Board was only for odor and dust nuisances. The Board thought that title 6 of the Act, which finds excessive noise socially undesirable, necessarily requires implementing regulations by its language. In another noteworthy case, the City of Evanston unsuccessfully contended that since it was a home rule unit under the Illinois Constitution of 1970, it had the power to operate its municipal incinerators as it saw fit irrespective of environmental restric tions under the Envionmental Protection Act.[36] The Board denied the "home rule" defense with the observation that home rule entitled municipalities to make laws rather than to disobey laws as by polluting at will. The Board also rejected the city's contention that the Attorney General is not entitled to prosecute enforcement actions before the Board. The Board rejected this second contention also on the ground that as official advisor of all state agencies, the Attorney General had the duty to conduct the legal business of the state in court as well as out of court.[37]

Finally, in *Environmental Protection Agency v. City of Du Quoin*[38] the Board found both Du Quoin and the United Electrical

35. Environmental Protection Agency v. Ralston Purina Co., No. 71-88, — P.C.B. — (April 5, 1973). The Illinois Institute for Environmental Quality has submitted to the Board a detailed set of proposed regulations for the control of noise from stationary sources. P.C.B. Newsletter No. 43 (Feb. 22, 1972).

36. Environmental Protection Agency v. City of Evanston, No. 72-286, — P.C.B. — (April 5, 1973).

37. Since the Environmental Protection Agency has the authority under the Environmental Protection Act to appear before the Board in any hearing and shall appear in variance hearings, potential conflicting or duplicative jurisdiction exists between the Agency and the Attorney General. ILL. REV. STAT. ch. 111½, § 1004(f) (1971).

38. No. 72-200, — P.C.B. — (March 29, 1973).

Coal Company guilty of unlawful refuse disposal. The city was found guilty as the lessee of the premises and the company was found guilty in its capacity as owner-lessor of the premises. The Board disallowed the petition of the company to be dismissed on the theory that it had had no control or possession of the premises since 1954 and that the lease with the city contained an exculpatory clause running in favor of the company. The Board adhered to its position that a lease relationship does not absolve an owner-lessor of responsibility even though the owner-lessor may not have actively participated in any pollution.[39] The Board then fined each defendant $500. The *City of Du Quoin* decision is a strong and recent authority for the proposition that the Environmental Protection Act is a kind of "no-fault" legislation potently endowed with penalty powers that need bear no relation to actual damages.

THE COMMON LAW: DOWN BUT NOT OUT

The story of environmental reform in Illinois has been thus far largely the story of legislative initiative. The role of the courts has been almost invariably confined to statutory interpretation problems and occasionally to constitutional rulings. However *City of Chicago v. General Motors Corp.*[40] indicates the movement of the common law in the area of environmental control. In that case, the Seventh Circuit Court of Appeals affirmed the dismissal of a twenty-count complaint filed on July 31, 1970 by the City of Chicago individually and on behalf of all Illinois citizens who were residents of Chicago. By its complaint the city sought to require the General Motors Corporation to equip all of its new and old vehicles operating in Chicago with tamper-proof emission control devices. The jurisdiction was based on diversity and the theory of the cause of action was based solely on the Illinois common law of strict products liability in tort. By means of the products liability doctrine the city hoped that the federal court would summarily develop and extend

39. It would appear that the owner-lessor in such a situation may then proceed against the lessee for any "penalty" paid by the owner-lessor either on a theory of express indemnity or at least on a classically valid civil action based on active-passive implied indemnity. *See* John Griffiths & Sons, Co. v. National Fireproofing Co., 310 Ill. 331, 141 N.E. 739 (1923). This would be a promising way to test whether the "penalty" is truly "civil."

40. 332 F. Supp. 285 (N.D. Ill. 1971), *aff'd on other grounds*, 467 F.2d 1262 (7th Cir. 1972).

the strict liability theory to environmental control by compelling General Motors to install emission control devices in order to prevent continued environmental damage. The magnitude of the action is most apparent in the requested relief by the city that General Motors also be compelled to recall its old model automobiles (1960-1970), which were still operating in Chicago, and equip them with emission control devices as well. The city frankly admitted that the suit had no statutory underpinning but was based upon state common law.

Since the Air Quality Act of 1967[41] explicitly provided for federal pre-emption in the field of emission standards for new vehicles, the city abandoned its strict liability products claim as to all vehicles covered by the 1967 legislation. In effect, this still left the city free to press its suit as to 1960-1967 model years inasmuch as the 1967 legislation postdated those models. The Clean Air Amendments of 1970,[42] which were also considered in the case, specifically provide that nothing in the amendments precludes any right of any person or class of persons, which exists under statute or common law, to seek enforcement of any emission standard. The 1970 Clean Air Amendments, therefore, were invoked to sustain the remaining balance of the products liability action for the older models of the General Motors automobile line. The district court invoked the abstention doctrine to dismiss the case.

Although the court of appeals affirmed the dismissal, it is significant that the appellate dismissal was based not on the abstention doctrine but rather on the substantive failure of the claim to state a cause of action under *existing* Illinois law.[43] Even in its dismissal of the case, however, the Seventh Circuit Court of Appeals left open the possibility that modifications of the products liability doctrine might still make the doctrine potentially useful in the environmental field. The only basic flaw seen in the Illinois products liability doctrine as it then existed was the requirement that the defect in the product be "unreasonably dangerous." The court felt that it would only be possible to make this determination of an unreasonably dangerous defect by examining each automobile or vehicle on an individual case-by-case basis. The court seemed reluctant to

41. 42 U.S.C. §§ 1857 *et seq.* (1969).

42. *Id.* (*As amended* 1970).

43. 467 F.2d at 1268.

dismiss the suit inasmuch as it emphasized that it was compelled in a diversity case to apply state law. The court, perhaps wistfully, noted that the complaint could not even be construed as an invocation of a nascent federal common law of nuisance which has won recognition in a recent United States Supreme Court case.[44]

Recently, however, the requirement that a product defect must be "unreasonably dangerous" in order to permit recovery in strict liability has been repudiated in California.[45] The California court in its landmark decision repudiated the necessity of the unreasonably dangerous rule on the ground that the rule was simply a type of semantic legerdemain for the reintroduction of negligence principles into the strict products liability field. The California court felt that the remaining products liability requirements of an actual defect and proximate cause would be sufficient to prevent a defendant from becoming an absolute insurer. Therefore, it is within the realm of possibility that Illinois, as a pace-setter in the field of strict products liability, may well follow the California lead just as it followed California in permitting innocent bystanders, who were non-users and non-consumers, to recover in strict products liability cases.[46] If this comes to pass, then both the state and federal courts in Illinois will have to reconsider the *City of Chicago* decision. The requirement of an unreasonably dangerous defect would no longer bar remedial actions against vehicular pollution. All that would apparently be needed is a finding that there was a defect in certain vehicle models and a further finding that the injury caused by the defect was proximately related to the injured individuals or class suing. Obviously there would still be substantial problems of proximate cause because urban air pollution is most often the result of a complex conglomerate of causes. But the contro-

44. Illinois v. City of Milwaukee, 406 U.S. 91 (1972).

45. Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1973). *Cf.* Suvada v. White Motor Co., 32 Ill. 2d 612, 210 N.E.2d 182 (1965), which introduced into Illinois the requirement that the product defect be "unreasonably dangerous." *Accord*, Gelsumino v. Bliss Co., 10 Ill. App. 3d 604, 295 N.E.2d 110 (1973).

46. Elmore v. American Motors Corp., 70 Cal. 2d 578, 451 P.2d 84, 75 Cal. Rptr. 652 (1969) permitted recovery in strict products liability to innocent bystanders who were neither users nor consumers of the product. Illinois followed this development in White v. Jeffrey Galion, Inc., 326 F. Supp. 751 (E.D. Ill. 1971) and in Mieher v. Brown, 3 Ill. App. 3d 802, 278 N.E.2d 869 (1972), *rev'd* 54 Ill. 2d 539, 301 N.E.2d 307 (1973).

verted fact questions raised in the proximate cause analysis are at least likely to get the plaintiff to the jury. In addition, there is precedent and reason in such a case for shifting the burden of apportioning damages, if possible, to the defendants.[47] Developments in the field of common law products liability have been so rapid in the past few years that new actions modelled on the *City of Chicago* case may well become feasible in the near future.

CONCLUSION

The recent tide of judicial activity in Illinois concerning the environment should not obscure the likelihood that the legislature will further modify the Environmental Protection Act. As of June 1973 there were at least twenty-four bills pending in the legislature which would in some way amend or modify the Act.[48] It is too soon to conclude that the statutory framework has been finally fixed so that all that remains is judicial interpretation. Of course there are the usual special interests that seek to be represented in special amendments to the Environmental Protection Act. For instance, the custom of openly burning leaves and the fears of the farming community have been the source of a spate of bills to amend the Act.[49] This, however, is not an unexpected occurrence when dealing with any major piece of legislation.

What is more important is that several bills have been introduced which involve a reconsideration of the major policies and provisions that were written into the Act. House Bill 170 would create an Environmental Protection Agency Legislative Study Commission composed of sixteen members of the Illinois legislature to study, examine and evaluate all the rules, regulations and policies of the Environmental Protection Agency and of the Illinois Pollution Control Board to determine if these administrative bodies have

47. W. PROSSER, THE LAW OF TORTS 317-20 (4th ed. 1971).

48. 3 Environmental Control Law Newsletter, Ill. State Bar Ass'n, 4 at v (June, 1973).

49. H.B. 42, 78th Ill. Gen. Assembly (1973) prohibits environmental regulation of certain livestock operations. H.B. 41, 78th Ill. Gen. Assembly (1973) prohibits regulation of grain elevators except for toxic discharges into the air. H.B. 40, 78th Ill. Gen. Assembly (1973) specifies that nothing in the Environmental Protection Act permits regulation of the growing or production of grain crops. No less than four bills attempt to limit or remove Board power over the open burning of leaves, brush, trees or other natural vegetation. S.B. 26, H.B. 14, 43, 289, 78th Ill. Gen. Assembly (1973).

caused undue hardship to persons or political subdivisions.[50] Bills to transfer jurisdiction over the Agency from the Governor to the Attorney General[51] and to require the Board to hold public meetings on the economic impact of its decisions[52] evince the concern about the concentration of powers that flows between the Board and the Agency.

Perhaps what will prevail are those bills that seek to improve upon existing mechanisms without upsetting basic policy. Several bills would upgrade the role of a hearing officer from that of a mere collector of evidence to that of a preliminary decision-making official in the manner of federal agencies.[53] This development seems inevitable since a growing caseload will at some point in the near future make it a sheer physical impossibility for the Board to be the only decider of fact and law in every enforcement or variance case that comes before it, no matter how small or trivial the case. Moreover, House Bill 701 would require an environmental impact statement by state agencies and state institutions before taking action which might affect the environment.[54] In light of the previously mentioned *Karn* decision,[55] this amendment is needed if the intent is to make such a statement a condition precedent to the state activity in question. Otherwise there are no real enforcement teeth to legislative admonishments that plans and specifications be filed. Finally, Senate Bill 858 would amend the Illinois Income Tax Act to provide a credit against tax for the installation of certified pollution control devices.[56]

The alternating roles of activity between legislature and judiciary have guaranteed that environmental laws not merely some passing legal fancy to be buried in an administrative agency. The legal ferment in legislative, judicial and administrative circles during the last year in relation to the environment is a clear indication that concern for the environment is still an unsettled social issue of high priority in this state.

50. H.B. 170, 78th Ill. Gen. Assembly (1973).
51. S.B. 979, 78th Ill. Gen. Assembly (1973).
52. S.B. 589, 78th Ill. Gen. Assembly (1973).
53. H.B. 1279 and 1772, 78th Ill. Gen. Assembly (1973).
54. H.B. 701, 78th Ill. Gen. Assembly (1973).
55. 9 Ill. App. 3d 784, 293 N.E.2d 162 (1973).
56. S.B. 858, 78th Ill. Gen. Assembly (1973).