With efforts to reform the Toxic Substances Control Act (“TSCA”) and modernize chemical control at the federal level stalled, some states have taken the initiative to fill perceived gaps by adopting Green Chemistry initiatives. The policies underlying such laws are certainly laudable—to identify potentially hazardous substances in consumer products and reduce exposures by, in part, considering safer alternatives. These initiatives, however, have come under increasing attack, as product manufacturers point to a growing patchwork of differing requirements and obligations across states, thus increasing the cost and effort needed to ensure compliance.

While it is not surprising that interested parties have focused most of their attention on the regulatory aspects of these programs, there is yet another area that deserves further consideration: the impact of Green Chemistry initiatives on product liability litigation. On the one hand, both the AA process and product liability litigation ostensibly deal with similar issues—i.e., the relative safety of a product. Indeed, as we discuss below, the process of evaluating the use of chemicals in consumer products and, in particular, identifying safer alternatives through what are known as Alternatives Assessments (“AA”), tracks on some level a similar analysis undertaken by courts in product liability cases. On the other hand, it is equally important to note significant differences between the two. While Green Chemistry programs...
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**NOTE FROM THE EDITOR**

I hope you enjoy the TIPS TTEL Spring Newsletter, which features five intriguing articles ranging from wide-spread changes in substantive and procedural laws in two active jurisdictions (Illinois and California) for toxic tort litigators to the potential impact of Green Chemistry initiatives on product liability litigation. I hope that you find these articles to be interesting and relevant to the ever-changing climate of toxic tort and environmental law. I am currently searching for submissions for the next newsletter, and encourage committee members and nonmembers to submit article proposals. Please send your proposals directly to me at eliot.harris@sedgwicklaw.com. I would like to thank the authors that have contributed to this edition, as well as the section members for their efforts in supporting this publication. A special thanks to committee chair, Joshua Lee, for his help with this Newsletter.

Sincerely yours,

Eliot Harris, Sedgwick LLP
EFFECTIVE STRATEGIES FOR DEFENDING RCRA CITIZEN SUITS

By: Roy Alan Cohen Esq. and Julius M. Redd, Esq.¹

There are a number of federal statutes that serve as the basis for pursuing those allegedly responsible for environmental contamination. With the Supreme Court’s 2004 curtailment of a party’s right to contribution for environmental contamination from liable parties under the Comprehensive Environmental Response, Compensation, and Liability Act and political tension around regulation by government agencies, citizen suits brought under the Resource Conservation and Recovery Act (“RCRA”) remain a viable option for plaintiffs. This article highlights numerous tools available to effectively defend against a citizen suit action under RCRA. In particular, this article analyzes how a defendant can use the “imminent and substantial endangerment” element to its advantage in defeating a citizen suit.

Enacted in 1976, RCRA is a comprehensive environmental statute that regulates the disposal, treatment, and storage of hazardous and solid waste.² Its primary purpose “is to reduce the generation of hazardous waste and to ensure the proper treatment, storage, and disposal” of generated waste in order to reduce its threat on human health and the environment.³ Section 7002 of RCRA is the “citizen suit” provision, which allows plaintiffs to commence a suit against “any person, including the United States and any other governmental instrumentality or agency, and including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility, who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment.”⁴ To prevail in a citizen suit action, courts have interpreted this clause as requiring a plaintiff to prove the following elements:

1) that the defendant is a person, including, but not limited to, one who was or is a generator or transporter of solid or hazardous waste or one who was or is an owner or operator of a solid or hazardous waste treatment, storage, or disposal facility; (2) that the defendant has contributed to or is contributing to the handling, storage, treatment, transportation, or disposal of solid or hazardous waste; and (3) that the solid or hazardous waste may present an imminent and substantial endangerment to health or the environment.⁵

Statutory Defenses to a RCRA Citizen Suit

RCRA has numerous defenses built right into the statute. For example, a litigant cannot commence a citizen suit without first giving ninety days’ notice to the Environmental Protection Agency (“EPA”) Administrator, the State in which the alleged endangerment is located, and the potential defendants.⁶ Additionally, if the EPA or the State has already commenced an enforcement action and is diligently pursuing it, a private party cannot initiate a citizen suit for the same endangerment.⁷

Finally, while not specifically provided by the statute, another important defense to be considered by a defendant facing a citizen suit is standing. Often, environmental groups commence citizen suits under RCRA without being able to establish the three basic standing requirements of injury-in-fact, causation, and redressability.⁸ Where any of these requirements are lacking, the court will not hesitate to dismiss the action.⁹

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³ 42 U.S.C. § 6901 et seq.
⁷ 42 U.S.C. § 6972(b)(2)(A);
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ILLINOIS- ONE STATE, ONE WORKERS’ COMPENSATION SYSTEM, TWO INTERPRETATIONS

By: Jonathan Lively¹ and Elizabeth Schieber²

Can an employee claiming an asbestos-related disease bring a civil suit against an employer outside the workers’ compensation system? The answer depends on where he chooses to file his claim. In Illinois, a plaintiff would be barred from pursuing a common law action against his employer for an asbestos-related injury in the First Judicial Circuit Court of Cook County. However, a plaintiff filing in the Third Judicial Circuit in Madison County may file a civil suit against his employer, and thus, circumvent the exclusivity provision and seek exponentially higher damages. This differing treatment is due to Madison County’s interpretation of Illinois’ workers’ compensation statutes, which differs from Cook County’s, the Northern District of Illinois’, as well as other states’ interpretation of similar exclusivity provisions.

The Act

All fifty states have workers’ compensation systems. Like other states, Illinois’ workers’ compensation system was “designed as a substitute for previous rights of action of employees against employers and to cover the whole ground of the liabilities of the master, and it has been so regarded by all courts.” Moushon v. Nat’l Garages, 9 Ill. 2d 407, 411 (Ill. 1956) (emphasis added). In other words, “[e]mployee claims against any employer for occupational disease-related injuries are ordinarily barred by the exclusivity provisions of the Workers’ Compensation Act and the Workers’ Occupational Diseases Act.” Hartline v. Celotex Corp., 272 Ill. App. 3d 952, 955 (1st Dist. 1995). In designing the Workers’ Compensation Act and the Workers’ Occupational Diseases Act (collectively “the Act”),³ the Legislature intended to “balance the interests” of the employer and employee by imposing “no fault” liability on an employer through the workers’ compensation system, but barring employees from proceeding against their employers in a common law action. See Meerbrey v. Marshall Field and Co., Inc., 139 Ill. 2d 455, 463 (Ill. 1990). The exclusivity provision of the Workers’ Compensation Act provides:

No common law or statutory right to recover damages from the employer… for injury or death sustained by any employee while engaged in the line of his duty as such employee, other than the compensation herein provided, is available to any employee who is covered by the provisions of this Act.

820 ILCS 305/5(a) (emphasis added). Likewise, the Workers’ Occupational Diseases Act provides:

The compensation herein provided for shall be the full, complete and only measure of the liability of the employer bound by election under this Act and such employer’s liability for compensation and medical benefits under this Act shall be exclusive and in place of any and all other civil liability whatsoever, at common law or otherwise, to any employee of his legal representative on account of damage, disability or death caused or contributed to by any disease contracted or sustained in the course of employment.

820 ILCS 310/11 (emphasis added). In interpreting these statutes, Illinois courts have carved out four exceptions to the exclusivity provision which are strictly construed. See Collier v. Wagner Castings Co., 81 Ill. 2d 229, 237 (Ill. 1980); see also Rosales v. Verson Allsteel Press Co., 41 Ill. App. 3d 787, 789 (1st Dist. 1976).

To “escape the exclusivity bar, a plaintiff must prove that the injury (1) was not intentional; (2) did not arise out of employment; (3) was not incurred during the course of employment; or (4) was noncompensable under the Act.” Hartline, 651 N.E. 2d at 584. Plaintiffs alleging asbestos-related injuries against their employers

Continued on page 20

¹ Jonathan Lively, a shareholder and trial attorney in Segal McCambridge Singer & Mahoney’s Chicago office, defends product manufacturers and premises owners who face litigation in areas including toxic tort/asbestos, environmental, products liability, transportation, and other civil matters. He is a 2012-2013 Vice Chair of the American Bar Association’s Toxic Torts and Environmental Law Committee.
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³ Illinois courts have found the exclusivity provisions of these statutes “homologous for purposes of judicial construction.” James v. Viteriillas, Inc., 242 Ill. App. 3d 538, 549-50 (1st Dist. 1993).
“NEXUS” REQUIRED TO ESTABLISH DISCHARGER LIABILITY FOR DAMAGES UNDER THE NEW JERSEY SPILL ACT

By: F. Paul Pittman

The liability of a discharger under the New Jersey Spill Compensation and Control Act (“Spill Act”) has received considerable attention by the New Jersey Supreme Court (“Court”) over the years. Traditionally, the Court has focused on the liability of a discharger for the occurrence of a discharge. Virtually no attention has been given to the liability of the discharger for the damages caused by the discharge. In *New Jersey Department of Environmental Protection v. Dimant*, the Court elucidated the standard for imposing liability on a discharger for damages, and held that the New Jersey Department of Environmental Protection (“DEP”) must establish a reasonable connection or “nexus” between a discharge, the discharger, and the contaminated resource, by a preponderance of the evidence, to recover damages under the Spill Act. *Dimant* clarified the burden of proof the DEP must meet to establish “discharger liability” under the Spill Act.

**New Jersey Spill Compensation and Control Act**

The Spill Act was passed in 1976 and provides a mechanism for the prevention and remediation of the discharge of hazardous substances. Under the Spill Act “any person who has discharged a hazardous substance, or is in any way responsible for any hazardous substance, shall be strictly liable, jointly and severally, without regard to fault, for all cleanup and removal costs no matter by whom incurred. Such person shall also be strictly liable, jointly and severally, without regard to fault, for all cleanup and removal costs incurred by the department or a local unit.”

The Spill Act was established prior to the analogous federal statute, the Comprehensive Environmental Response, Compensation and Liability Act (“CERLCA”), which also provides for liability for remediation costs from releases of hazardous substances as well as the cleanup of inactive hazardous waste sites. Unlike the Spill Act, a PRP under CERLCA may apportion liability among responsible parties when a division can be reasonably determined, rather than being subject to joint and several liability. Similar to the Spill Act, under CERLCA, liability for response costs may be found where a potentially responsible party (“PRP”) disposed of hazardous substances at a facility where hazardous substances have been released (or threatened with release) into the environment. Notably, when assessing discharger liability under CERLCA, courts have held that “some connection” is required to be shown between the actions of the PRP and the contamination at the site in question, but that the standard need not rise to proximate causation.

**Prior Decisions Examining Discharger Liability Under the Spill Act**

Prior to *Dimant*, Court decisions examining the liability of a discharger under the Spill Act did not specifically address the requirements for imposing liability on a discharger for damages to a contaminated resource. Instead, the cases focused on the connection between the discharge, and the discharger or owner of the property. In these decisions, the Court relied on the language in the Spill Act imposing liability on any person “in any way responsible for a hazardous substance,” to extend liability to those who either owned or controlled the property at the time of the discharge, or who had control over the hazardous substance that caused the contamination. For example, the Court held a corporation liable for cleanup and removal costs resulting from mercury contamination, caused by its subsidiary that was seeping into a nearby creek. A few years later, the Court found corporate owners of two service stations liable for groundwater contamination in a town, but provided no discussion on how the contamination had been traced from the service stations to the town.

1 F. Paul Pittman handles environmental and toxic tort, product liability, complex litigation and class action matters. Mr. Pittman has defended several major oil companies in dozens of cases nationwide brought by individuals, public and private utilities and state governments in state and federal courts for their use of a gasoline additive that has been found in various public and private water sources. Mr. Pittman also has experience defending against class certification and approval of class settlements in those and other cases, including product liability litigation by boat owners against major oil companies for their use of ethanol in fuel. Mr. Pittman has experience in all phases of litigation, with an emphasis on pre-trial defense and preparation.


3 N.J.S.A. 58:10-23.11.

4 *New Jersey Turnpike Authority v. PPG Industries, Inc.*, 197 F.3d 96 (3d Cir. 1999).


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CALIFORNIA IMPOSES NEW LIMITS ON DEPOSITIONS

By: Deborah A. Smith and Richard R. Ames

California Governor Jerry Brown signed a law generally limiting California depositions to seven hours of testimony. This law took effect on January 1, 2013, and adds a new limitation on discovery in California. While the application of the rule appears to try and bring California deposition practice closer to Federal practice, it does not add any of the other Federal Court procedures including mandatory disclosures, duty to supplement discovery responses without request, Rule 11 sanctions, and partial summary judgment. This new limitation on discovery may make it more difficult to resolve cases on the merits in many complex cases where the exceptions do not swallow the rule.

The scope of discovery in California is, in principle, broad. The parties are entitled to the discovery of all relevant evidence, and all information, not subject to privilege, that is “reasonably calculated to lead to the discovery of admissible evidence.” California does not impose any mandatory disclosure on parties to disclose all relevant or discoverable information in their possession. By contrast, the Federal Rules impose a mandatory early discovery meeting, and require all parties to affirmatively disclose all evidence that party will use at trial to support their claims. The Federal Rules also impose a mandatory duty to supplement “in a timely manner” without waiting for a specific request if the information has not been made available through discovery. California, by contrast, provides for a limited number of supplemental interrogatories, and imposes no duty to supplement.

This article is not intended to be a full outline of the differences between California and Federal discovery practice – others have performed this task. However, these overall guidelines are meant to outline the general difference in emphasis between the California discovery scheme and the Federal Rules. A brief review of the new rule and the exceptions to the new rule is a must for any attorney handling a case where the deposition testimony of one or more percipient witnesses may be the only evidence presented on any issue.

The New Rule:

The full text of California Civil Procedure (“CCP”) section 2025.290 follows:

(a) Except as provided in subdivision (b), or by any court order, including a case management order, a deposition examination of the witness by all counsel, other than the witness’ counsel of record, shall be limited to seven hours of total testimony. The court shall allow additional time, beyond any limits imposed by this section, if needed to fairly examine the deponent or if the deponent, another person, or any other circumstance impedes or delays the examination.

(b) This section shall not apply under any of the following circumstances:

(1) If the parties have stipulated that this section will not apply to a specific deposition or to the entire proceeding.

(2) To any deposition of a witness designated as an expert pursuant to Sections 2034.210 to 2034.310, inclusive.

(3) To any case designated as complex by the court pursuant to Rule 3.400 of the California Rules of Court, unless a licensed physician attests in a declaration served on the parties that the deponent suffers from an illness or condition that raises substantial medical doubt of survival of the deponent beyond six months, in which case the deposition...
examination of the witness by all counsel, other than the witness’ counsel of record, shall be limited to two days of no more than seven hours of total testimony each day, or 14 hours of total testimony.

(4) To any case brought by an employee or applicant for employment against an employer for acts or omissions arising out of or relating to the employment relationship.

(5) To any deposition of a person who is designated as the most qualified person to be deposed under Section 2025.230.

(6) To any party who appeared in the action after the deposition has concluded, in which case the new party may notice another deposition subject to the requirements of this section.

(c) It is the intent of the Legislature that any exclusions made by this section shall not be construed to create any presumption or any substantive change to existing law relating to the appropriate time limit for depositions falling within the exclusion. Nothing in this section shall be construed to affect the existing right of any party to move for a protective order or the court’s discretion to make any order that justice requires to limit a deposition in order to protect any party, deponent, or other natural person or organization from unwarranted annoyance, embarrassment, oppression, undue burden, or expense.

The exceptions and what to know about them:

In the new rule, subsections 2025.290(b)(1), (2), and (5) remove the limitation where parties have stipulated, or with respect to the depositions of experts, or of a party’s Person Most Qualified under section 2025.230. However, parties should be sure to memorialize any specific stipulations regarding a change in discovery rules in writing, and be sure that necessary court approval is obtained if required by local rules or case management orders.

Section 2025.290(3) modifies the presumptive limitation to fourteen hours in any case in which a licensed physician attests that a deponent suffers from an illness that “raises substantial medical doubt” of survival of the deponent beyond six months. This exception will likely swallow the rule in any case in which a plaintiff suffers from a potentially terminal cancer that could give rise to preference status under section 36(d) of the Code of Civil Procedure – a section which provides for a trial date in a scant 120 days, but which does not provide for any mandatory disclosures or other methods to ensure that both sides have equal access to information prior to trial. In some complex cases, such as asbestos cases, parties and some jurisdictions have modified these rules, but this limitation seems likely to spur a new round of discovery battles over the length of these depositions.

Section 2025.090 also excepts any case designated as complex by the court pursuant to Rule 3.400 of the California Rules of Court. The designations of some cases, including asbestos cases, have been routine as a matter of course. However, with the adoption of this new rule, parties are thinking twice about designating their cases that do not fall under the requirements for preference status as complex at filing and at least one court has asked the question of whether such cases should lose their complex designation generally.

There is an additional blanket exception for cases brought by an employee or applicant for employment against an employer for acts or omissions arising out of or relating to the employment relationship contained in section 2025.290(4). Finally, any new party to a case will be permitted to notice another deposition subject to the rules limitation per section 2025.090(6).

However, any party in these cases who wishes to limit a deposition may still seek a protective order to prevent unduly burdensome, harassing, or oppressive examination. Conversely, any party may also request that the court make any order that justice requires to expand the limits.

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7 Cal. Code Civ. Proc. 2024.060
What to consider for your next case in California:

If you have a complex multi-party case, the issues will vary widely between defendants, and may span years or decades. Issues of causation, general background, family histories, education, standards of care across divergent industries, varied work histories, complex damages and interpersonal relationships all may be at play. Parties and attorneys may have previous cooperative or adversarial relationships. Parties faced with limited deposition time must carefully conduct discovery, and follow-through with motions to compel if information is not forthcoming, to have basic framework of evidence within which to conduct a limited, effective, and informed deposition. No modifications were made to the discovery statutes, so parties will need to be proactive in discovery practice to have Courts grant motions to compel if necessary.

For the adverse party, having limited the time to conduct a discovery deposition of an adverse witness may cause that party to avoid areas of inquiry into legitimate information that would lead to relevant and critical information. To avoid this result, careful written discovery and additional motion practice should be planned and executed. For parties for whom a limited deposition allows them to game the system by evasive or vague discovery responses and limited deposition time for their adversary, this rule change promises potential for better results based on uncertainty.

address policy concerns regarding the general public’s exposure to chemicals, product liability claims focus on individual plaintiffs. Thus, in many respects, each analysis is designed to answer very different questions regarding issues of whether a chemical, in fact, poses a health risk, what exposure levels are of concern, and to what extent, if any, a manufacturer has a duty to address potential safety issues.

This article briefly discusses these important distinctions and identifies several key points that manufacturers and product liability attorneys should keep in mind as states begin to implement green chemistry reporting and AA submissions.

Green Chemistry: A Brief Overview

To date, Green Chemistry programs have been adopted in California, Connecticut, Maine, Michigan, Minnesota, and Washington. The programs differ in terms of scope and requirements, but they share the same underlying goals of identifying and evaluating potentially hazardous chemicals and using this information to minimize or eliminate the risk of consumer harm. To these ends, the Green Chemistry programs typically require that:

- the state identify and prioritize lists of potentially toxic chemicals;
- manufacturers of regulated consumer products report the presence of listed chemicals in covered products; and
- manufacturers, at least in some states, perform an AA that evaluates potentially safer alternatives to listed chemicals used in the products (referred to in this article as "target" chemicals) and report their findings to the state.

The AA Requirement

Although only a few states have adopted or proposed detailed AA requirements as part of their Green Chemistry initiatives, it is already apparent that manufacturers will have to develop considerable amounts of information regarding target chemicals used in their products and any safer alternatives. An “alternative” might include not only a replacement chemical that may pose fewer health or environmental risks, but also non-chemical substitutes, product redesign, new manufacturing processes, or the removal of the target chemical from the product. Manufacturers and/or state agencies will then use these data to compare the chemical and alternatives to determine whether it is possible to reduce or eliminate any hazards associated with the product.
There are three AA programs currently in various stages of enforcement or development. Maine’s program has taken effect and currently applies to children’s products containing Bisphenol A (“BPA”) and nonylphenols and nonylphenol ethoxylates. Washington’s law has also taken effect. It applies only to children’s products, but includes a greater number of chemicals than the Maine program. Washington does not mandate AA submissions, but encourages manufacturers to voluntarily conduct AAs using guidance materials now being developed by the state. California has proposed several versions of draft regulations, the latest issued in July 2012, that cover a broad range of consumer products and would require submittal of an AA that meets 13 enumerated statutory factors. While these programs differ in some respects, all three require information that will be of interest to plaintiffs in product liability cases.

With regard to target chemicals, such information includes the:

- nature of the chemical and the amount used in each regulated product;
- function of the chemical in the product;
- likelihood of exposure through product use and exposure pathways; and
- human health and environmental risks posed by the chemical.

As for potential alternatives, relevant information includes the:

- availability, costs, and product performance of each identified alternative;
- present commercialization of the alternatives or barriers to marketplace entry;
- potential exposure levels to replacement chemicals and exposure pathways; and
- human health and environmental risks associated with the alternatives.

In Maine, a manufacturer must produce an AA report, but is not required to indicate as part of the AA whether it will adopt an alternative or continue using the target chemical, at least as a general principle, although BPA is subject to special and different treatment. California’s proposed regulations take a slightly different approach, requiring the manufacturer, as part of the AA, to actually select an alternative or indicate that no changes to the product will be made. Both programs, however, require that information submitted as part of the AA process, including the AA reports, be made publicly available subject to trade secret or confidentiality claims. Even a voluntary AA that is submitted to a state agency, as might be the case in Washington, could be subject to a FOIA request and, in any event, could be obtained in litigation through the discovery process.

**Implications for Product Liability**

There are several aspects of the AA process that could be relevant in the product liability context. In putative design defect actions, arguments to support that a product’s design is defective will often include evidence that foreseeable risks of harm, such as those associated with chemical exposures, could have been reduced or avoided through a reasonable alternative design. Under this “risk-utility” approach, the product and potential alternatives are compared. Various factors are typically considered, including cost, technical feasibility, functionality, and relative risks or hazards to human health. This looks much like the AA process and, thus, parties in a product liability suit will likely battle over whether the AA report should come into evidence or whether it is relevant to a given expert’s opinion.

In failure to warn claims, moreover, a design defect may be established in many states by showing that foreseeable risks of harm could have been reduced or avoided by adequate instructions or warnings. In particular, courts will ask if the manufacturer knew or should have known of the hazards at the
time of manufacture. Similarly, AA provisions ask manufacturers to provide information regarding the potential risks of a target chemical. For instance, in Maine and under California’s proposed rules, the AA report must identify the human health and environmental hazards of the target chemical, including information like toxicological endpoints (e.g., skin irritation, reproductive effects, cancer) and pathways of exposure (e.g., inhalation, dermal, ingestion). An AA report, therefore, might also be viewed by product liability litigants as relevant to this type of claim.

In addition, information regarding potential chemical exposures may be pertinent to claims like fear of disease or medical monitoring, at least where those causes of action are recognized under state law. For example, in states that have already adopted Green Chemistry statutes, courts have allowed fear of disease claims where the plaintiff has been exposed to a chemical and the resulting fear is deemed reasonable. Similarly, at least in California, medical monitoring costs may be recovered as damages in a negligence action where, through reliable expert testimony, the need for future monitoring is deemed reasonable and necessary. Given the broad scope of information that will be contained in AA reports, including data regarding public exposures, AA analyses will likely become a focus in these types of suits as well.

It is important to note that, depending on the information and conclusions contained in an AA report, the AA process may be helpful to either plaintiffs or defendants in a product liability suit. For instance, once an AA report concludes that safer alternatives exist, the redesigned product as envisioned during the AA process may become the alleged industry standard or state-of-the-art that plaintiffs will point to when establishing a prima facie case. Conversely, an AA report may conclude that there are no safer alternatives and the product as designed is representative of industry standards or the state-of-the-art, thus aiding in a manufacturer’s defense. The same could be true for failure to warn claims. The AA report might point to potential hazards that had not been previously disclosed by the defendant or provide conclusive evidence that the manufacturer has adequately warned against known risks. Another wrinkle, however, is that if a state determines the AA is inadequate, it may be able to commission an independent AA (and charge businesses for the cost of preparing it).

Finally, with regard to how an AA report is employed by one side or the other, its use will not necessarily be limited to a case involving the manufacturer who actually prepared and submitted the report. For example, a party or its experts could use information produced by a manufacturer in one state in a case involving a company producing the same type of product in another state, even where the latter state has no Green Chemistry statute.

Limitations of an AA Report

While an AA report, in certain cases, will go a long way in helping at least one side litigate a product liability claim, the AA process will not address other types of information that will be relevant to the suit. In addition to establishing a product defect or other wrongful conduct, a plaintiff must also prove that he/she was exposed to a target chemical in amounts that could have caused the plaintiff’s injury. Simply showing that a product contains a target chemical will not be enough for a plaintiff to win a case. Central to any chemical exposure claim is the notion that “the dose makes the poison.” Specifically, a plaintiff must demonstrate that: (1) the target chemical can cause the alleged disease and at what dose; and (2) he/she was exposed to the chemical at or above such dose so one may draw the inference that the chemical, in fact, caused the individual’s disease. In other words, the plaintiff must submit evidence establishing a “dose-response” relationship.

An AA report, however, will not contain all of this information, and will have virtually nothing to do with any scientifically supportable dose-response analysis. In Maine and under California’s proposed regulations, for example, a given chemical may be subject to AA requirements even if the product does not result in exposures at or above a certain dose-response level. Courts and litigants should be particularly sensitive to this distinction, as chemicals are often used in products in only trace amounts or are encapsulated in the product thus minimizing the chance of exposure. Nothing in an AA report, moreover, will speak to an individual

17 Id.
19 See, e.g., Potter v. Firestone Tire and Rubber Co., 863 P.2d 795, 816 (Cal. 1993) (allowing California claim where plaintiff proves fear stems from knowledge that it is more likely than not that cancer will develop in the future due to toxic exposure); In re Moorenovich, 634 F. Supp. 634, 637 (D. Me. 1986) (permitting Maine claim where there is exposure and alleged anxiety is reasonable); Pilson v. Key Tronic Corp., 701 P.2d 518, 524 (Ct. App. Wash. 1985) (finding Washington claim reasonable where there was actual exposure to toxic chemicals).
20 Potter, 863 P.2d at 824-25.
plaintiff’s actual level of exposure to a target chemical, thus leaving the parties with significant proof issues to fight over notwithstanding the AA process.

Even in cases involving fear of disease and medical monitoring claims, where there has been no showing of a present physical injury, more than just mere presence or even exposure to a chemical is often required. For example, in California, the plaintiff pursuing a fear of disease claim must show that it is more likely than not that the disease will manifest itself in the future. Moreover, in medical monitoring claims, California courts look to various factors, including the significance and extent of the plaintiff’s exposure, and the relative increase in risk to the plaintiff as a result of the exposure. As with the more traditional product liability claims discussed above, this type of information specific to the individual plaintiff would not be contained in any AA report.

**Conclusion**

Regulatory requirements associated with Green Chemistry initiatives are not the only issues that interested parties should be focused on. Broader considerations are at play, especially with regard to product liability litigation, when considering the overall impact of the AA process.

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22 Potter, 863 P.2d at 816.
23 Id. at 823.
Some Effective “Imminent and Substantial Endangerment” Defenses

Defendants facing a RCRA citizen suit will be well-served to avail themselves of defenses stemming from the “solid or hazardous waste may present an imminent and substantial endangerment” element. These defenses are powerful because they can often be successfully employed at relatively early stages of the litigation.

Although RCRA does not define the operative terms, judicial opinions provide much guidance on the meaning of these words as used in the statute. In the seminal case of Meghrig v. KFC Western, Inc., the Supreme Court defined “imminent” as follows: “[a]n endangerment can only be ‘imminent’ if it ‘threaten[s] to occur immediately’ and the reference to waste which ‘may present’ imminent harm quite clearly excludes waste that no longer presents such danger.” 11 The Court continued that this language of the statute “implies that there must be a threat which is present now, although the impact of the threat may not be felt until later.” 12

Courts have interpreted the term “endangerment” as “a threatened or potential harm,” which does not necessarily require proof of actual harm. 13 Finally, courts will find an endangerment “substantial” if it poses a serious threat of harm to the plaintiff’s health or the environment. 14 The interplay of these operative terms allows a court to find this element satisfied if a plaintiff proves that “there is a reasonable cause for concern that someone or [the environment] may be exposed to a risk of [serious] harm by release, or threatened release, of hazardous substances in the event remedial action is not taken.” 15

1. Defense Presented When the Risk of Harm is Demonstrably Low

Defendants can extricate themselves from citizen suits by demonstrating that plaintiff’s allegations only show a low risk of harm from the alleged endangerment the waste poses. In Price v. U.S. Navy, a pivotal case that is frequently relied upon by defendants to defeat citizen suits, the Ninth Circuit determined that the presence of contaminants on a property adjacent to plaintiff’s property presented a low risk of harm. 16

Plaintiff’s house, and several neighboring properties, was located on top of a former Navy junkyard that was previously used to dump waste containing lead, copper, zinc, and asbestos. After the contamination was discovered, the state successfully remediated the site, including remediating plaintiff’s property in such a way that eliminated the only possible pathway of exposure to contaminated soil under her house. Nevertheless, plaintiff commenced a citizen suit alleging that due foundation problems with her home, she would need to excavate the contaminated soil under her home to fix the problems, thereby potentially endangering her and her family. 17 In affirming the district court’s grant of defendant’s summary judgment motion, the Ninth Circuit found that there was a low risk of harm because plaintiff failed to show that there was “a hazardous level of contamination under her foundation” as the soil under her house was not tested. 18 Additionally, the testing of soil found in the cracks of her foundation did not reveal any contamination, thereby failing to meet the imminent and substantial endangerment element.

Defendants were similarly successful in obtaining summary judgment on plaintiffs’ RCRA citizen suit claim in Adams v. NVR Homes, Inc. 19 There, plaintiffs were purchasers of homes in a subdivision that was located on a former sand and gravel mine. During the mine’s operation, hazardous waste was dumped on various portions of the site. 20 The mine ceased operations in the
early 1970’s and was thereafter sold. The purchasers began reclaiming the site with fill material and by the late 1980’s, it had been filled completely and capped with topsoil. The property was eventually sold to a property developer who had the site examined by an environmental consulting firm, which concluded that the “site did not contain any hazardous materials or environmental contamination.” The developer thereafter sold numerous lots on the site to defendant NVR Homes, Inc. (“NVR Homes”), one of several defendants in the case.

In 1996, NVR Homes began constructing homes on various lots it had purchased in the site, which became known as the Calvert Ridge subdivision. On September 2, 1998, three houses in the subdivision, none of which was involved in the case, were evacuated after elevated levels of methane gas were detected in each house. Immediately thereafter, NVR Homes installed natural gas detectors and a passive ventilation system in the houses it was constructing, each of the house. Additionally, NVR Homes retained two engineering firms and several independent experts to discern the source of the methane problem at Calvert Ridge. It was determined that the fill below one of the lots in the subdivision (a lot that was not involved in the case) was the primarily source of the methane generation. The lot was thereafter excavated and remediated with clean fill.

The plaintiffs in Adams were seventeen families who bought homes in the Calvert Ridge subdivision. After the September 2nd incident, methane levels at plaintiffs’ homes were tested on more than 175 occasions, resulting in negative results on every occasion with the exception of one instance. Additionally, plaintiffs’ natural gas detectors alarmed dozens of times and elevated methane levels were detected in the yards of certain homes. Most of these alarms, however, were due to identifiable sources unrelated to the methane gas.

In Adams, plaintiffs alleged that, inter alia, the decomposing material used to fill the sand and gravel mine generated elevated levels of methane gas that could potentially cause fires and explosions in their homes and yards. In granting defendants’ summary judgment motion, the court determined that explosive levels of methane gas were never detected inside any of the plaintiffs’ homes in the 175 tests that were conducted. The court also found that on the few occasions that explosive levels of methane gas were found in the plaintiffs’ yard, no substantial harm was demonstrated because methane gas must be in a confined space with an ignition source in order to pose a threat of explosion. Accordingly, the court concluded that the contamination posed a low risk of harm and granted defendants’ summary judgment motion.

Where the plaintiff can only prove a low risk of harm, like in Price and Adams, defendants have a strong argument that the imminent and substantial endangerment standard element cannot be satisfied. 2. Defense Against Contamination in Excess of State Regulatory Levels

While a plaintiff may argue that contamination above a state threshold governing hazardous waste establishes the imminent and substantial endangerment element; defendants can successfully seek summary judgment. In fact, defendants often defeat RCRA citizen suits at the summary judgment stage even though contamination is in excess of a state regulatory level.

The Third Circuit discussed at length the applicability of state regulatory levels to citizen suits in Interfaith Community Organization v. Honeywell International, Inc. In Interfaith, when a RCRA citizen suit was in the district court, the court required the plaintiff to prove that the contamination complained of was in excess of state regulatory guidelines. On appeal to the Third Circuit, although it observed that if an error is made in applying the substantial endangerment standard, the error should be made “in favor of protecting public health, welfare and the environment[,]” the court nevertheless

21 \textit{Id.}
22 \textit{Id. at 682.}
23 Adams, supra note 18 at 684. While not toxic or poisonous, methane gas can explode when atmospheric levels of it reach at least 5% and the gas is “mixed with oxygen in a confined space and ignited by a spark.” High concentrations of methane gas can also lead to asphyxiation. \textit{Id.} at n.6.
24 \textit{Id.}
25 \textit{Id. at 684.}
26 \textit{Id. at 688.}
27 \textit{Id. at 689.}
28 Adams, supra note 18 at 688-89.
29 \textit{Id. at 688.}
30 \textit{Id. at 689.} The same conclusion was reached in Sierra Club v. Gates, 2008 U.S. Dist. LEXIS 71860, *107-14 (S.D. Ind. Sept. 22, 2008), where the court determined that a company’s manufacture, shipment, and subsequent incineration of a chemical warfare agent presents a low risk of harm.
31 399 F.3d 248 (3rd Cir. 2005).
determined that the district court erroneously required the plaintiff to prove that the contamination exceeded state levels.\(^{32}\) In fact, the Third Circuit specifically stated that “substantial endangerment” does not require proof above state thresholds. It also articulated its belief that Congress did not intend citizens suits “to be dependent upon the states in such a manner, and [that] that statutory language [of the provision] provides no support for such dependency.”\(^{33}\) The court concluded that while contamination above state regulatory standards could support citizen suit liability in some cases, requiring a plaintiff to prove contamination above those levels is unjustified. When this analysis is taken further, it is apparent that contamination above such levels is not dispositive proof of the imminent and substantial endangerment element.

*Cordiano v. Metacon Gun Club, Inc.* illustrates the point well.\(^{34}\) In *Cordiano*, Metacon operated a private outdoor shooting range. Metacon admitted that, as a result of spent casings and munitions, thousands of pounds of lead were deposited at the shooting range yearly. A State of Connecticut Department of Environmental Protection (“CTDEP”) investigation revealed that surface water and groundwater samples from the Metacon site exceeded Connecticut’s Remediation Standard Regulation (“RSR”).\(^{35}\) Due to quality control concerns with the sampling, however, CTDEP requested that Metcon retain an expert to conduct another round of sampling. Metacon hired Leggette, Brashears & Graham, Inc. (“LBG”) to conduct the requested sampling. Contrary to CTDEP’s previous test, LBG found no evidence of lead contamination at the Metcon property.

Thereafter, plaintiffs, who were a group of residents who lived close to the Metacon site, retained their own expert, Advanced Environmental Interface, Inc. (“AEI”).\(^{36}\) Unlike LBG, which had only tested groundwater and surface water, AEI also tested the soil and wetlands sediment in addition to the groundwater and surface water at the Metacon Site. AEI found that the soil was contaminated with lead in excess of CTDEP Direct Exposure Criterion (“DEC”) for residential sites, with several samples exceeding the Significant Environmental Hazard notification threshold. AEI also found that the wetlands sediments were contaminated with lead above the DEC and determined that some surface water samples exceeded CTDEP regulatory levels. AEI concluded that the spent ammunition contaminated the Metacon site with lead; however, it advised that a risk assessment would be needed to determine the degree of risk to humans and wildlife.\(^{37}\)

Plaintiffs thereafter initiated a RCRA citizen suit, among other causes of action, against Metacon and its members and guests. Despite AEI’s conclusion that the lead contamination exceeded CTDEP’s regulatory standards. Metacon successfully moved for summary judgment in the district court. Citing *Interfaith*, the Second Circuit noted on appeal that “state environmental standards ‘do not define a party’s federal liability under RCRA.’”\(^ {38}\) The court relied on the fact that the AEI report stated that a risk assessment should be conducted to determine the risk posed to humans and wildlife. It rejected plaintiffs’ argument that contamination above CTDEP’s limits was dispositive proof of the imminent and substantial endangerment element. Accordingly, the court concluded as follows:

In sum, the evidence that certain samples taken from the Metacon site exceeded Connecticut’s RSR and SEH standards simply provides an inadequate basis for a jury to conclude that federal law, specifically, [the RCRA citizen suit provision], has been violated. Absent additional evidence, the mere fact that [plaintiffs have] produced such samples does not support a reasonable inference that Metacon’s site presents an imminent and substantial endangerment.\(^{39}\)

The *Cordiano* case is by no means an anomaly. The Eastern District of California recently reached the same conclusion in *City of Fresno v. U.S.*\(^{40}\) There, Fresno’s citizen suit was defeated pursuant to defendant’s motion on the pleadings although the contamination complained of was in excess of state regulatory levels. Some instances

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32 Id. at 269.
33 Id. at 260.
34 575 F.3d 199 (2nd Cir. 2009).
35 Id. at 203.
36 Id.
37 Id. at 203-04.
38 Id. at 212.
39 Id. at 214.
40 709 F. Supp. 2d 888 (E.D. Cal. 2010).
of the offending contamination was greater than 100 times the applicable California regulatory threshold. Nevertheless, the court concluded that such evidence alone “does not support a reasonable inference that the contamination presents an imminent and substantial endangerment to health or the environment.”\textsuperscript{41} Likewise, in 2011, the Western District of New York granted summary judgment to a pesticide formulations company defending a RCRA citizen suit when the contamination at its facility exceeded state regulatory levels.\textsuperscript{42} In granting defendant’s motion, the court observed that the state regulations plaintiffs relied upon “do not define a party’s federal liability under RCRA, nor do they mandate remediation when soil levels are found to exceed the cleanup standards. Without any evidence linking the cited standards to potential imminent and substantial risks to human health or wildlife, reliance on the standards alone presents merely a speculative prospect of future harm, the seriousness of which is equally hypothetical.”\textsuperscript{43}

In sum, where the sole basis of a citizen suit is contamination above state regulatory levels, defendants have a potent argument that such evidence by itself is insufficient to satisfy the “imminent and substantial endangerment” standard. Indeed, defendants often use this argument to defeat the citizen suit via a summary judgment motion. This argument is particularly strong when the state regulations are non-binding or are risk assessments or thresholds that do not require action or remediation.

**Lack of Redressability Defense**

Whether certain relief is actually and legally available in citizen suits is another potentially powerful defense. Initially, to state what might be the obvious, if a plaintiff cannot articulate the appropriate relief under RCRA, courts will dismiss the action. To be certain, monetary damages are not permissible in citizen suits. A plaintiff can only seek injunctive relief: “a private citizen suing under [the citizen suit provision] could seek mandatory injunction, \textit{i.e.}, one that orders a responsible party to ‘take action’ by attending to the cleanup and proper disposal of toxic waste, or a prohibitory injunction, \textit{i.e.}, one that ‘restrains’ a responsible party from further violating RCRA.”\textsuperscript{44} However, a citizen suit seeking solely money damages, or one where injunctive relief would not benefit plaintiff is not cognizable under RCRA.

In *87 Street Owners Corp. v. Carnegie Hill-87th Street Corp.*, defendant successfully moved for summary judgment after the court determined that injunctive relief would be ineffective.\textsuperscript{45} In that case, plaintiff and defendant were neighboring property owners. Plaintiff commenced a RCRA citizen suit alleging that oil contamination emanating from defendant’s storage tank presented an imminent and substantial endangerment. When plaintiff commenced its suit, however, the New York Department of Conservation (“NYDEC”) was already supervising remediation efforts on defendant’s property. With the NYDEC already conducting remediation activities on the site, the court determined that it could not fashion any further injunctive remedy and granted defendant’s summary judgment motion:

> Although there are material issues of fact regarding the existence of an imminent and substantial danger within the meaning of RCRA, summary judgment for defendant will nevertheless be granted, because plaintiff has been unable to establish a need for injunctive relief, or even to suggest a form of injunctive relief that could abate whatever environmental danger may be present.\textsuperscript{46}

The Western District of Pennsylvania recently reaffirmed this defense in *Trinity Industries v. Chicago Bridge & Iron Co.* The court determined that since defendant had entered into a consent order requiring that it remediate the potentially endangering contamination, injunctive relief was inappropriate: “the court will grant summary judgment in favor of [defendant] because there is no meaningful relief available under RCRA in light of the Consent Order.”\textsuperscript{47} *Trinity Industries and 87 Street Owners* are important cases because, although both courts found that there were material issues of fact, they nevertheless granted the defendants’ summary judgment motions because meaningful injunctive relief could not have been issued in either case.

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\textsuperscript{41} \textit{Id.} at 930.  \\
\textsuperscript{42} 786 F. Supp. 2d 690 (W.D.N.Y. 2011).  \\
\textsuperscript{43} \textit{Id.} at 710.  \\
\textsuperscript{44} Meghrig, supra note 3 at 486.  \\
\textsuperscript{45} 251 F. Supp. 2d 1215 (S.D.N.Y. 2002).  \\
\textsuperscript{46} \textit{Id.} at 1217.  \\
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Similarly, the court in 3000 E. Imperial, LLC v. Robertshaw Controls Co., granted defendants’ summary judgment motion, which successfully argued that since it had already entered into a settlement agreement to remediate the subject property, no relief was available under RCRA.\textsuperscript{48} This case is pivotal because a successful plaintiff can generally recoup attorneys’ fees under RCRA’s fee-shifting provision.\textsuperscript{49} Here, however, plaintiff sought an award of attorneys’ fees although defendants’ summary judgment motion was granted. The court explained that only “prevailing parties” are entitled to a fee award under the statute. Since plaintiff’s was not entitled to injunctive relief under its citizen suit, it was not a prevailing party and not entitled to fees.\textsuperscript{50} Therefore, plaintiff’s citizen suit was defeated on summary judgment and it was not entitled to fees.

CONCLUSION

Plaintiffs pursuing damages for environmental contamination most often utilize the obvious causes of action - strict liability, public and private nuisance, trespass, negligence and other potential common law claims. However, when looking for leverage, plaintiffs more frequently are filing RCRA citizen suits or including RCRA causes of action. Clients and lawyers unfamiliar with defending these kinds of claims need to know that there is a potent arsenal available using some of the weapons outlined in this article. Discovery, preparation and timing, as always, is important, but bringing in defense counsel with experience will more than pay dividends for the defense.\textsuperscript{52}

ILLINOIS- ONE STATE...

\textit{Continued from page 20}

have latched onto the fourth prong – the compensability exception – as a means of avoiding the exclusivity provision and seeking damages outside of the Act.

Split in Authority

The Act contains a statute of repose that prohibits a plaintiff from seeking compensation for an alleged asbestos-related injury when the alleged injury did not manifest itself within three years of the last exposure, or where the claim was not filed within twenty-five years following the last exposure. See 820 ILCS 310/1(f) and 6(c); 820 ILCS 505/6.

Plaintiffs filing suit against employers in Madison County have interpreted the Act’s statute of repose as a means to bypass the exclusivity provision. Specifically, plaintiffs argue that the “noncompensable” exception allows time-barred claims under the Act to proceed against employers outside of the Act, and thus, bypass the exclusivity provision. Judge Harrison, who oversees the asbestos docket in Madison County, has adopted this analysis. See Martin v. Fru-Con Construction Corp., No. 10 L 1128; Lehr v. Air & Liquid Systems Corp., No. 12-

L-79.\textsuperscript{4} Judge Harrison bases his holdings on the Fifth District’s ruling in \textit{Toothman} – a non-asbestos and non-statute of repose case. 304 Ill. App. 3d 521 (5th Dist. 1999). In \textit{Toothman}, the plaintiffs alleged emotional distress injuries resulting from their employer’s work place conduct. \textit{Id}. The Fifth District held that when the claimant does not seek medical care for emotional distress injuries, such claims are not covered under the Act. \textit{Id. at 534}. Therefore, because the plaintiffs’ damages were not “recoverable” through a workers’ compensation claim, they could proceed against their employer in a common law action. \textit{Id}.

Applying the \textit{Toothman} holding to asbestos cases, Judge Harrison has permitted a plaintiff whose claim is time-barred under the Act to proceed against an employer in a civil action. From the bench, Judge Harrison has explicitly expressed frustration with the \textit{Toothman} analysis and has noted that the Fifth District’s comparison of “compensability” to “recoverability” is a “little unusual” but that it “seemingly would be binding upon” him. Martin v. Fru-Con, No. 10 L 1128. He went further when ruling on this issue in Lehr v. Air & Liquid Systems Corp., asserting that his decision does not “accord with public policy of any sort” and operates

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\item[4] Judge Harrison recently granted a Defendant’s Motion for Summary Judgment based on Illinois’ Workers’ Compensation exclusivity provision. See \textit{Giles v. Air & Liquid Systems}, No. 12-L-44. There, however, the non-compensability exception was not at play, as the statute of repose had not expired. Similarly, Judge Harrison has granted Motions for Summary Judgment where another state’s law applies. See, e.g., Hanson v. Convex Corp., No. 10-L-1277 (applying Minnesota law).
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in a “manner completely contrary to the way the [A]ct was designed to work”:

    I believe [my decision] is the way the statute operates as explained by the Toothman court. It has nothing to do with the legislative history and public policy of the [A]ct that’s been outlined on numerous occasions. I cannot tell you it accords with that, rather it accords with this strange exception that Illinois has.

    Lehr v. Air & Liquid Systems Corp., File No. 12-L-79. Despite his explicit hesitation, Judge Harrison continues to allow plaintiff to proceed in a common law action against his employer.

    In contrast, Judge Maddux – the judge presiding over the asbestos docket in Cook County – interprets the “noncompensable” exception to refer to whether the plaintiff’s particular injury is covered by the Act. In other words, Judge Maddux interprets this exception to allow a plaintiff to proceed in a common law action against an employer only if the alleged injury is not contemplated by the Act. Because asbestos-related injuries are explicitly contemplated by the Act, plaintiffs filing in the Circuit Court of Cook County are barred from bringing common law asbestos actions against their employers. Further, as interpreted by Judge Maddux, whether or not a plaintiff’s claim is barred under the Act has no bearing on whether the alleged injury is compensable – i.e., contemplated by the Act. See Folta v. A Special Electric Service & Supply Co., et al., 11 L 6753, Order filed March 23, 2012.

    Furthermore, this interpretation has been consistently applied by federal courts reviewing Illinois law, as well as by other states analyzing its own workers’ compensation statutes. See, e.g., Bogner v. Airco, Inc., 2003 WL 24121083 at *10 (C.D. Ill. Apr. 1 2003) (analyzing Illinois law and holding that common-law action barred even though compensation benefits not recoverable due to statutory time limitations); Ganske v. Spahn and Rose Lumber Co., 580 N.W.2d 812, 816 (Iowa 1998) (claim was time-barred under workers’ compensation act but act was still plaintiff’s only remedy for mesothelioma); Welden v. Celotex Corp., 695 F.2d 67, 71 (3d Cir. 1982); Tomlinson v. Owens-Corning Fiberglass Corp., 244 Kan. 506 (1989) (workers’ compensation act covered plaintiff’s asbestos-related disease and was his exclusive remedy, even though a time-bar prevented him from receiving benefits). 5

Ramifications

    Judge Harrison’s interpretation of the Act significantly diminishes the strength and import of the exclusivity provision as well as the statute of repose contained within the Act. A plaintiff in Harrison’s courtroom may bring a common law action against his employer – even when the Legislature has explicitly barred such an action – if he can show that he could not recover monetary damages through a workers’ compensation claim. The same plaintiff in Judge Maddux’s courtroom would be barred from bringing such an action. Illinois’ split in authority on this issue will further compel plaintiffs to forum shop and file cases in Madison County. Judge Harrison’s self-admitted “unusual” interpretation of the Act is presently confined to Madison County, Illinois. However, should other states carve out similar exceptions, the workers’ compensation bars that currently protect employers from common law actions stand to be significantly undermined. 57

5 While a trial court in Missouri has recently held that occupational diseases are no longer exclusively covered by the Missouri Workers’ Compensation Act, the court’s reasoning differed from Judge Harrison’s analysis and was based on a recent amendment to Missouri’s Workers’ Compensation statute. State ex. rel. KCP&L Greater Missouri Operations, Co. v. The Honorable Jacqueline Cook, No. 73462 (Mo. App. W.D., September 13, 2011).
The Court subsequently found that a landowner was subject to liability for contamination caused by a leaking underground storage tank existing on the land prior to the landowner’s purchase, even though the landowner was unaware of the existence of the underground storage tank.7 While these cases reinforced the necessity of establishing a nexus tying the discharger to the discharge under the Spill Act, they did not address, in any detail, the link between the contaminated resource and the discharge by the party.

The requirement that the DEP establish a link between a discharger, a discharge, and a contaminated resource to impose damages under the Spill Act was discussed by the United States Court of Appeals for the Third Circuit in New Jersey Turnpike Authority v. PPG Industries, Inc.8 There, the New Jersey Turnpike Authority brought claims under the Spill Act for contribution for chromium contamination (“COPR”) at seven sites along the New Jersey Turnpike against numerous defendants that were alleged to have produced chromium. The Third Circuit reviewed the District Court’s decision to grant summary judgment to the defendants, and considered the sole issue of whether the plaintiffs had presented reliable evidence that connected the defendants to the contaminated sites. The Third Circuit affirmed, stating:

The Supreme Court of New Jersey has determined that a party “even remotely responsible for causing contamination will be deemed a responsible party under the Act.” However remote a party’s responsibility under the Spill Act may be, the statute nonetheless requires some degree of particularity; one cannot be “responsible” for hazardous substance without having some connection to the site on which that substance was deposited. In other words, like CERCLA, the Spill Act places a burden on the Turnpike to demonstrate some connection or nexus between the COPR [chromium] at the site in question and the appellees in this case.9

Plaintiffs’ evidence consisted of DEP directives, deposition testimony, and an expert report, which was vague, imprecise, unreliable, and at best, only showed deliveries by the defendants to the general area where the contaminated properties were located. As a result, the proof was insufficient because it did not specifically link the chromium at any of the seven contaminated sites to any of the defendants.

New Jersey Department of Environmental Protection v. Dimant

The Court addressed the connection necessary to impose liability under the Spill Act on a discharger for costs and damages associated with the contamination of a natural resource caused by a discharge in Dimant.10 There, perchlorethylene (PCE) was detected in private wells in Bound Brook, New Jersey in 1988. The private wells were located near several dry cleaners including defendant Sue’s dry cleaning business operating since December 1987. Sue’s occupied a unit in a strip mall that had been used as a laundromat by the prior owners since the 1950’s. Sue’s owned two dry cleaning machines that utilized PCE. In December of 1988, DEP conducted a single sampling from a leaking pipe extending from the exterior of Sue’s five feet above the pavement. The leakage contained PCE at 3,000 times the New Jersey state standard. In early 1989, Sue’s stopped using dry cleaning machines. Over ten years later in 2000, a DEP geologist issued a report that identified Sue’s as one source of groundwater contamination in the area, but admittedly, did not confirm whether Sue’s or a prior operator actually caused the contamination in Bound Brook.

The DEP brought a claim under the Spill Act in New Jersey Superior Court against Sue’s and several other defendants, seeking contribution for the costs of the investigation and remediation of the contamination in the Bound Brook groundwater, and natural resource damages. The trial court dismissed the Spill Act claim finding that the DEP had not established by a preponderance of the evidence that Sue’s discharged the PCE found in the private wells. The court reasoned that despite the existence of strict liability under the Spill Act for a discharge, a “nexus between the discharge and the need for remediation and consequent damages” is still required to be shown.11 The trial court judge

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8 New Jersey Turnpike Authority v. PPG Industries, Inc., 197 F.3d 96 (3d Cir. 1999).
9 Id. at 106.
made several findings of fact, including that: 1) the groundwater contamination preceded Sue’s dry cleaning operations; 2) the drip from the outside pipe a Sue’s store was tested once and there was no evidence that the drip was continuous or intermittent, nor that the pavement onto which the drip flowed showed any signs of PCE contamination from cracking or erosion; and 3) DEP’s primary witness (geologist) was unable to establish by a preponderance of the evidence that Sue’s was specifically responsible for the PCE that contaminated the Bound Brook groundwater, where there had been other alternative sources of PCE contamination in the vicinity for over four decades.12

DEP appealed the trial court decision, arguing that the trial court misapplied the Spill Act because it failed to find Sue’s strictly liable for the PCE discharge from the outside pipe in 1988. Citing CERCLA and New Jersey Turnpike,13 DEP argued that the Spill Act must be interpreted to find that any discharge at any time imposes liability on all operators (current and past) that handled the product at a site. No direct causal connection between the discharge and the contaminated resource was necessary. The appellate court disagreed, finding that both CERCLA and New Jersey Turnpike support the notion that a plaintiff is required to establish some connection between a “hazardous substance . . . and the site on which the substance was deposited.”14 Despite the absence of an express statement in the Spill Act, the requirement that a plaintiff establish a nexus between the discharge, and the damages resulting from the contamination caused by the discharge, is implicit in the prior Court holdings. Describing DEP’s position as speculative and unsupported by the evidence, the appellate court agreed that DEP had failed to meet its burden to demonstrate that Sue’s was specifically responsible for the Bound Brook groundwater contamination, and affirmed the trial court decision.15

Undeterred, the DEP petitioned the Court to clarify the nexus required to establish liability under the Spill Act.16 This time, DEP argued that the presence of a confirmed discharge of PCE from Sue’s and detections of PCE in the groundwater under Sue’s property created the necessary causal nexus to impose liability under the Spill Act. Sue’s maintained that DEP had failed to sustain its burden of establishing a connection between any alleged discharge of PCE from Sue’s and the PCE that contaminated the Bound Brook groundwater, by a preponderance of the evidence. The Court explained that the determinative question was whether DEP had connected the discharge that occurred at Sue’s to the relief (costs and damages) it sought from Sue’s. The Court focused its analysis on the evidence presented by DEP and explained that a nexus had to be found in the first instance between the discharge and the discharger. In this regard, the Court stated as follows: “That nexus is what ties the discharger to the discharge that is alleged to be the, or a, culprit in the environmental contamination in issue.”17 Once a party is identified as a discharger, a nexus must be found to exist between the discharge and the contaminated site for which costs and damages are sought.

On this point, the Court determined that clarity was needed regarding the proof necessary to establish a nexus between a discharge and the relief sought, because the Spill Act did not definitively address this issue. The Court distinguished between liability for expenditures to clean up a discharge and liability for damages arising from the discharge itself, explaining that while liability for cleanup expenditures is imposed without regard to fault, a causal link is required for discharger liability for damages. The Court cautioned that the causal link need not rise to the standard for proximate causation, because the causation standard must accommodate the multiple forms of relief under the Spill Act, which includes injunctive relief. As such, the Court held that a reasonable nexus or causal link must be demonstrated by a preponderance of the evidence.18 A plaintiff must provide more than proof that a hazardous substance was discharged by the defendant and that the substance was found at the contaminated site. The Court stated as follows: “In an action to obtain damages, authorized costs and other similar relief, there must be a reasonable link between the discharge, the putative discharger, and the contamination at the specifically damaged site.” In addition, where the existence of a discharge is proven, a party can obtain prompt injunctive relief under the Spill Act.19

12 Id. at 540.
15 Id. at 545.
17 Id. at 177.
18 Id. at 182.
19 Id. at 182.
With regard to Sue’s, the Court found that the DEP failed to show how the PCE dripping from a pipe onto the pavement at Sue’s reasonably could have made its way to the Bound Brook private wells, noting that the case is not about PCE contamination of the asphalt, but PCE contamination of the groundwater in Bound Brook. The Court found that the evidence presented did not warrant the imposition of liability on Sue’s for damages from the tainted wells. The Court concluded by identifying the types of proof that could be offered to establish a plausible migration pathway by which a contaminant could have traveled from a defendant’s facility to a plaintiff’s site, such as an undisputed release of a contaminant into a river, underground migration or the transportation of waste from one site to the other.21

**Conclusion and Analysis**

The *Dimant* decision toughens the standard of proof required for the DEP to impose liability for damages on a discharger under the New Jersey Spill Act. Rather than simply imposing liability for damages on a discharger simply because a discharge occurred, the onus is on the DEP to establish how the contamination caused by a discharge made its way to the contaminated resource for which damages are sought. Consequently, the *Dimant* decision could influence DEP’s behavior in bringing Spill Act claims. The increased evidentiary standard required to establish a “nexus” is likely to reduce the number of actions instituted under the Spill Act. For example, in “two site” cases – migration from one site to a natural resource – DEP may be more tentative in pursuing Spill Act claims since it will have to establish a plausible migration pathway for the contaminants. Similarly, in multi-discharger cases, the DEP will have to be selective and conduct a thorough investigation in deciding which potentially responsible party to pursue, which will prevent DEP from simply selecting a “deep pocket.” More importantly, the increased evidentiary standard will increase DEP’s cost to pursue a claim. Consultants and experts will have to utilize more resources and engage in more thorough investigations and analyses to meet the standard. Ultimately, the increased costs and efforts could impede DEP’s ability (or desire) to bring claims for damages under the Spill Act.

Finally, the decision in Dimant could impact discharger liability under other statutes, including its federal analogue CERCLA. Similar to the court in *Dimant*, courts considering liability of a PRP under CERCLA have determined that “some connection” is required between a discharger and the contaminated site, while stopping short of requiring proximate causation. The similarities between CERCLA and the Spill Act, could motivate litigants to use the *Dimant* decision in support of establishing (or at least clarifying) the evidentiary standard necessary to establish the requisite nexus for discharger liability under CERCLA. 22

20 Id. at 182-183
21 Id. at 183-185
# 2013 TIPS CALENDAR

## April 2013

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<td>4-5</td>
<td>Emerging Issues in Motor Vehicle Product Liability Litigation National Program</td>
<td>Arizona Biltmore Resort &amp; Spa, Phoenix, AZ</td>
<td>Donald Quarles – 312/988-5708</td>
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<td>5-6</td>
<td>Toxic Torts &amp; Environmental Law Committee Midyear Meeting</td>
<td>Arizona Biltmore Resort &amp; Spa</td>
<td>Felisha A. Stewart – 312/988-5672</td>
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<td>13-17</td>
<td>TIPS National Trial Academy</td>
<td>Grand Sierra Resort, Reno, NV</td>
<td>Donald Quarles – 312/988-5708</td>
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<td>15</td>
<td>TIPS Premier Program</td>
<td>ABA Center for CLE</td>
<td>Earnestine Murphy – 312/988-6204</td>
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<td>19</td>
<td>Current Issues in Insurance Regulation</td>
<td>New York City Bar, New York, NY</td>
<td>Ninah F. Moore – 312/988-5498</td>
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<td>24-28</td>
<td>TIPS &amp; Judicial Division Joint Spring Meeting</td>
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<td>ADR National CLE Forum</td>
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## May 2013

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