MESSAGE FROM THE CHAIR
Donald D. Anderson

This edition of our newsletter focuses on an ongoing primary theme of the Environmental Litigation and Toxic Torts Committee: legal and technical issues arising from the presence in the environment of low levels of chemicals. Our first article addresses this from an injury perspective: is demonstrable injury still a predicate to most civil actions? Our second piece takes a hard look at the science used to assess causation in chemical exposure cases, specifically evaluating it in the context of recent “popcorn lung” litigation. Our next article examines the role of experts in toxic tort litigation and recent Daubert developments. Finally, we include a student-authored piece on the use of Rule 68 offers of judgment in citizen suit litigation. We think you will find each of these articles extremely interesting and possibly of immediate value in your current litigation practice.

I hope to see you at the Section’s 22nd Annual Fall Conference, to be held October 8–11, 2014, at the Trump National Doral in Miami. Topics of particular interest to environmental litigators include “Environmental Accidents: Nuts and Bolts for Counsel in Times of Crisis”; “The Supreme Court and Greenhouse Gases—What It All Means for Your Clients and Practice”; and “Fracking from the Frontlines: A Review of Key Hydraulic Fracturing Issues, Including the Interaction of Local, State, and Federal Law and Cross-Cutting Regulatory Developments Across the Basins.” There will also be an outstanding pre-trial and trial demonstration of a complex environmental case by leading environmental litigators.

Finally, let me welcome our incoming committee Co-chairs, Patrick Jacobi and Ben Snowden. Ben and Patrick have expressed deep appreciation for the accomplishments of the members of the section and are determined for their team efforts to reflect the quality of the membership. They not only welcome but will also rely on the input and participation of members to succeed in setting and meeting an ambitious agenda for 2014–2015. If there are particular issues you would like to see the committee address in the upcoming year, or would be interested in organizing a program or writing for the committee newsletter, please feel free to reach out to them directly at patrick_jacobi@yahoo.com or bsnowden@kilpatricktownsend.com.
In this issue:

Message from the Chair
Donald D. Anderson ...................... 1

No Harm, No Foul: Reckoning with the Injury Requirement
Scott L. Winkleman and Tracy A. Roman .................. 3

Diacetyl Exposure and “Popcorn Lung” Litigation: Assessing the Evidence for General Causation
Brent L. Finley, PhD, DABT, and Paul K. Scott ................ 7

Court-Appointed Experts in a Time of Increasing Environmental Complexity
David Montgomery Moore ............... 11

Potential Fee-Shifting Under FRCP 68 in Environmental Citizen Suits
Maggie Coulter .......................... 15

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Most of us can recall learning in law school that there can be no civil action without injury. Many actions may cry out for redress, but not all give rise to proper lawsuits. As with the familiar basketball adage, “no harm, no foul” was the watchword for gaining access to a courtroom. And harm meant something specific—demonstrable injury actually incurred.

The injury requirement anchors tort law, and much of civil law more generally. It is also a cornerstone condition of the right to appear in federal court. As the Supreme Court recently affirmed, Article III standing requires injury, meaning harm of a sort “concrete, particularized, and actual or imminent.” Clapper v. Amnesty Int’l USA, 133 S. Ct. 1138, 1147 (2013).

In recent years, the injury rule has come under assault, increasingly honored in the breach. Courts have permitted plaintiffs to employ various work-arounds to end-run the time-honored injury requirement. The result is a blurring of the line between actionable and non-actionable wrong, fuzziness in the application of torts and warranty law in environmental litigation and beyond, and a tug of war between those courts guarding the courthouse doors and others willing to open them wide.

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Courts continue to wrestle with this concept. Typical of cases recently recognizing a cause of action for medical monitoring is Donovan, tobacco litigation in which plaintiffs produced “evidence of physiological changes caused by smoking” and submitted expert medical testimony that such physiological changes resulted in a “substantially greater risk of cancer.” 455 Mass. at 225. The court emphasized that a successful medical monitoring claim must show that one’s exposure to a hazardous substance resulted in “subcellular changes that substantially increased the risk of serious disease, illness or injury”; the court distinguished cases where plaintiffs did not have such proof of symptoms or subclinical effects arising from exposure to hazardous substances. Id. at 225–26.

By contrast, New York’s highest court recently declined to recognize an independent cause of action for medical monitoring absent injury. In Caronia v. Philip Morris USA, Inc., 22 N.Y.3d 439, 446 (2013), a class of smokers claiming to face increased risk of lung cancer asked the court to order medical monitoring to detect cancer in its early stages. The Court of Appeals held the line, concluding that it would not endorse such a “significant deviation” from its tort jurisprudence by recognizing an independent claim for medical monitoring without evidence of “present physical injury or damage to property.” Id. at 452; see also id. at 446 (holding that the “threat of future harm is insufficient to impose liability against a defendant in a tort context”). At the same time, the court acknowledged that plaintiffs could seek medical monitoring as consequential damages in connection with other traditional tort claims. Id. at 452.

Maryland’s highest court also recently addressed the issue in environmental tort litigation involving an underground gasoline leak. In Exxon Mobil Corp. v. Ford, 433 Md. 426 (2013), the court reversed the jury’s award of non-economic damages for emotional distress (including the fear of contracting cancer) and damages for the cost of future medical monitoring. The court found that while some plaintiffs had shown...
exposure to chemicals at levels above those considered safe, they failed to present expert testimony showing that “any individual faced a particularized and significantly increased risk as a result of the leak in relation to the public at large.” Id. at 475. It also rejected claims for emotional distress based on fear of cancer, in part because plaintiffs failed to present evidence of actual injury. Id. at 470. Explaining that a plaintiff must sustain “an objectively demonstrable physical injury,” the court ruled that plaintiffs had failed to show injury “manifesting emotional distress,” meaning an injury to their mental state, physiological or psychological symptoms, or an actual physical harm, arising from exposure to the leak. Id.

Nuisance. The amorphous tort of private nuisance likewise has proven elastic when it comes to injury. It was once settled that nuisance law required bona fide injury of a sort worthy of judicial remedy, and did not redress what courts and treatises familiarly called “trifling annoyances.” Banford v. Aldrich Chem. Co., 126 Ohio St. 3d 210, 213 (2010) (“[A] plaintiff may not recover for trifling annoyance and unsubstantiated or unrealized fears. There must be an appreciable, substantial, tangible harm resulting in actual, material physical discomfort.”); 58 AM. JUR. 2d Nuisances § 72 (“[T]he law of nuisance does not concern itself with trifles or seek to remedy all the petty annoyances of everyday life in a civilized community.”). Yet annoyance has become the lone injury anchor for recent environmental litigation in which claimants temporarily evacuated from their homes due to a factory explosion claim inconvenience and seek redress in nuisance. At least one state supreme court appears to hold that annoyance claimants may proceed on their nuisance theory so long as their alleged disturbance is tied to physical discomfort. Banford, at 216-17.

Defect as Injury. Other litigants seeking to test the injury requirement strive to equate defect with injury. A product line has a flaw, so the reasoning goes, and that flaw is itself the injury needed to bring suit. Under this reasoning, because a crib’s drop-side may fail (but hasn’t yet), a vehicle’s braking system is unsound (but hasn’t yet failed), and electrical system components may cause a house fire (but haven’t yet), Article III standing exists and a common law cause of action is available.

Multiple courts stand firm in the face of such theories by requiring injury—actual failure producing actual harm. See Briehl v. General Motors Corp., 172 F.3d 623, 620 (8th Cir. 1999) (affirming dismissal of express and implied warranty claims where plaintiffs alleged that their vehicles’ brake mechanisms were defective but no plaintiff alleged that her vehicle’s brakes had failed); O’Neil v. Simplicity, Inc., 574 F.3d 501, 503 (8th Cir. 2009) (affirming dismissal of express and implied warranty, Magnuson-Moss Warranty Act, and unjust enrichment claims where purported defect in drop-side crib did not manifest in plaintiff’s own product); Harrison v. Leviton Mfg. Co., No. 05-cv-0491, 2006 WL 2990524, at **7–8 (N.D. Okla. Oct. 19, 2006) (dismissing tort and warranty claims where homeowner alleged that defective electrical system could deteriorate and lead to fire, but not that his system actually had deteriorated). Under this line of authorities, defect is not sufficient, nor is economic harm in the form of the purchase of a defective product or the cost to replace it. See, e.g., Rivera v. Wyeth-Ayerst Labs., 283 F.3d 315, 319 (5th Cir. 2002); Gonzalez v. Kinro, Inc., 473 F. App’x 768, 769 (9th Cir. 2012).

Other courts find standing in such circumstances, even absent manifestation of the defect posited. See In re Aqua Dots Prods. Liab. Litig., 654 F.3d 748, 750 (7th Cir. 2011) (plaintiffs suffered injury where they paid more for allegedly defective toy than they would have paid for nondefective toy, though none suffered physical injury in its use); Cole v. General Motors Corp., 484 F.3d 717, 723 (5th Cir. 2007) (denying motion to dismiss warranty claims where plaintiffs alleged that “they have suffered economic loss satisfying the injury-in-fact requirement because [their vehicles] were defective at the moment of purchase”).

This defect theory of injury inevitably will get a workout in the recent and much-publicized wave of hacking events. In the days before modern-day hacking, courts would dismiss tort claims based on defects in security systems where the only alleged harm was product disappointment and resulting economic
loss. Fireman’s Fund Am. Ins. Cos. v. Burns Elec. Sec. Servs., Inc., 48 Ill. App. 3d 298, 300-01 (1980) (affirming dismissal of strict liability case where a burglarized jewelry store had only suffered economic loss, stating: “When a buyer loses the benefit of his bargain because the goods are defective, that is, when he suffers economic loss, he has his contract to look to for remedies. Tort law need not, and should not, enter the picture.”). Now, the hack of a retail store’s credit card system, or of some company’s computer system, can be expected to produce consumer class litigation brought on behalf of all affected credit card customers or computer owners. The theory of injury will be not injury itself, but the plaintiffs’ vulnerability to harm following the hacking.

Courts vary in their assessments on whether this injury theory is sufficient to establish standing. In In re Barnes & Noble Pin Pad Litig., for instance, so-called skimmers attempted to steal customer credit and debit card information by hacking pin pad systems in 63 Barnes & Noble stores. No. 12-cv-8617, 201 WL 4759588, at *1, *3 (N.D. Ill. Sept. 3, 2013). The court held that none of the ten separate theories of injury asserted by plaintiff customers at the time skimming occurred were sufficient to confer standing because plaintiffs did not allege that their information actually had been stolen or, in the case of the one plaintiff who did so allege, that she suffered any lasting harm from the theft. Id. at *2, *6. The court explained that “[m]erely alleging an increased risk of identity theft or fraud is insufficient to establish standing.” Id. at *3. Instead, plaintiffs would have needed to show a “‘certainly impending’” injury (id.); allegations of “‘possible future injury’” were not enough. Id. at *2 (quoting Clapper, 133 S. Ct. at 1147).

By contrast, in Pisciotta v. Old National Bancorp, the Seventh Circuit found standing for plaintiffs suing the owner of a secure website after a computer hacker gained access to plaintiffs’ confidential and personal information stored on the site, even though plaintiffs did not allege that the hacker actually used their information. 499 F.3d 629, 631-32 (7th Cir. 2007). Yet the claims were ultimately dismissed for failure to state injury sufficient to support relief.

The Supreme Court Weighs In - and Takes a Pass. The Supreme Court has recently had occasion to offer its own views on injury. Twice it has done so, twice it has passed.

In Hollingsworth v. Perry, 133 S. Ct. 2652, 2661 (2013), which found proponents of California’s ban on same-sex marriage to have standing to appeal a district court order invalidating the ban, the Court reaffirmed that a party must “seek a remedy for a personal and tangible harm.” The Hollingsworth Court found this no mere technicality: “The Article III requirement that a party invoking the jurisdiction of a federal court seek relief for a personal, particularized injury serves vital interests going to the role of the Judiciary in our system of separated powers.” Id. at 2667.

In Clapper v. Amnesty Int’l USA, 133 S. Ct. 1138 (2013), a case involving surveillance of the communications of non-U.S. citizens under the Foreign Intelligence Surveillance Act (FISA), the Court addressed whether future injuries can establish Article III standing. Plaintiffs, human rights lawyers, and others opposed to FISA-approved surveillance, argued they had standing because “there [was] an objectively reasonable likelihood that their communications with their foreign contacts” would be intercepted under FISA. Id. at 1146. The Court majority held the line. Noting that Article III requires that an injury be actual or imminent, the Court concluded that for future injury to be imminent it must be “certainly impending” and not merely possible. Id. at 1147. Ultimately, the Court found plaintiffs’ theory of potential future injury too speculative to be “certainly impending” for standing purposes. Id. at 1150.

Only months after deciding Clapper, in a move that surprised many court-watchers, the Supreme Court declined to review class certification decisions in two product liability class actions involving alleged washing machine defects that caused mold growth and noxious odors for some but not all purchasers. The Sixth Circuit had affirmed class certification of all purchasers of Duet washing machines in Ohio, despite Whirlpool’s contention that because the incidence of mold is rare, most class member purchasers suffered no injury. In re Whirlpool Corp. Front-Loading Washer Prods.
The Seventh Circuit followed suit in *Butler v. Sears, Roebuck & Co.*, despite Sears’s argument that class certification was not appropriate because most class members had not experienced mold. 702 F.3d 359, 362 (7th Cir. 2012).

The Supreme Court initially agreed to review both cases. Ultimately the Court reversed course, vacating and remanding for further consideration in light of its decision in *Comcast v. Behrend*, 133 S. Ct. 1426 (2013); *Whirlpool Corp. v. Glazer*, 133 S. Ct. 1722 (2013); *Sears, Roebuck & Co. v. Butler*, 133 S. Ct. 2768 (2013). On remand, both the Sixth and Seventh Circuits reaffirmed, holding that *Comcast* did not change the outcome of the class certification determination because all members of the respective classes allegedly suffered injury in the form of purchase of a defective washing machine. *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 722 F.3d 838, 857 (6th Cir. 2013); *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 798, 801 (7th Cir. 2013). As the Sixth Circuit explained, “[b]ecause all Duet owners were injured at the point of sale upon paying a premium price for the Duets as designed, even those owners who have not experienced a mold problem are properly included within the certified class.” *In re Whirlpool*, 722 F.3d at 857.

On February 24, 2014, the Supreme Court declined to review the two affirmances, thus foregoing an opportunity to clarify the current state of injury doctrine.

**Holding Firm on Injury.** The injury requirement serves important social, legal, and political functions. For one, injury separates courtroom resolution from the work of expert regulatory agencies, which are free to make social policy decisions and regulate products untethered to the personal circumstances of any given claimant. Courts lax on injury often wind up taking on *de facto* the role of such regulatory bodies, blurring the line between the branches of government.

Requiring injury also helps ensure that courts act like courts, resolving genuine cases and controversies and matters ripe for resolution, by “defin[ing] the class of persons who actually possess a cause of action” and “provid[ing] a basis for the factfinder to determine whether a litigant actually possesses a claim.” *Caronia*, 22 N.Y.3d at 446. Insisting on injury also safeguards against “frivolous and unfounded” lawsuits, conserving the courts’ resources for disputes that are ripe and ready for adjudication. *Id.* Moreover, allowing the uninjured to recover may lead to inequitable division of resources, with fewer funds available to the injured. See *Metro-N. Commuter R.R. Co. v. Buckley*, 521 U.S. 424, 442-44 (1997); *Caronia*, 22 N.Y.3d at 451.

Let’s also not forget what we learned in law school. We were taught the importance of the injury requirement for a reason. It remains an important lesson.

**Scott L. Winkelman** is a partner in Crowell Moring, co-chair of the Environment & Natural Resources Group, and a member of the firm’s Management Board and Executive Committee. He litigates class actions, multidistrict proceedings, and other complex litigation nationwide in products and commercial matters. Scott received his undergraduate degree from the University of Michigan (1984), and his law degree from Harvard Law School (1987), before serving as a judicial clerk to the Honorable John Pratt of the U.S. District Court for the District of Columbia.

**Tracy A. Roman** is a partner in Crowell & Moring’s Litigation Group. She has extensive experience litigating a wide range of matters in federal and state courts across the country. Her practice includes defending clients in numerous industries in class actions, including multidistrict litigations. Tracy received both her law degree and her undergraduate degree from the University of Virginia and is a member of the bars of the Commonwealth of Virginia and the District of Columbia.
DIACETYL EXPOSURE AND “POPCORN LUNG” LITIGATION: ASSESSING THE EVIDENCE FOR GENERAL CAUSATION
Brent L. Finley, PhD, DABT and Paul K. Scott

Although diacetyl has been used for decades as a flavoring agent to impart a buttery odor and taste to coffee, flour, chocolate, tobacco, cooking oils, popcorn and other snack foods (NIEHS 2007; NTP 2005; NTP 2007), concerns have been raised regarding reported respiratory disorders in certain food and flavorings manufacturing workers. Specifically, over the past ten years, some scientists at the National Institute for Occupational Safety and Health (NIOSH) have investigated numerous microwave popcorn and flavoring production facilities and they have concluded that diacetyl may be contributing to or causing severe respiratory disorders, including the rare disease bronchiolitis obliterans (referred to by some as “popcorn lung”), in highly exposed workers.

Due to worker health concerns, possible insurance coverage issues, and anticipated difficulties in meeting proposed workplace standards, diacetyl has largely been phased out in the food/flavoring industries and replaced by 2,3-pentanedione and other chemicals.

Recent Verdicts Involving Diacetyl Litigation

Several plaintiff verdicts ranging from $2.7M to $20M have been obtained in Missouri State Courts from 2004 to 2008. In Kuiper v. Givaudan Flavors Corp., 602 F. Supp. 2d 1036 (N.D. Iowa 2009), over $7M was awarded to a former Iowa popcorn butter flavor mixer. Consumer cases, which involve non-occupational exposures to artificial butter in microwave popcorn, have also gone to verdict. For example, in Watson v. Dillon Cos., 797 F. Supp. 2d 1138 (D. Colo. 2011), Wayne Watson was awarded $7.2 million in 2012 after he began developing breathing disorders in 1998. He testified that he consumed 2-3 bags of microwave popcorn per day.

Defense verdicts have also been rendered. Recently, in the first diacetyl case to be tried in California (2012), a defense verdict was issued in Velasquez v. Flavor and Extract Manufacturers Association, BC370319 (L.A. Super. Ct. 2007). In that case, a former flavoring factory worker claimed diacetyl exposure caused him to develop bronchiolitis obliterans. Plaintiff sought $27 million in damages. The jury was not compelled by plaintiff expert testimony suggesting that diacetyl was the cause of his disease, and defense counsel for Advanced Biotech (Peter Garchie and Ruben Tarango of Lewis Brisbois Bisgaard & Smith) were named in a “top verdict of 2012” review by the Los Angeles Daily Journal.

Regulatory Activity Regarding Occupational Diacetyl Exposure Limits

In 2011, NIOSH proposed a short-term exposure limit (STEL) of 0.025 ppm, and an eight-hour time-weighted average (TWA) of 0.005 ppm, for diacetyl. However, these occupational exposure limits (OELs) have yet to be finalized as formal recommendations. The American Conference of Governmental Industrial Hygienists (ACGIH) has recently adopted an eight-hour Threshold Limit Value (TLV) of 0.01 ppm and a STEL of 0.02 ppm for diacetyl (ACGIH 2012, 2014) while the Occupational Safety and Health Administration (OSHA) has thus far not established any workplace standards for diacetyl and it does not appear they plan to do so anytime soon.

Diacetyl defendants who no longer distribute the product might assume these OELs do not apply to their cases since the defendant “is no longer in the diacetyl business”. However, workplace exposures often exceeded these OELs, and therefore plaintiff experts may rely on OEL exceedances as “proof” of individual causation.

State of the Science Review

Naturally occurring airborne diacetyl is emitted from a variety of everyday consumable products (coffee, wine, tobacco), often at concentrations that exceed workplace levels and the proposed OELs by several orders of magnitude.
This raises an interesting question as to whether handling, processing, or consumption of everyday products might be associated with naturally-occurring diacetyl exposures that some would consider “hazardous to health” simply because airborne concentrations exceed workplace OELs. It also raises a more serious concern regarding the merits of claims that a strong relationship between workplace diacetyl exposure and serious respiratory disorders has been observed.

Below we assess the general causation evidence for diacetyl exposure and respiratory disorders, including bronchiolitis obliterans.

**Animal Toxicology Evidence**

There are several well-established chemical risk factors for bronchiolitis obliterans in humans. These chemicals are highly reactive (or are converted to highly reactive compounds in the body) and exert clearly demonstrable destructive effects on the small, lower airways and alveoli of animals at relatively low concentrations. For example, nitrogen dioxide (NO₂), which is one of the most common chemical agents associated with bronchiolitis obliterans in humans, is often present in silo gases, and there are case reports of farm workers developing bronchiolitis obliterans as a result of silo gas exposures. NO₂ is highly toxic because it is hydrolyzed to a reactive and biologically destructive acid (nitric acid) throughout the respiratory tract, including the alveoli. Other inducers of bronchiolitis obliterans in animals and humans include mustard gas, sulfur dioxide, and methyl isocyanate.

Hence, if diacetyl is truly a risk factor for bronchiolitis obliterans in humans, animal inhalation studies should demonstrate adverse effects on the deep lung at low concentrations, just like other known inducers of bronchiolitis obliterans in animals.

However, the animal diacetyl inhalation studies published to date (Hubbs et al. (2002); Hubbs et al. (2008); Hubbs et al. (2012); Morgan et al. (2008)) have not reported significant effects on the alveoli or deep lung in animals exposed to very high diacetyl concentrations, including concentrations that are both well beyond workplace levels and are high enough to kill the animals.

**Epidemiology Studies of Flavoring/Popcorn Workers**

Studies of diacetyl-exposed workers, individually and in aggregate, have failed to consistently demonstrate a causal relationship between diacetyl exposure and respiratory disorders. First, a majority of the published studies that reported workplace airborne diacetyl concentrations and respiratory function (spirometric measurements) did not find an increased incidence of obstruction in the diacetyl-exposed workers (e.g., Akpinar-Elci et al. (2005; 2006), Kanwal et al. (2006), and van Rooy et al. (2009)). In fact, at least one study found that respiratory performance in highly exposed workers actually improved as a function of diacetyl exposure (van Rooy et al. (2009)). There have also been reports of “bronchiolitis obliterans” in flavoring workers with little to no known diacetyl exposure (e.g., NIOSH (2007)). Finally, in many instances, initial impressions of “constrictive bronchiolitis obliterans” were not supported by pathologic descriptions of lung biopsy specimens, with other disease processes, such as hypersensitivity pneumonitis, end-stage bronchiectasis, or other chronic lung disorders more strongly favored by the histologic findings.

Even in those few instances where an association between diacetyl exposure and obstruction has reportedly been observed (Kreiss et al. (2002); Lockey et al. (2009)), the authors did not consider whether the hundreds of other volatile workplace chemicals known to have been present, many of which are respiratory irritants, might have caused the observed effects. This is a critical confounding factor that affects all worker studies, and some juries have factored this into their decisions. As the jury foreman noted in Velasquez “There really was never anything that [said diacetyl] was the only chemical they were working with.”

Combined with the previously discussed animal data that have failed to show evidence of significant deep lung effects even following very high diacetyl exposures, it would appear that the preponderance of
data do not show a relationship between diacetyl exposure and serious respiratory disorders.

**Respiratory Effect Threshold for Diacetyl**

As noted above, TWA OELS of 0.01 and 0.005 ppm have been adopted or proposed by ACGIH and NIOSH, respectively. Egilman et al. (2011) suggested that a value of 0.001 ppm diacetyl is a reasonable threshold for protection against diacetyl-induced respiratory disorders.

Maier et al. (2010) proposed a much higher OEL of 0.2 ppm based on the occurrence of “minimal to mild” peribronchial lymphocytic inflammation (PLI) in the Morgan et al. (2008) study of mice exposed to diacetyl. The value is not confounded by co-exposure to numerous other chemicals or preexisting health conditions, as are all of the worker studies.

It is important to note that the 0.2 ppm OEL was based on default values for mouse inhalation volumes. When specific values for the mice used in the Morgan et al. (2008) study are substituted, the OEL value increases to 0.7 ppm. It is also important to reiterate that the 0.7 ppm value is based on mild to minimal PLI, which can be a precursor to more severe respiratory effects, such as fibrosis, but is not an actual respiratory disease itself. Diacetyl levels required to cause actual respiratory disease, including bronchiolitis obliterans, would, of course, be higher than 0.7 ppm.

Most published and unpublished TWA diacetyl concentrations (sample time of one hour or longer) in flavoring and microwave popcorn facilities are less than 1 ppm. Hence, if the 0.7 ppm threshold derived from Maier et al. (2010) is accurate, it would seem unlikely that workplace TWA diacetyl levels would be causative of bronchiolitis obliterans.

**Reality Check: Naturally Occurring Diacetyl Exposures Associated with Common Consumer Products**

Yeretzian et al. (2003) measured 7 ppm naturally-occurring diacetyl in the headspace of an open cup of unflavored coffee. If indeed diacetyl levels as low as 0.001 ppm pose a risk of serious respiratory disorders (as suggested in Egilman et al. (2011)), then according to some scientists the simple act of making a cup of coffee should require fit-testing for a full face respirator, and we would expect to see an epidemic of bronchiolitis obliterans in the thousands of baristas around the world. But of course this has not occurred. Very few cases of bronchiolitis obliterans are diagnosed annually and most of those are due to failed lung transplants.

Even more compelling is recently completed research showing that cigarette smoke contains 200-400 ppm naturally-occurring diacetyl (Pierce et al. (2014)). These findings in particular raise serious doubts about the existing diacetyl dose-response evaluations of the flavoring/popcorn cohorts. First, all of the flavoring/popcorn cohorts had significant smoking histories. Indeed, for smokers, the degree of diacetyl exposure from their own cigarettes exceeded their diacetyl workplace exposures. And yet this highly significant “non-occupational diacetyl exposure” was not considered in the NIOSH or ACGIH dose-response analyses. Second, smokers are not at increased risk of developing bronchiolitis obliterans, yet it appears they are the most highly exposed individuals identified to date.

**Plaintiff and Defense Science Strategies**

As noted above, plaintiff experts may rely on exceedances of ACGIH or NIOSH OELs as “proof” of individual causation. To date, plaintiff experts have rarely estimated plaintiff’s diacetyl exposure and they typically do not consider any other workplace chemicals as possible risk factors. Much of the relevant peer-reviewed literature (animal and worker studies) has been published by NIOSH scientists who largely appear to be convinced of general causation, and hence there are numerous published conclusions by NIOSH scientists that may be relied upon in plaintiff’s testimony.

The aforementioned Dr. David Egilman, a plaintiff expert in numerous diacetyl cases, has found his opinions challenged and in at least one instance, dismissed outright. For example, in Newkirk v.
Environmental Litigation and Toxic Torts Committee, August 2014

ConAgra Foods et al., 727 F. Supp. 2d 1006 (E.D. Wash. 2010), 9th District Judge Rosanna Peterson found that Dr. Egilman’s testimony was not admissible since, among other things, he had reached “misleading conclusions” from published studies and “fail[ed] to apply reliable scientific methods.” She concluded: “The bulk of Dr. Egilman’s conclusions do not rise above ‘subjective belief or unsupported speculation.’”

Defense strategy for causation often involves a quantitative estimate of plaintiff’s diacetyl exposure, benchmarked against a respiratory effect threshold derived from the Maier et al. (2010) study or some other source. Regarding state of the science, defense experts often point out the fact that even NIOSH did not begin to make causation statements until recently, and as is currently maintained by OSHA: “No firm causative relationship between diacetyl exposure and bronchiolitis obliterans has been established” (OSHA, 2014a), and “A cause-effect relationship between diacetyl and bronchiolitis obliterans is difficult to assess because . . . food-processing and flavor-manufacturing employees with this lung disease were exposed to other volatile agents” (OSHA 2014b).

Future of Diacetyl and Flavorings Litigation

Because there are a limited number of individuals who formerly worked in popcorn/flavorings manufacturing settings, more “consumer cases” are likely to be filed in the coming years. It is unclear if OSHA will establish diacetyl OELs, but if and when that occurs, the values and their derivation will probably play a large role in the evaluation of individual causation. Finally, it appears that personal injury claims may occur regarding the replacement chemicals that are being used as substitutes for diacetyl. For example, NIOSH has already asserted that its research indicates that 2,3-pentanedione, the primary diacetyl substitute, may be an even more potent respiratory toxicant than diacetyl.

Brent L. Finley is a Managing Principal Health Scientist and Executive Vice President at Cardno ChemRisk. Dr. Finley is a board-certified toxicologist with 25 years of experience conducting and managing studies involving chemical exposures and human health risk assessment. He has provided expert witness testimony in lawsuits involving alleged exposure to diacetyl.

Paul K. Scott is a Supervising Health Scientist at Cardno ChemRisk. Mr. Scott has 23 years of experience applying statistics, exposure assessment methods, and fate and transport modeling in the areas of environmental forensics, epidemiology, toxicology, occupational health, and human health and ecological risk assessment. He is a published expert in applying dose-response modeling to determining health benchmarks using both animal toxicity and human epidemiology data.

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Environmental Litigation and Toxic Torts Committee, August 2014
The easy environmental cases have gone away. Environmental issues have become more complex. Laboratories are able to measure at levels not possible just years ago. Experts debate effects of contaminants that now seem ubiquitous and products commonly and widely used. Environmental problems drive engineers to cutting-edge technologies. Today, the expert advocate serves an ever more important role in environmental and toxic tort litigation. Daubert serves as the gatekeeping standard, with the judiciary deciding what testimony and experts are admissible. Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993).

As Justice Rehnquist wrote in his dissent in Daubert, “determinations regarding scientific knowledge, scientific method, scientific validity, and peer review [are] matters far afield from the expertise of judges.” 509 U.S. at 599. Professional jury consultants emphasize keeping trial themes simple, while environmental and toxic tort cases become ever more complex, requiring juries to distinguish between the scientific “truth” and “uncertainty” in complex environmental matters.

Where professional standards are nonexistent or vague, or the matter complex, or there is no consensus on method, use of a court-appointed expert may help guide the fact finder toward a just result.

Daubert and Good Science

From an objective judicial standpoint, the prescriptions and standards of Daubert should ensure that only reliable expert testimony is presented to the jury. Daubert involved the admissibility of novel scientific evidence, which had not found “general acceptance” among the relevant scientific community, regarding pharmaceutical effects. In reversing the decision below, the Supreme Court rejected the Frye test of general acceptance replacing it with assessment of whether: (1) the scientific theory or technique has been subjected to peer review and publication; (2) there is a known or potential rate of error, and (4) the theory or methodology has been accepted within the scientific community. The fourth factor is vestige of the Frye test. Frye v. United States, 293 F. 1013 (1923).


In the thousands of decisions applying Daubert, it is a fairly simple matter to find facially conflicting conclusions. Reliance on animal studies has been both allowed and excluded depending on the context. In Daubert on remand, the 9th Circuit Court of Appeals rejected animal study evidence. Daubert v. Merrell Dow Pharmaceuticals, Inc., 43 F.3d 1311, 1319–20 (9th Cir. 1995) (rejecting experts’ opinions that relied on animal studies, chemical structure analyses, and epidemiological data when experts failed to demonstrate scientific methodology); Conde v. Velsicol Chem. Corp., 24 F.3d 809, 814 (6th Cir. 1994) (finding animal studies inadequate for showing causation of disease in humans with chlordane exposure). But EPA commonly uses animal studies to establish carcinogenic risk standards, and courts have accepted expert opinion ultimately based upon animal studies. In re Paoli R.R. Yard PCB Litigation, 35 F.3d 717 (1994) (animal studies supported by some epidemiological data and had been used by EPA to conclude that PCBs were a probable human carcinogen). Courts are placed in the difficult position of choosing between the opinions of esteemed and credentialed experts who disagree on the method and meaning of facts in a case.

Scientific Method and Standards

On Daubert’s remand, the 9th Circuit Court of Appeals recognized the heavy burden on the judiciary:
Our responsibility then, unless we badly misread the Supreme Court’s opinion [in Daubert], is to resolve disputes among respected, well-credentialed scientists about matters squarely within their expertise, in areas where there is no scientific consensus what is and what is not “good science,” and occasionally to reject such expert testimony because it was not “derived by the scientific method.” Mindful of our position in the hierarchy of the federal judiciary, we take a deep breath and proceed with this heady task.

43 F.3d at 1316. In Kumho, the Supreme Court again visited expert testimony and held that an expert must “employ[] in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the field.” Kumho Tire Co. v. Carmichael, 119 S. Ct. 1167, 1176 (1999); see also Daubert, 509 U.S. at 593–94. The heavy judicial burden referenced by the Court in Daubert could be relieved by application of professional standards. Watkins v. Telsmith, Inc., 121 F.3d 984, 991 (5th Cir. 1997) (district court should verify that “the opinion comports with applicable professional standards outside the courtroom”); Grinnell Mut. Reinsurance Co. v. Heritage Ins. Agency, CIV. 00-1632DWFAJB, 2001 WL 902777 (D. Minn. Aug. 10, 2001) (allowing testimony of witness “thoroughly familiar with all insurance industry standards”). Examples include the Uniform Standards of Professional Appraisal Practice, Generally Accepted Accounting Principles, engineering standards of the American Society of Civil Engineers, and the Statement on Standards for Consulting Services, published by entities such as the American Institute of Certified Public Accountants. See, e.g., In re Williams Sec. Litig., 496 F. Supp. 2d 1195, 1240 (N.D. Okla. 2007), aff’d sub nom. In re Williams Sec. Litigation-WCG Subclass, 558 F.3d 1130 (10th Cir. 2009). The testimony of highly qualified and experienced experts may be excluded where the standard and method for analysis established by a professional organization was not followed. Adams v. Lab. Corp. of Am., 1:10-CV-3309-WSD, 2012 WL 370262 (N.D. Ga. Feb. 3, 2012) (expert witness failed to follow method established by the College of American Pathologists and American Society of Cytopathology). Professional licensing, registration, and standards have been used to establish acceptable methodology under Daubert. Testimony has been excluded where an expert could not identify any professional standards on which she had relied in preparing testimony. Dev. Specialists, Inc. v. Weiser Realty Advisors LLC, 09 CIV. 4084 KBF, 2012 WL 242835 (S.D.N.Y. Jan. 24, 2012).

In environmental law, professional standards might include professional organizational standards, scientific methods, and standards for technical analysis for environmental matters. Examples are U.S. Environmental Protection Agency (EPA) methods such as the Office of Solid Waste and Emergency Response sampling and analytical protocols, Safe Drinking Water Act methods, Clean Water Act, and Clean Air Act methods. See, e.g., 40 C.F.R. Part 136 (Guidelines for Establishing Test Procedures for the Analysis of Pollutants). EPA has also incorporated many standards such as those of the American Society for Testing and Materials (ASTM) through application of notice-and-comment rulemaking under federal law. 1 C.F.R. Part 51 (incorporation by reference); see e.g., 40 C.F.R. Part 300 (National Contingency Plan). EPA- and state-published cleanup standards often serve as a basis of expert opinion regarding damages and potential for harm.

EPA standards have been established, however, for regulatory purposes, not case or site analyses. Under statutory methods, federal standards may typically be conservative. It is not uncommon for EPA to explicitly overestimate maximum individual risk and the magnitude of risk experienced by individual members of the population when establishing risk-based regulatory standards. Methods established for regulatory purposes may not be suitable for case-specific litigation. This conservatism in a regulatory context may not be appropriate in fact-specific litigation.

Reliance on promulgated federal standards can cut both ways. As an example, many environmental standards are established as total concentration standards, as opposed to bioavailable components. EPA and states typically apply a standard total concentration for cleanup levels, while agency studies recognize that some fraction of a contaminant may not be bioavailable. See, e.g., Estimation of Relative
Bioavailability of Lead in Soil and Soil-Like Materials Using In Vivo and In Vitro Methods (OSWER 9285.7-77, May 2007). This recognition of a bioavailable portion and published studies that demonstrate a difference from total concentration is a scientific method upon which an expert may rely under Daubert. However, in this circumstance there would be a published regulatory method and an alternative published and accepted scientific method that would produce very different results.

At the other end of the spectrum are non-promulgated methods and novel methods that may never have been published. Under Daubert, reliance on unpublished or non-peer-reviewed methods may cause exclusion of testimony. In re Rezulin Products Liab. Litig., 309 F. Supp. 2d 531, 563 (S.D.N.Y. 2004). When presented by a credentialed expert, these methods may erroneously be determined to meet Daubert standards. Experts unable to substantiate conclusions with any source other than their own “experience” will be excluded. Freepor-McMoran Res. Partners Ltd. P'Ship v. B-B Paint Corp., 56 F. Supp. 2d 823, 834 (E.D. Mich. 1999). Where unpublished, unreviewed work makes the same point as published, peer-reviewed pieces, however, then such testimony may be sufficiently reliable to pass Daubert's standard. Ruiz-Troche v. Pepsi Cola of Puerto Rico Bottling Co., 161 F.3d 77, 84 (1st Cir. 1998) (“Publication (which is but one element of peer review) is not a sine qua non of admissibility; it does not correlate with reliability.”).

In many areas of environmental litigation there are no established professional technical standards, or multiple potential standards could be applied. This leads to confusion regarding admissibility. As an example of multiple standards, cleanup standards for hazardous substance releases may include federal standards developed under EPA guidelines, or state-derived standards under the applicable or relevant and appropriate requirements provisions of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). 42 U.S.C. §§ 9601, 9621. Under other federal environmental laws, states may establish more stringent limits and standards. For many areas of environmental litigation, professional standards are absent, lacking in any consensus, or deviate significantly by jurisdiction. Many of the most contentious Daubert issues arise in novel areas where no professional standards exist, precisely the issue in the Daubert cases themselves.

**Court-Appointed Experts**

At the same time it espoused the new Daubert standard, Justice Blackmon writing for the majority reminded that judges “should also be mindful” of the authority to appoint experts under Rule 706 of the Federal Rules of Evidence. 509 U.S. at 595. Justice Rhenquist writing in dissent warned that “definitions of scientific knowledge, scientific method, scientific validity, and peer review” were “matters far afield from the expertise of judges.” 509 U.S. at 599 (J. Rhenquist, dissenting). Expert testimony frequently concerns complex matters with which the trier of fact is unfamiliar. 29 CHARLES ALAN WRIGHT & VICTOR JAMES GOLD, FEDERAL PRACTICE AND PROCEDURE § 6302 (1st ed.). Early judicial scholars noted that the mere presence in court of the neutral expert has a great tranquilizing effect on prospective expert witnesses, since they know that the neutral expert is informed as to their subject. Proceedings of the Seminar on Protracted Cases for United States Circuit and District Judges, 21 F.R.D. 395 (1957), at 51.

Rule 706 of the Federal Rules of Evidence provides that, by a party’s motion or sua sponte, the court may appoint a neutral expert witness. (For a listing of state jurisdictions that apply Rule 706 or a similar rule regarding court-appointed experts, see 6 WHARTON’S CRIMINAL EVIDENCE § 65:1 (15th ed.)). Rule 706 allows the parties to submit nominations for experts. The rule provides for assignment of duties, reporting findings, deposition, testimony, and compensation. In terms of procedure, a court-appointed expert may be part of the pretrial conference and discovery order, as originally contemplated in developing Rule 706. Proceedings of the Seminar on Protracted Cases for United States Circuit and District Judges, 21 F.R.D. 395 (1957). A court-appointed expert may also be established during the discovery period or presumably later where the court deems necessary to address a technical issue. Courts have appointed experts following summary judgment motion briefing to address central technical issues. In re Midland Nat.

The Advisory Committee notes to Rule 706 state that courts have great discretion in using Rule 706-appointed experts. The inherent power of a trial court to appoint an expert is “virtually unquestioned.” Scott v. Spanjer Bros., Inc., 298 F.2d 928 (2d Cir. 1962). In many jurisdictions case law holds that Rule 706 should be invoked only in “rare and compelling circumstances.” Monolithic Power Sys., Inc. v. O2 Micro Int’l Ltd., 558 F.3d 1341, 1346 (9th Cir. 2009); see 29 CHARLES ALAN WRIGHT & VICTOR JAMES GOLD, FEDERAL PRACTICE AND PROCEDURE § 6302 (1997) (quoting Joe S. Cecil and Thomas E. Willging, Court-Appointed Experts, in FEDERAL JUDICIAL CENTER REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 539 (1994)).


Court-Appointed Experts Where Professional Standards Are Vague or Conflicting

Little guidance exists regarding when it might be appropriate for a court to appoint an expert. That parties’ experts have a divergence of opinion does not require appointment of an independent expert. Oklahoma Natural Gas Co. v. Mahan & Rowsey, Inc., 786 F.2d 1004 (10th Cir. 1986), cert. denied, 479 U.S. 853 (1987). Complex mass torts, where the ordinary adversary process is insufficient, may be appropriate for court-appointed experts. In re Asbestos Litigation, 830 F. Supp. 686 (E.D.N.Y. 1993). There are many other instances where a court-appointed expert could be useful in litigation.

Professional organizations in fields such as engineering, toxicology, and biology will be increasingly called upon to provide guidance on cutting-edge environmental issues to assist the courts in applying Daubert. Meanwhile, where professional standards are vague, or multiple possible standards exist, using a court-appointed expert would aid the trier of fact. With vague standards, a neutral court-appointed expert provides an excellent alternative to the adversary advocate method, avoiding confusing non-technical members of juries and judges. Reasons for a court-appointed expert include avoiding confusion and changing the debate from the persuasive quality of the expert advocates’ presentation to the substance of the method, gaps in scientific knowledge, and probability of correctness of the opinion. Where alternative methods are possible, a neutral court-appointed expert can provide reliability testimony regarding the distinctions between the methods and resulting opinions.
Similarly, a court-appointed neutral expert may be appropriate where there is a question regarding application of a regulatory standard to a toxic tort or damage case. Putting aside per se negligence claims, neutral experts could objectively identify and explain concepts such as margin of safety, magnitude of risk, and overestimation of risk inherent in EPA or state regulatory standards.


Too much is at stake in environmental litigation to risk application of an improper method or standard. As has been shown in recent complex, large-scale environmental litigation, court-appointed experts provide a potential solution. Where standards may be vague or conflicting, using a court-appointed expert is an important tool for reducing risk of confusing the trier of fact.

David Montgomery Moore, is a partner at Smith, Gambrell & Russell and Adjunct Professor, Emory School of Law. Mr. Moore graduated cum laude from the environmental law program at Pace University School of Law, and has a B.S. in biology from the University of South Florida. He has written on scientific and legal issues including EPA’s Toxicity Characteristic Leaching Procedure, divisibility of harm, and other technical environmental topics.

POTENTIAL FEE-SHIFTING UNDER FRC P 68 IN ENVIRONMENTAL CITIZEN SUITS
Maggie Coulter

Introduction

Often overlooked by defendants in environmental citizen suits, Federal Rule of Civil Procedure 68 has recently come into the spotlight for its potential to shift some of defendants’ costs onto plaintiffs, even in situations where the plaintiff prevails. Though courts have traditionally disallowed Rule 68’s use in environmental citizen suits for policy reasons, in Interfaith Community Organization v. Honeywell International, 726 F.3d 403 (3d Cir. 2013), the Third Circuit recently allowed its use. The decision may well have the chilling effect cited as a primary policy reason for rejecting the offer of judgment procedure in the earlier decisions.

Federal Rule of Civil Procedure 68 was created in 1937 in the interest of encouraging settlement, and avoiding the burden and cost of continuing litigation. Ian H. Fisher, Federal Rule 68, A Defendant’s Subtle Weapon: Its Use and Pitfalls, 14 DePaul Bus. L.J. 89, 91 (2001); 12 Charles Alan Wright et al., Federal Practice and Procedure § 3006 (2d ed. 1997); see also Marek v. Chesny, 473 U.S. 1, 5 (1985) (“The plain purpose of Rule 68 is to encourage settlement and avoid litigation.”). An offer of judgment is slightly different from a typical settlement offer; it is “[a] settlement offer by one party to allow a specified judgment to be taken against the party.” Black’s Law Dictionary (9th ed. 2009). Rule 68 allows a defendant to submit an offer of judgment in only two situations: either at least 14 days before trial begins, or after one party’s liability has been determined but the extent of the liability remains to be determined by further proceedings. Fed. R. Civ. P. 68. The relevant text of Rule 68 provides:

(d) Paying Costs After an Unaccepted Offer. If the judgment that the offeree finally obtains is not more favorable than the unaccepted offer, the offeree must pay the costs incurred after the offer was made. Id. (emphasis in original).
Thus, if the plaintiff refuses a settlement offer and ultimately fails to “beat” that offer at trial, Rule 68 imposes a cost-shifting penalty.

This provision alters the cost-benefit balancing analysis conducted by a plaintiff faced with an offer of judgment and encourages plaintiffs to seriously consider any offers of judgment submitted by the defendant because plaintiffs could potentially be liable for some of the defendant’s costs. Even prior to the adoption of Rule 68, many state courts recognized the general legal principle that it is “within the powers of an equity court regardless of the existence of a rule such as [Rule 68]” that “even a prevailing party could be denied costs for persisting vexatiously after refusing an offer of settlement if it recovered no more than it had been previously offered.” 12 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3001 (2d ed. 1997). See also BLACK’S LAW DICTIONARY, “offer of judgment” (9th ed. 2009) (“In federal procedure (and in many states), if the adverse party rejects the offer, and if a judgment finally obtained by that party is not more favorable than the offer, then that party must pay the costs incurred after the offer was made.”). This cost-shifting mechanism promotes settlement by providing the incentive for parties to seriously consider any offers of judgment presented, to promote Rule 68’s goal of encouraging settlement. It is through the cost-shifting mechanism of Rule 68 that environmental nongovernmental organizations that file citizen suits could be held liable for a portion of defendant’s costs and could lose the ability to recover a portion of their attorney’s fees.

Courts have held, for policy reasons, that the offer of judgment rule is inapplicable in class action suits, claims for equitable relief, and citizen suits. See, e.g., Gay v. Waiters’ & Dairy Lunchmen’s Union Local No. 30, 86 F.R.D. 500 (N.D. Cal. 1980) (refraining from applying Rule 68 to class actions); N. Carolina Shellfish Growers Ass’n v. Holly Ridge Associates, LLC, 278 F. Supp. 2d 654 (E.D.N.C. 2003) (holding that Rule 68 is inapplicable to citizen suits under the Clean Water Act); Friends of the Earth v. Chevron Chem. Co., 885 F. Supp. 934, 940 (E.D. Tex. 1995) (invalidating an offer of judgment in a Clean Water Act citizen suit); Public Interest Research Group v. Struthers-Dunn, Inc., 1988 WL 147639 (D.N.J. Aug. 16, 1988) (invalidating a Rule 68 offer of judgment in a Clean Water Act citizen suit). Courts reasoned that in these types of litigation, Rule 68’s cost-shifting mechanism does not incentivize settlement, creates valuation problems, and discourages citizens from bringing enforcement actions. Rule 68 was designed to compel plaintiffs to seriously consider any offer of judgment because of the possibility that defendant’s costs will be shifted to plaintiff. See Gay v. Waiters’ & Dairy Lunchmen’s Union Local No. 30, 86 F.R.D. at 502–04 (“An offer of judgment forces an individual offeree to weigh his own exposure to liability for the offeror’s subsequent costs against his own expected recovery, thereby encouraging a close evaluation of the merits of his claim.”). Those holdings had been rejected by later decisions emphasizing fundamental principles of statutory interpretation. See Marek v. Chesny, 473 U.S. 1 (1985) (holding that Rule 68 was applicable in a case involving injunctive relief); Weiss v. Regal Collections, 385 F.3d 337 (3rd Cir. 2004) (affirming the applicability of Rule 68 to class actions). These cases laid the foundation for the Third Circuit’s decision in Interfaith Community Org. v. Honeywell.

**Rule 68 and Citizen Suits**

When applied to citizen suits, Rule 68 offers of judgment arguably create a perverse incentive unrelated to the goal of reducing litigation; because of the potential liability for costs and the loss of some attorney’s fees, Rule 68 offers of judgment disincentivize citizens from bringing citizen enforcement suits. Plainly stated, such plaintiffs would gain no personal monetary or individual reward from bringing such suits, yet would be faced with the potential liability for costs imposed by Rule 68’s cost-shifting mechanism.

In Friends of Earth, Inc. v. Chevron, the court held that the policy interests at play in a citizen suit do not reflect the purposes of Rule 68. The court explained that the citizen plaintiff in a citizen suit “has no profit interest” in the outcome of the litigation because “a citizen may only be reimbursed for her costs and attorney’s fees” and “[a]ny damage award is remitted to the U.S. Treasury.” Id. at 939. The court felt that the “speculative hazard” created by Rule 68’s cost-shifting...
mechanism would have a “chilling effect upon citizens bringing enforcement actions.” *Id.* at 939–40.

Moreover,

In bringing this suit, Plaintiff is not seeking personal redress; rather, Plaintiff is standing in the shoes of the government and performing a public service. Civil actions of this nature are substantially different from common civil actions, and offers of judgment would have an irregular dynamic effect upon litigants in these actions. To employ the offer of judgment provision in this situation would be inappropriate.

*Id.* at 940. As Rule 68 would undermine the effectiveness of citizen suit provisions, the court disallowed the use of a Rule 68 offer of judgment in the case at issue, a citizen suit claim brought under the Clean Water Act (CWA). See also *Public Interest Research Group v. Struthers-Dunn* (applying the court’s rationale in *Friends of the Earth v. Chevron* to invalidate a Rule 68 offer of judgment in the context of a Clean Water Act citizen suit).

This policy justification was reiterated and strengthened in *North Carolina Shellfish Growers Association v. Holly Ridge*. The court explained further that “[t]he application of Rule 68 to CWA citizen suits creates enormous disincentives and discourages citizens plaintiffs from vigorously prosecuting claims under the CWA” and that “[i]n doing so, Rule 68 frustrates the express intention of Congress “that citizens should be unconstrained to bring these actions.”” (at 668, citing S. Rep. No. 92-414, at 3746 (1971)).

In addition to the “chilling” effect that Rule 68 offers of judgment would have on citizen plaintiffs bringing enforcement actions, some courts have held that such an application would violate the Rules Enabling Act. The case concerned the applicability of a Rule 68 offer of judgment in a dispute over attorney fees filed separately from the underlying environmental cleanup case. Citing *Public Interest Research Group v. Struthers-Dunn*, the *Interfaith* district court explained that the use of Rule 68 offers of judgment “in the context of citizen’s suits that seek only injunctive and remedial relief, but offer no potential for Plaintiffs to receive monetary recovery” is “simply incompatible with the purposes Congress sought to serve” by enacting citizen suit provisions. *Id.* at 756. The *Interfaith* district court further explained that “such an impingement on a Congressional statute through the application of a federal rule of civil procedure is barred by the Rules Enabling Act” (quoting *Public Interest Research Group v. Struthers-Dunn*).

On appeal, the Third Circuit rejected both the district court’s analysis of the Rules Enabling Act and its policy justifications for invalidating the use of Rule 68 offers of judgment in the context of citizen suits, and overturned the lower court’s decision. The Third Circuit found that Rule 68 offers of judgment were valid in *Interfaith* by applying the Supreme Court’s test for violations of the Rules Enabling Act set out in *Mississippi Publishing Corp. v. Murphee*, 326 U.S. 438, 446 (1946). As later explained by Justice Scalia in *Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 130 S. Ct. 1431, 1442 (2010), “[w]hat matters is what the rule itself regulates [– i]f it governs only the manner and the means by which the litigants rights are enforced, it is valid; if it alters the rules of
**decision by which [the] court will adjudicate [those] rights, it is not.”

Under the *Mississippi Publishing* test, the Third Circuit found that the application of Rule 68 did not violate the Rules Enabling Act, because “[t]he amount of the fee to be awarded remains governed by the same rules of decision regardless of the interposition of an offer of judgment” and thus “the requirement that a plaintiff bear the fees incurred after it rejects an offer of judgment simply cannot be said to abridge some substantive right.” 726 F.3d at 409. Under this standard, the application of an offer of judgment to an attorney’s fees dispute rooted in a citizen suit did not violate the Rules Enabling Act.

In *Interfaith* the Third Circuit looked solely at the plain language of the rule and dismissed policy considerations as irrelevant. The Third Circuit rejected the policy considerations that the lower court found compelling, explaining that Federal Rule of Civil Procedure 1 states that the federal rules necessarily apply to *all* civil suits, and the court cannot create exceptions beyond those described in Rule 81, Fed. R. Civ. P. 1 (“These rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81.”). The Third Circuit began its inquiry into the applicability of Rule 68 to citizen suits with the plain language of the rule, as was done by the Supreme Court in *Marek v. Chesny*, 473 U.S. 1 (1985). The Third Circuit analogized the attorney’s fees claim at issue in *Interfaith* with the scenario in *Marek*, which involved the interaction between Rule 68 and the civil rights fee-shifting statute. 42 U.S.C. § 1988.

In *Marek* the Supreme Court addressed whether a plaintiff who received a verdict that was less than the offer of judgment could recover the fees incurred after the offer was made under the civil rights fee-shifting statute. 473 U.S. at 10-11. Similar to the arguments made by the plaintiffs in *Interfaith*, the *Marek* plaintiffs argued that applying Rule 68 would unfairly burden civil rights plaintiffs by discouraging attorneys from bringing meritorious claims at the risk of losing attorney’s fees. However, the Supreme Court applied a plain language interpretation of the statute and held that policy considerations were irrelevant to the Court’s inquiry. 473 U.S. at 11-12. In the same way, the *Interfaith* court analyzed the plain meaning of Rule 68 and held that “Rule 68 does not exempt from its purview any type of civil action.” 726 F.3d at 408. Further, Rule 1 of the Federal Rules of Civil Procedure states that the rules, including Rule 68, apply to “all suits of a civil nature.” Fed. R. Civ. P. 1. Exemptions to Rule 1 are explicated in Federal Rule of Civil Procedure 81, which does not set forth any restrictions on Rule 68’s applicability to citizen suits or suits seeking equitable relief generally.

The Third Circuit further rejected the plaintiffs’ espousal of the policy argument based on *Public Interest Research Group v. Struthers-Dunn* that Rule 68 creates a chilling effect in enforcement of citizen suits. The Third Circuit explained that the “potential chilling effect of allowing Rule 68 offers of judgment in citizen suits under RCRA” is “simply irrelevant to the pertinent inquiry: whether the rules of decision are altered by the offer of judgment.” *Id.*

The Third Circuit was also unpersuaded by plaintiff’s final argument that *Marek* is distinguishable from the citizen suit case at hand because civil rights plaintiffs are often motivated by the potential for personal gain in contrast to RCRA plaintiffs who seek injunctive relief in furtherance of a purely public gain. The *Interfaith* court ultimately found that the motivations underlying citizen suits, to encourage plaintiffs to bring meritorious suits to enforce environmental laws, were not incompatible with motivations underlying the Rule 68 cost-shifting mechanism, to encourage the settlement of civil suits. *See also Marek*, “Rule 68’s policy of encouraging settlements is neutral, favoring neither plaintiffs nor defendants; it expresses a clear policy of favoring settlement of all lawsuits” (473 U.S. at 10. This conclusion is reflected in the Third Circuit’s holding, where the offer of judgment and its mandatory cost shifting were allowed in the RCRA attorney’s fees dispute at issue.

**Looking Forward**

The mandatory cost-shifting mechanism of Federal Rule of Civil Procedure 68 is triggered when (1) defendant makes an offer of judgment under Federal Rule of Civil Procedure 68, (2) plaintiff rejects that
offer and (3) plaintiff subsequently obtains a judgment that is less favorable than the defendant’s offer. Under the rule’s mandatory cost shifting, plaintiff may be liable to defendant for costs incurred after the offer as well as barred from recovering its own costs incurred since the time of the offer. The court’s holding in Interfaith Community Organization v. Honeywell clarifies the application of the cost-shifting provision, rejecting previous courts’ policy justifications for invalidating offers of judgment in class action suits, requests for equitable relief, and citizen suits, instead adhering to a strict plain language analysis of Rule 68.

Maggie Coulter is a legal fellow at the Surfrider Foundation in San Clemente, CA and a candidate for Master of Arts in International Affairs in December 2014, American University School of International Service. She is awaiting the results of the July California Bar Exam and is pursuing employment in California and Washington, D.C., in the fields of energy, natural resources, and environmental law. She may be reached at maggiecoulter@cox.net.

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