Friendly Passages

Supporting Equal Access to Law in Florida

January/February 2016

A Publication of The Friends of the Rupert J. Smith Law Library of St. Lucie County Florida

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Published since September 2011 for the purpose of promoting intelligent education of the Bar and general public about law as a basis for growth of justice and the common welfare, while combating the indifference which might hinder such growth.

Friendly Passages — Supporting Equal Access to Law in Florida — January/February 2016

A Publication of The Friends of the Rupert J. Smith Law Library of St. Lucie County Florida

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We wish to thank our authors and other contributors for making this issue a success!

Library Holiday Schedule

Monday February 15, 2016 President's Day
Sunday March 27, 2016 Easter Sunday

On The Cover

George Biersack, 81, enjoyed painting as a young man but raising a family, work, and building a home took up almost all of his spare time. After retiring to Florida 21 years ago, he was able to resume his interests in boating, the outdoors and especially creating beautiful things often expressed in wood or his art. He currently resides in Port St. Lucie, Fl.

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On Behalf of the Publisher

By James T. Walker
President, Friends of the
Rupert J. Smith Law Library

"What would you think if I sang out of tune
Would you stand up and walk out on me?
Lend me your ears and I'll sing you a song
And I'll try not to sing out of key
Oh I get by with a little help from my friends
Mm I get higher with a little help from my friends
Mm gonna try with a little help from my friends."

The Beatles, "With a Little Help From My Friends", lyrics by Billy Shears

Two thousand and sixteen is a special year for ***Friendly Passages.*** This is now the fifth year of publication. An anniversary of sorts. ***Passages*** introduced itself to the readership with its Sept/Oct 2011 debut issue. It invited discussion on the law: "Judicial administrators, lawyers, librarians, scholars and other concerned thinkers are all asked to contribute to the dialogue appearing here. Out of the glorious diversity of informed voices there emerges from these pages an appreciation for the intertwined character of law, justice and the common welfare. Those elements collectively shape a story that's funny, sad, silly, profound, and engaging. It's a story about people, ideas, morality and immorality, or as so well put by Oliver Wendell Holmes, Jr., 'It is perfectly proper to regard and study the law simply as a great anthropological document.' It's a wonderful story. The Friends is happy to share it. Thank you, dear reader, for being a part of that conversation." And readers were. And have been. This little volunteer publication is ever indebted to those supporters who so enriched these past five years.

How to ever thank all of these people? One thinks of Lulu, who acknowledged the challenge in "To Sir With Love": "But how do you thank someone/Who has taken you from crayons to perfume?/ It isn't easy, but I'll try/ if you wanted the sky,/ I would write across the sky in letters/ That would soar a thousand feet high/ 'To Sir, With Love'". Unfortunately, ***Passages*** hasn't the means of casting its gratitude across the sky in thousand-foot letters emblazing each person's name on the firmament. Besides, the FAA would take an interest. But ***Passages*** would if it could. There is a simpler formulation from Shakespeare: "I can no other answer make, but thanks, and thanks and ever thanks." (*Twelfth Night* III.iii.1503-1504) That works. Thank you and thank you.

But though each is showered in heartfelt thanks, perhaps there is another way to approach this. The words of gratitude are nice, even essential. But each individual contributes to ***Passages*** for a reason. His or her effort draws meaning according to success of the contribution in accomplishing its intended purpose. The best way to express thanks and gratitude may be to demonstrate that these contributions were in fact successful in enabling what this publication is all about. By showing that their gifts of time and effort well created an "appreciation for the intertwined character of law, justice and the common welfare," contributors may find meaning in knowing they made this possible.

For a yardstick, there might be used the mission statement of ***Friendly Passages,*** as declared on the masthead of each issue: "Published since September 2011 for the purpose of promoting intelligent education of the Bar and general public about law as a basis for growth of justice and the common welfare, while combating the indifference which might hinder such growth."

The first round of applause must go to the staff, Nora Everlove, Paul Nucci, Kim Cunzo, Heather Smith, Katie Everlove-Stone and Ashley Walker. Nora Everlove is the editor. She works with the contributors, coordinates, schedules and organizes their work, and puts everything in place. She comes up with the Cryptoquote and adds filler where and when needed. Paul Nucci is the graphic designer—many of his paintings are kindly donated for the cover. He is also the layout editor. He lays out each issue, designs ads and announcements, and supplements the writings with graphic content. Long hours of work are needed for this. The Assistant Editors, Kim Cunzo, Heather Smith, Katie Everlove-Stone and Ashley Walker each help out with the proofreading. Once in a while a minor slip-up is seen. But not often. Just often enough to serve as a reminder that they're on the job and catching everything else that isn't seen. Wanda Barrett serves as backup double-checker and distributes the on-line version of ***Passages.*** The hard, sustained efforts of these unpaid volunteers is responsible for bi-monthly release of both the e-mail edition distributed to members of The Florida Bar, as well as a small print edition circulated locally in St. Lucie County. Thank you and thank you.

The second round of applause, as loud and sustained as the first, goes to our contributors. It's not easy crafting content. We know that. So it makes their fine work all the more impressive. While one wishes that warmest thanks and best wishes could be here extended to everyone who ever submitted for publication, that isn't possible. But what is possible is a look back over the past year, to recognize the most recent contributors. This is done with the understanding that they are standing in for all whose work ever got ***Passages*** this far down the road, from the first issue to the most current.

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On Behalf of the Publisher

The mission statement is divided up into three component purposes. The first of these recognizes as a goal the task of promoting education of the members of The Bar. In terms of articles submitted and published, this is the largest of the three, with eighteen representative pieces during the past year. The Honorable Shields McManus, Circuit Court Judge for the Nineteenth Circuit, analyzed a holding from the Fourth District Court on parental therapy, discussed the world of the local family court in the context of changing practice patterns, offered insight into the exacting life of a judge, and wrote a series on application of **Daubert** to expert testimony in the courtroom. Both Judge McManus and the Honorable Cynthia Cox shared honors in drafting a report on the status of mortgage litigation in the Nineteenth Circuit. Adrienne Naumann, nationally recognized expert in the field of intellectual property law, wrote a three-part series summarizing copyright, patent and trademark principles. She wrote a fascinating piece on the effect of **Louboutin v. Yves St. Laurent** on the status of color as an enforceable trademark. Dennis Wall, Orlando attorney and author, contributed a two-part series on lender force-placed insurance practices, based upon a book setting out his research into the topic. Professor Leonard Pertnoy, on the faculty of St. Thomas University School of Law, finished a two-part series on an examination of the use of lis pendens as a lien on real property, with particular attention given to disparate treatment assigned by the District Courts to such device. Mark Miller, appellate specialist who also serves as managing attorney for the Pacific Foundation, wrote on the vexatious task of challenging non-final orders in the appellate court. Louis Rosen, Assistant Law Professor at Barry University School of Law, shared his life with readers as a law librarian and what is involved with teaching legal research. Daniel Raab, a Miami attorney, went into the functions and liabilities of ocean transportation intermediaries. He promises a second installment on the topic. Edmund Sikorsky, a mediator in the Nineteenth Judicial Circuit, reviewed the strategies employed by effective mediators in all phases of the mediation process so as to prevent it from ending in impasse. Allison J. Evans, a student at Barry University College of Law and winner of the Annual Statewide Justice Alto Adams Writing Competition, submitted a composition on the current, surviving status of the Political Process Doctrine in the wake of **Schuette v. Coalition to Defend.** Thank you and thank you.

The second stated purpose of ***Passages*** is to provide education to the general public on law as a basis for growth of justice and the common welfare. Here there were fourteen contributions of general interest. Dr. Richard Wires, Professor Emeritus at Ball State University and professional writer with several published novels to his credit, produced a diverse series of pieces appealing to popular interest, on the tragic loss of the Sultana, controversies attendant to introduction of Daylight Savings Time, and Eagle Rogers as the precursor and inspiration for Stanley Gardner's famous character, Perry Mason. Dr. Wires also wrote about naval rules of engagement and the ground-breaking legal cases which upheld wiretap evidence. Carolyn Fabrizio, Coordinator for The Florida Rural Legal Services Corp., wrote about local availability of legal aid services, with an emphasis on migrant farmworkers. Amy Burns, Deputy Director for FRLSC, set out a detailed history of the organization and offered a glimpse into the frustrations of offering public legal service to the poor. Robert Brammer, senior research specialist for the Law Library of Congress in Washington, D.C., wrote about efforts by community activists to rehabilitate urban blight in Detroit. He also introduced readers to new on-line features involving use of Congress.gov, a powerful tool for researching Congressional activity. Joe Smith, Clerk of Court for St. Lucie County, identified improvements or enhancements to his Office, intended to promote justice and make it more accessible to the general public. Paul Nucci, painter, poet, musician, orchestra director and businessman, offered an analysis of oratorical and rhetorical techniques. Ashley Walker, third year law student at the Duke University College of Law, offered an overview of strategies on preparing for admission to law school, including taking of the LSAT, paying for a legal education, and answering a few commonly asked questions by those curious about embarking on a legal career. Rene Artaega, Branch Manager and Vice President for TD Bank, crafted a biography of Alto Adams, a St. Lucie rancher and justice and Chief Justice of the Florida Supreme Court, who inspired the annual statewide writing competition in his name. Thank you and thank you.

For a third purpose, ***Passages*** strives to combat "the indifference which might hinder such growth (of justice and the common welfare)." In furtherance of this objective there were a number of essays featured which highlighted areas of the law needing attention. Diamond Litty, Public Defender for the Nineteenth Circuit and organizer of Life Builders of the Treasure Coast, an organization designed to help those whose lives are impacted by criminal or dependency court, discussed the plight of Floridians labeled as felons. Art Ciasca, CEO for Suncoast Mental Health Center, provided an update on an earlier work on the crisis in health care for the mentally ill in Florida. Charles Shafer, criminal defense attorney with a statewide practice, called for an end to the legal culture built around criminal proscription of drug use. He discussed the many failings and high cost of what is popularly known as The War on Drugs. Ashley Walker addressed the unintended consequences of immigration measures aimed at terrorism, but which disproportionately impact women as the innocent victims of terrorism. Thank you and thank you.

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Attorney Disqualification When a Non-Lawyer Employee Switches Sides

By The Hon. F. Shields McManus, Circuit Judge

Suppose you have a need for a paralegal and several candidates apply. One has just the experience you are looking for. In fact, she previously worked for a law firm that does the same kind of cases you do. It is sometimes your opponent. What a find!

But wait; will this potential hire expose you to a motion for disqualification? Have you considered the possibility of a conflict of interest? Did this paralegal work on the other side of one of your cases? If so, what are the consequences of that? Do you know the standard for determining when the hiring of a non-lawyer employee of an opposing law firm requires the imputed disqualification of the hiring firm?

The District Courts of Florida have answered this question differently but a closer look suggests some common principles which balance the need to preserve the integrity of a fair adversary system and avoid even the appearance of impropriety with the competing principle of a client's right to the attorney of the client's choice. The Courts also are concerned to avoid unfairly restricting employment opportunities for lawyers, legal assistants and other non-lawyer employees. More than one District Court has certified conflict with other District Court's opinions but the Supreme Court has not accepted the opportunity to resolve the conflict.

Ethical Considerations for Lawyers Employing Legal Staff

Lawyers are required to use care to ensure that that non-lawyer employees who share in client's confidential information comply with the attorney's ethical duty not to disclose or use the information without the client's consent. Fla. Ethics Op. 86-5. The Ethics Committee noted that non-lawyer employees of law firms necessarily share in confidential information. Non-lawyer employees, therefore, should act consistently with the lawyers' ethical duty of confidentiality by maintaining such information in confidence.

When a non-lawyer employee switches sides, both the hiring firm and the former firm have duties to protect the client's confidences. The former firm should admonish the departing employee about the ethical duty not to reveal any confidential material of any client to the hiring firm. The hiring firm has an ethical duty not to seek or permit a disclosure of confidences by the employee and not to use such information.

If the departing employee had a close relationship with the client, the former firm must advise the client of the employee's departure and of the new employment. Rule 4-1.4, Florida Rules of Professional Conduct; Fla. Ethics Op. 86-5. This may lead to a client and the client's law firm deciding that disqualification of the law firm which hired the former employee is necessary.

The Standard for Disqualification

It is often written that disqualification of a party's chosen counsel is a drastic remedy that should be used sparingly. Most recently, see *Caruso v. Knight*, 124 So.3d 962 (Fla. 4th DCA 2013), reh'g. denied (2013). There are many circumstances in which disqualification may be sought. Of relevance here is the movement of an employee from one law firm to another.

Rule 4-1.10(b), Florida Rules of Professional Conduct, speaks to the circumstances of a lawyer moving to a firm representing a person adversely to a client of the lawyer or his former firm. In

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Attorney Disqualification When a Non-Lawyer Employee Switches Sides

order for there to be a conflict, the matter must be the same or substantially related to the matter in which the lawyer, or his former firm, represented a client. The parties' interests must be materially adverse. The lawyer must have acquired confidential information about the matter. If so, the lawyer's new firm may no longer represent the person. Disqualification of the lawyer's new firm is required. It is not sufficient to screen the lawyer from the matter.

The Third and Fourth District Courts Require Disqualification

Florida's Fourth District Court of Appeals applied this rule to non-lawyer employees in *Koulisis v. Rivers,* 730 So.2d 289 (Fla. 4th DCA 1999). "Damage done by the disclosure of privileged information is not minimized because the source of the information is clerical staff and not an attorney." *Id.* at 293. The opposing counsel had hired a legal secretary who had been exposed to confidential information in the case at her former firm. The new employer circulated a memo that the secretary was not to be exposed to the file in the matter. The file of the case was kept in an attorney's office to isolate it from the secretary. She was not to work for that attorney. In such a circumstance, the Court held that the burden shifted to the hiring firm to "demonstrate by the greater weight of the evidence that [the secretary] had no actual knowledge of any confidential information material to the case." *Id.* at 292. Screening the secretary from the case at the new employer was not sufficient to avoid disqualification of her new employer. The Court put the burden of proof on the hiring firm, noting that it was difficult to prove what someone knows but that the law firm "could have best avoided the ethical problem by more carefully screening a hiring decision." *Id.* at 292. The Court favored disqualification in order to preserve the integrity of a fair adversary system.

The trial judge must conduct an evidentiary hearing on a contested motion to disqualify the counsel of an opposing party. *Sch. Bd. of Broward Cty. v. Polera Bldg. Corp.,* 722 So.2d 971 (Fla. 4th DCA 1999); *Fountas v. Fountas*, 64 So.3d 164 (Fla. 4th DCA 2011). The other District Courts agree that an evidentiary hearing is necessary.

The Third District Court of Appeals adopted the Fourth's standard for disqualification in *First Miami Securities, Inc. vs. Sylvia,* 780 So.2d 250 (Fla. 3d DCA 2001). It found that the secretary was "exposed" to confidential information while employed at the prior law firm thereby giving rise to the rebuttable presumption that the secretary had "actual knowledge" of confidential information. It remanded the case for the trial court to have an evidentiary hearing to give the new employer the opportunity to rebut the presumption of actual knowledge. If the law firm is unable to rebut the presumption by the greater weight of the evidence, the firm must be disqualified. Screening the secretary from the case was not approved as a valid alternative to disqualification. *Id.* at 256.

The Fourth District Court, while affirming *Koulisis,* made an exception to it in *Eastrich No. 157 Corp. v. Gatto*, 868 So. 2d 1266 (Fla. 4th DCA 2004). It did not require disqualification of the hiring law firm because it found that the former legal assistant worked for the opposing counsel in a non-legal capacity as a temporary, independent contractor posting billing data. The opinion did not say, but the court apparently assumed that no confidential, material information was shared while working as a billing clerk.

Other courts have adopted the Fourth District Court's rule in *Koulisis v. Rivers, supra.* See *Owens v. First Family Financial Services, Inc.,* 379 F.Supp.2d 840 (S.D. MS 2005)(law firm disqualified due to employment of paralegal from opposing law firm, citing *Koulisis* with approval), and *Zimmerman v. Mahaska Bottling Company*, 19 P.3d 784, 270 Kan. 810 (2001) (law firm hiring legal secretary who had worked at plaintiff's firm was disqualified from continuing to represent defendants).

The First, Second and Fifth District Courts Do Not Require Disqualification

The First, Second, and Fifth District Courts of Appeal have also considered the circumstance of a legal employee switching sides. They made a similar analysis but arrived at a rule with a significant difference.

In *Esquire Care, Inc. v. Maguire*, 532 So. 2d 740 (Fla. 2d DCA 1988) a legal secretary left a firm where she had primary responsibility for a matter shortly before it was scheduled for trial. She immediately went to work for the opposing counsel in the case. The extent of her involvement in the case preparation was disputed. A motion for disqualification of the hiring firm was denied by the trial court.

The Second District opinion recognized that it should not make a difference that the employee was a secretary rather than a lawyer if the employee was privy to client confidences and work product. Nevertheless, the court sought to avoid the "harsh sanction" of disqualifying an attorney who had invested much of his and his client's time and resources. The court decided there should not be a strong presumption - as would arise if an attorney switched firms - that there was a violation of client confidences. Rather it decided that there should be an evidentiary hearing "to determine, not just whether an ethical violation has occurred, but whether as a result one party has obtained an unfair advantage over the other which can only be alleviated by removal of the attorney. [Citations deleted.]" *Id*. at 741. It affirmed the trial court which did conduct an evidentiary hearing and determined

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U.S. Army Corps of Engineers v. Hawkes: Protecting Property Rights at the Supreme Court of the United States

By Mark Miller & Damien Schiff[1]

Endnotes for this article can be found on page 25 of the online edition of Friendly Passages

Introduction

In early December, 2015, the Supreme Court of the United States granted review to *United States Army Corps of Engineers v. Hawkes Co., Inc.*, 782 F. 3d 994 (8th Cir. 2015), *rev. granted*, 2015 WL 8486656 (Dec. 11, 2015). The Court's review of the case on the merits will affect property rights across the nation, including here in Florida.

In *Hawkes*, a panel of the Eighth Circuit Court of Appeals held that a landowner may challenge in federal court an Army Corps of Engineers jurisdictional determination (JD) – a determination that the landowner holds property that includes federal waters of the United States, a/k/a federal wetlands – because the JD constitutes final agency action. *Id*. at 1002.

That decision made sense: once the federal government claims jurisdiction over a landowner's property, that landowner faces a very expensive and time-consuming federal permitting process if the landowner wants to exercise his rights to develop and use his property. That expense and time can amount to years of lost time and hundreds of thousands of dollars in expense.[2] For that reason, landowners *should* have recourse to the courts to challenge the JD when the landowner reasonably believes the property does not include federal wetlands, so as to avoid that time and expense when the landowner should not have to incur it. *Hawkes* got it right.

But the *Hawkes* decision conflicted with the Ninth Circuit's decision in *Fairbanks N. Star Borough v. U.S. Army Corps of Eng'rs*, 543 F.3d 586, 591–93 (9th Cir. 2008), and the Fifth Circuit's decision in *Belle Co., LLC v. U.S. Army Corps of Eng'rs*, 761 F.3d 383 (5th Cir. 2014).[3] Those courts had held that landowners had no choice but to swallow a JD and simply proceed with the expensive, time-consuming federal permitting process.

The Supreme Court will resolve this conflict in 2016.

Jurisdictional Determinations

Under regulations promulgated by the United States Army Corps of Engineers (Corps), a landowner may request from the District Corps Engineer a JD as to whether the landowner's property is subject to the Corps' jurisdiction under the Clean Water Act (CWA). *See* 33 C.F.R. § 320.1(a)(6). The JD constitutes the Corps' official and written statement as to whether a given wetland is regulated under the CWA. *See id*. § 331.2.

The Corps has also provided an administrative appeal process for JDs. *See id*. §§ 331.1-331.12. Through this process, the landowner receives one level of appeal, usually to the Corps division engineer, *see id*. § 331.7(a). That determination is final. *See id*. § 331.9(c).

The JD process is a helpful tool for the regulated public as well as the Corps. A landowner is informed early on in the development process whether a CWA dredge-and-fill permit will be required; and the Corps can find out whether it needs to expend limited funds and manpower on working with a landowner in the permit process. But what happens after all administrative appeals have been exhausted if the landowner still disagrees with the JD that the Corps has issued? The general rule is that judicial review of agency action is available (under the Administrative Procedure Act (APA), 5 U.S.C. § 551 et seq.) so long as that action (1) is "final," *see id*. § 704, (2) is not specifically made unreviewable by statute, *see id*. § 702, and (3) is not wholly committed to the agency's discretion, *see id*. *See generally Bennett v. Spear*, 520 U.S. 154 (1997).

Judicial Review

So, can the federal courts review a JD? Until *Hawkes* and *Belle Company*, the only circuit court to address the question said they could not. *See Fairbanks N. Star Borough v. U.S. Army Corps of Engineers*, 543 F. 3d 586, 593 (11th Cir. 2008) (holding that JD is not a final agency action from which obligations are determined or legal consequences flow). Likewise, the Corps says, "no" notwithstanding that the Corps' own regulations refer to a JD as, "Corps final agency action." 33 C.F.R. § 320.1(a)(6). A number of district court decisions come down the same way. *See*, *e.g.*, *St. Andrews Park, Inc. v. U.S. Army Corps*, 314 F. Supp. 2d 1238 (S.D. Fla. 2004). The common rationale running through these decisions is that a JD's issuance does not change the legal rights or obligations of either the landowner or the Corps, and therefore a JD cannot constitute final agency action.

But, the Supreme Court of the United States addressed a similar question after *Fairbanks*—whether EPA-issued compliance orders are judicially reviewable—and the Court's answer suggests that the *Fairbanks* court got its answer wrong. *See Sackett v. EPA*, __ U.S. __, 132 S. Ct. 1367 (2012). A review of *Sackett* helps shed light on why the Eighth Circuit correctly decided *Hawkes* and why the Supreme Court will likely affirm.

Sackett

In *Sackett*, the Court unanimously held—contrary to the circuit courts that had previously addressed the question[4]—that the federal courts can judicially review

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EPA compliance orders that are not unlike the JDs at issue in *Hawkes*. *Id.* at 1374.

Facts of *Sackett*

Mike and Chantell Sackett bought a small parcel of property in 2005 with the intent to build a three-bedroom family home on it. Their lot sat in a residential area, and neighbors built their own houses. The Sacketts obtained a county permit to build, and started laying gravel. But then the EPA, without hearings or notice, claimed the property was federal "wetlands"—and ordered them to return the property to a condition that complied with the agency's requirements, on pain of astronomical fines.

With good reason to believe the land was not wetlands within the meaning of the Clean Water Act (or, for that matter, at all), the Sacketts wanted to contest EPA's claim. But EPA denied their request for a hearing—and the Ninth Circuit ruled they had no right to immediate judicial review. It held that they would first have to go through a years-long "wetlands" permit process, which could cost 12 times the value of their land.

Supreme Court reverses

The Supreme Court reversed the Ninth Circuit unanimously and overturned decades of uniform case law prohibiting judicial review of compliance orders issued pursuant to the Clean Water Act. The Court held that a jurisdictional decision issued through a compliance order is "final" and subject to judicial review under the Administrative Procedure Act.

Relying on *Bennett*, the Court had no trouble finding that the compliance order "marks the 'consummation' of the agency's decision making process." *Sackett*, 132 S. Ct. at 1372. The reasoning the Court used is instructive. The Court held the order marked the consummation of the agency's decision making process because "the 'Findings and Conclusions' that the compliance order contained were not subject to further agency review," *Id*. Just like the JD in *Hawkes*.

The "Findings and Conclusions" in *Sackett* included a jurisdictional decision or determination. In fact, that determination was the predicate finding of a violation. This is significant because it was the consummation of the agency's decision-making process relative to jurisdiction that informed the Supreme Court's conclusion that the compliance order was justiciable. This is made clear by Justice Ginsburg's concurring opinion:

> Faced with an EPA administrative compliance order threatening tens of thousands of dollars in civil penalties per day, the Sacketts sued "to contest the jurisdictional bases for the order." Brief for Petitioners 9. "As a logical prerequisite to the issuance of the challenged compliance order," the Sacketts contend, "EPA had to determine that it has regulatory authority over [our] property." *Id*. at 54-55. The Court holds that the Sacketts may immediately litigate their jurisdictional challenge in federal court. I agree, for the Agency has ruled definitively on that question.

Sackett, 132 S. Ct. at 1374 (Ginsburg, J., concurring).

Justice Ginsburg's conclusion is telling, in that the compliance order at issue in *Sackett* was no more final than the JD in *Hawkes*.

That perceptive comment on finality is as good a place as any to turn to *Hawkes* and the EPA's overreaching sibling: the Army Corps of Engineers.

Background on *Hawkes*

In *Hawkes*, Minnesota business owners sought permission to harvest 530 acres of swampland for peat moss used in landscaping. The owners conceded from the beginning that the swampland amounted to wetlands by definition, but not federal wetlands. Under the Supreme Court decision in *Rapanos*, only wetlands that are adjacent to a permanent water body, or which have a "significant nexus" with traditional navigable waters, are subject to *federal* jurisdiction under the Clean Water Act. Since the nearest river sat 120 miles away, and no water bodies connected the swampland to the river, no reasonable person could find these wetlands subject to federal jurisdiction.

Litigation in the District Court

But reasonableness often has no home in federal government decision making. When the Corps issued a Jurisdictional Determination asserting the swamp was covered by the Act, without demonstrating the requisite connection to traditional navigable waters, Hawkes sought to challenge the determination in court. Hawkes argued that the *Sackett* decision requires judicial review of Jurisdictional Determinations, which are issued in the hundreds each year by the Corps nationwide. Hawkes' argument flowed from *Sackett*: (1) the JD represented the consummation of the Corps' decision making process; and (2) the JD had immediate legal consequences for Hawkes.

The trial court rejected those arguments. It ruled for the government and held that

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Hawkes had three options: (1) abandon the project and, perhaps, the business; (2) seek an arguably unnecessary federal permit at a devastating cost of over $270,000; or (3) go forward without a permit risking civil fines of up to $75,000 per day and/or criminal sanctions including imprisonment. Those did not amount to immediate legal consequences, in the court's estimation—despite the *Sackett* decision. Pacific Legal Foundation appealed that decision to the Eighth Circuit.

Litigation in the Eighth Circuit

The Court of Appeals reversed. The court held, relying on *Sackett*, that JDs are final agency actions subject to immediate challenge in court. In discussing the three "alternatives" that the trial court held demonstrated a lack of immediate legal consequence, the court explained:

> The prohibitive costs, risk, and delay of these alternatives to immediate judicial review evidence a transparently obvious litigation strategy: by leaving appellants with no immediate judicial review and no adequate alternative remedy, the Corps will achieve the result its local officers desire, abandonment of the peat mining project, without having to test whether its expansive assertion of jurisdiction—rejected by one of their own commanding officers on administrative appeal—is consistent with the Supreme Court's limiting decision in *Rapanos*.
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> ***
>
> The Court's decision in *Sackett* reflected concern that failing to permit immediate judicial review of assertions of CWA jurisdiction would leave regulated parties unable, as a practical matter, to challenge those assertions. The Court concluded that was contrary to the APA's presumption of judicial review.

Hawkes Co., Inc. v. U.S. Army Corps of Engineers, 782 F.3d 994, 1001-02 (8th Cir. 2015).

In holding for Hawkes on the question of legal consequence arising from the JD, the Eighth Circuit got it right. The court explained why the Corps' arguments to the contrary held no water:

> The Corps' assertion that the Revised JD is merely advisory and has no more effect than an environmental consultant's opinion ignores reality. "[I]n reality it has a powerful coercive effect." *Bennett*, 520 U.S. at 169. Absent immediate judicial review, the impracticality of otherwise obtaining review, combined with 'the uncertain reach of the Clean Water Act and the draconian penalties imposed for the sort of violations alleged in this case . . . leaves most property owners with little practical alternative but to dance to the EPA's [or to the Corps'] tune.'" "In a nation that values due process, not to mention private property, such treatment is unthinkable." *Sackett*, 132 S. Ct. at 1375 (Alito, J., concurring).

Id. at 1002. In other words, due process requires nothing less than the opportunity to go to court when the government tramples one's constitutional rights—here, property rights. The *Sackett* Court said so unanimously, and this case merits the same response.

Judge Kelly, in her concurrence, explicitly relied on Justice Ginsburg's explanation for her vote (as described above) in finding the JD reviewable. In *Sackett*, Ginsburg's vote turned on the EPA's determination of jurisdiction that set the dispute in motion; likewise, as Judge Kelly pointed out, the JD set the dispute in motion in *Hawkes*. *Hawkes*, 782 F. 3d at 1003-04 (citing *Sackett*, 132 S. Ct. at 1374-75 (Ginsburg, J., concurring)).

The *Hawkes* Decision Correctly Answered the Finality Question

There are three principal consequences arising from a JD that meet the *Bennett* test for agency action finality, and demonstrate that the Eighth Circuit got it right. First, a JD finding jurisdiction makes it much more likely that any civil fine assessed against the landowner will be greater than otherwise would be the case had the JD found no jurisdiction. *See* 33 U.S.C. § 1319(d) (noting "good faith" as one of the factors). *Cf. United States v. Key West Towers, Inc.*, 720 F. Supp. 963, 965-66 (S.D. Fla. 1989) (filling of wetlands in violation of Corps' cease-and-desist letter justifies substantial civil penalty); *Hanson v. United States*, 710 F. Supp. 1105, 1109 (E.D. Tex. 1989) (upholding substantial administrative penalty owing in part to violation of three cease-and-desist orders); *United States v. Ciampitti*, 669 F. Supp. 684, 699 (D.N.J. 1987) (substantial civil penalty justified based upon defendant's knowing disregard of CWA).

Second, a JD directly and immediately alters a landowner's course of conduct. A JD constitutes the Corps' authoritative determination that a given site is subject to CWA regulation and, therefore, that the site's owner thus must seek a permit prior to commencing any dredge or fill activity. *Cf. Or. Natural Desert Ass'n v. U.S. Forest Serv.*, 465 F.3d 977, 987 (9th Cir. 2006) ("[A]n agency action may be final if it has a direct and immediate . . . effect on the day-to-day business of the subject party.") (internal quotation marks omitted).

Third, a JD fulfills *Bennett*'s legal consequences

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U.S. Army Corps of Engineers v. Hawkes: Protecting Property Rights at the Supreme Court of the United States

requirement because a JD can provide legal immunity, through an estoppel defense, to landowners. *See United States v. Tallmadge*, 829 F.2d 767, 773 (9th Cir. 1987) (noting that an estoppel defense "applies when an official tells the defendant that certain conduct is legal and the defendant believes the official") (internal quotation marks omitted). *Cf. Gen. Elec. Co. v. EPA,* 290 F.3d 377, 383 (D.C. Cir. 2002) ("In some circumstances, if the language of the document is such that private parties can rely on it as a norm or safe harbor by which to shape their actions, it can be binding as a practical matter.") (emphasis added; internal quotation marks omitted).

Hawkes answered the question of finality correctly.

The *Hawkes* Decision Is Good Judicial Policy[5]

The *Hawkes* decision allows the public to avoid the dilemma for the regulated public that the *Northstar* and *Belle Company* courts did not allow.

Once a landowner receives a JD finding jurisdiction, he can (1) abandon his development plans, (2) seek a permit, expending considerable sums that cannot be refunded regardless of how jurisdiction is ultimately resolved, or (3) proceed with his development at the risk of serious civil and criminal penalties. The law does not support forcing this choice upon landowners.

And this choice is abhorrent to sound environmental policy. Surely, both the regulated public and the Corps have strong interests in ascertaining the extent of CWA jurisdiction as early as possible. For the landowner, finding out whether jurisdiction is present helps to avoid the costs of litigating unnecessarily over jurisdiction. For the Corps, an early judicial determination regarding jurisdiction helps to focus the agency's enforcement efforts. There is no reason to expend manpower and resources in a prolonged permit or enforcement proceeding if CWA jurisdiction is absent. Agency resources could instead be directed to those cases where jurisdiction has been judicially determined to be present. Moreover, because JDs are not typically issued within the context of an enforcement action, and are not a necessary prelude to such an action, judicial review would not hamper the Corps' administration of the CWA. And relatedly, judicial review of pre-enforcement activities would not effectively deny the Corps the power of election among enforcement mechanisms (i.e., pre-enforcement order as opposed to immediate judicial action), because the issuance of a JD does not presuppose that the applicant has already or is continuing to violate the CWA.

Conclusion

Like the jurisdictional decision and compliance order in *Sackett*, the formal Jurisdictional Determination in *Hawkes* has immediate and direct legal consequences. It is, in fact, an adjudicative decision that applies the law to the specific facts of this case and is legally binding on the agency and the landowner, thereby fixing a legal relationship; the *sin qua non* of "final agency action." Therefore, the Corps' Jurisdictional Determination or JD is justiciable.

Questions of reviewability of EPA and Corps actions under the Clean Water Act have been in the federal courts for decades. Much of the case law has focused on the reviewability of pre-enforcement actions. For a host of reasons, before *Sackett*, and now *Hawkes*, the courts had consistently held that APA review is unavailable for these types of actions. The Supreme Court in *Sackett*, and the Eighth Circuit in *Hawkes*, correctly changed the trajectory of administrative law, and hemmed in agencies that had long ago left the bounds of reasonableness. That is why the Supreme Court of the United States will likely affirm the Eighth Circuit's wise decision in *Hawkes*—that case, like *Sackett* before it, recognized the need to protect due process, basic fairness, and to contain the power of agencies that for too long have acted well beyond their constitutional limits.

Mark Miller will appear as co-counsel for Hawkes Co. before the Supreme Court of the United States later this year. He is a Florida Bar board certified appellate attorney, the Vice President of the Martin County Bar Association, and Managing Attorney of Pacific Legal Foundation's Atlantic Center in Palm Beach Gardens.

Damien M. Schiff is a Principal Attorney with and member of Pacific Legal Foundation's Environmental Law Practice Group, and successfully litigated Sackett v. E.P.A. in the Supreme Court of the United States.

Endnotes for this article can be found on page 25 of the online edition of Friendly Passages

Last Issue's Cryptoquote Answer

A GP VMGRTZKO ZXM FLGR A GP GBN LGQT. PD RLGBEYVAQABV AY JTMJTRKGO. - LTBMD NGQAN RLXMTGK

I am grateful for what I am and have. My Thanksgiving is perpetual. - Henry David Thoreau

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On Behalf of the Publisher

Finally, there are the poets. Dylan Thomas once said that, "A good poem is a contribution to reality. The world is never the same once a good poem has been added to it. A good poem helps to change the shape of the universe, helps to extend everyone's knowledge of himself and the world around him." ***Passages*** deeply appreciates the sharing of self and word that each of its poetic contributors brings to this magazine: Mark Martin, Paige Simkins, Paul Nucci and Andrew Everlove. Theirs is a unique empowerment of language that adds depth, texture and meaning, serving to remind us that, above all, the law is a human construct, indivisible from all of the glories and weaknesses of its creators. For better or for worse, it is what we are. Thank you and thank you.

In sum, once again, ***Friendly Passages*** thanks each and every person who ever assisted in getting it to the five-year mark. It's been a grand adventure along the way and with continued help we'll keep on doing what we do best and strive to make it even better. Your support is appreciated. JimW

Poet's Corner

The Conscientious Objector
By Edna St. Vincent Millay

I shall die, but
that is all that I shall do for Death.
I hear him leading his horse out of the stall;
I hear the clatter on the barn-floor.
He is in haste; he has business in Cuba,
business in the Balkans, many calls to make this morning.
But I will not hold the bridle
while he clinches the girth.
And he may mount by himself:
I will not give him a leg up.

Though he flick my shoulders with his whip,
I will not tell him which way the fox ran.
With his hoof on my breast, I will not tell him where the black boy hides in the swamp.
I shall die, but that is all that I shall do for Death;
I am not on his pay-roll.

I will not tell him the whereabout of my friends
nor of my enemies either.
Though he promise me much,
I will not map him the route to any man's door.
Am I a spy in the land of the living,
that I should deliver men to Death?
Brother, the password and the plans of our city
are safe with me; never through me Shall you be overcome.

Cryptoquote

X AXTP LMY OCYIL LMXTO XT LMXN QVCDP XN TVL NV HZFM QMYCY QY NLITP, IN XT QMIL PXCYFLXVT QY ICY HVEXTO: LV CYIFM LMY JVCL VA MYIEYT, QY HZNL NIXD NVHYLXHYN QXLM LMY QXTP ITP NVHYLXHYN IOIXTNL XL - GZL QY HZNL NIXD, ITP TVL PCXAL, TVC DXY IL ITFMVC.
- VDXEYC QYTPYDD MVDHYN, NC.

For the impatient, e-mail your answer to nora@rjslawlibrary.org for confirmation. For the patient, the decoded quote will appear in the next issue.

Not Your Mom's {trade} Dress: Apple, Inc. v. Samsung Electronics

By Adrienne Naumann

Apple, Inc. v. Samsung Electronics Co. Ltd.[1] addresses protection of external features of Apple's iPhones 3G and 3GS under United States trade dress, design and utility patent statutes. In April 2011, Apple filed a lawsuit against Samsung for copying the external features of its iPhones 3G and 3GS and displaying them upon Samsung's own Smartphone. Apple's legal theories for liability included dilution of Apple's unregistered trade dress and federally registered trade dress, as well as infringement of its design and utility patents. The district court entered final judgment in favor of Apple on trade dress, design patent and utility patent liability. The district court initially awarded Apple damages of over six hundred million dollars, but this amount was then reduced in a partial retrial prior to Samsung's appeal to the Federal Circuit Court of Appeals [hereinafter the Federal Circuit]. This article addresses trade dress and design patent liability on this appeal.

Trade Dress Dilution

The Federal Circuit relied upon Supreme Court and Ninth Circuit precedent in its analysis of trade dress dilution.[2] Trade dress consists of (i) the totality of elements in which a product or service is packaged or presented, or (ii) a product's structural configuration. Stephen W. Boney, Inc .v. Boney Services, Inc. 127 F.3d 821, 829 (9th Cir. 1997).[3] Similarly to a trademark or service mark, the purpose of trade dress is to identify and distinguish the source of a product or service. A product configuration is functional if it (i) is essential to the use or purpose of the product or (ii) affects the cost or quality of the product. Inwood Laboratories Inc. v. Ives Laboratories, Inc. 456 U.S. 844, 850 n.10 (1982). Although functional features[4] are often present within a product's structural configuration, they are not protected under trade dress law because they are often necessary for third persons to compete in business.

Because of this economic concern, functional features are only protectable by United States utility patents during a finite period of enforceability for a patent owner's exclusive use, sales and production. To be enforceable, trade dress must be both nonfunctional and have acquired secondary meaning, although if trade dress is functional, a court will not reach the issue of secondary meaning. Under Ninth Circuit law, product configuration is functional when the following criteria exist:

(i) the configuration yields a utilitarian advantage,

(ii) alternative product designs do not provide the same benefits,

(iii) advertising of the configuration promotes a utilitarian purpose, and

(iv) there is significant cost effectiveness in manufacture of the product configuration.

Disc Golf Association v. Champion Discs, Inc., 158 F.2d 1002, 1006 (9th Cir. 1998). A product configuration feature need only contain some utilitarian advantage to be functional. *Id.* at 1007. For example, a product configuration is functional if its shape as a whole results in optimal utility. Leatherman Tool Group, Inc. v. Cooper Industries, Inc., 199 F.3d 1009, 1011-12 (9th Cir. 1999).

Apple's unregistered trade dress consisted of the following:

1. a flat, clear surface covering the front surface of the phone;
2. a display screen under this clear surface;
3. a substantial black border above and below the display screen;
4. narrow black borders along the iPhone's anterior surface
5. a row of small dots on the display screens;
6. a matrix of colorful square icons with evenly rounded display screen corners;
7. a permanent bottom configuration of colorful square icons with (i) evenly rounded corners (ii) Which were spatially removed from the display's remaining icons; and
8. an overall rectangular product with four evenly rounded corners.

Apple's registered iPhone trade dress included:

(i) the design details of each of the sixteen icons on the iPhone home screen, and

(ii) a rectangular shape with rounded corners, silver edges and a black background.

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Not Your Mom's (trade) Dress: Apple, Inc. v. Samsung Electronics

For Apple's federally registered trade dress, Samsung had the initial burden to present evidence that Apple's registered trade dress elements, although presumptively valid, each contained an element of functionality. For the unregistered trade dress, the initial evidentiary burden was on Apple to present evidence for the absence of functionality. However, for both registered and unregistered trade dress, the substantive issues to prove or disprove functionality were substantially the same. In particular, Apple's position was that the aesthetics of the iPhone exterior features established the non-utilitarian nature of its trade dress. Samsung asserted that for both registered and unregistered trade dress Apple did not present evidence that (i) its claimed features were completely non-functional, and therefore (ii) the presence of aesthetic elements within the trade dress was irrelevant.

For the first prong of the Ninth Circuit criteria i.e., that the claimed trade dress resulted in a utilitarian advantage, the court concluded that there was functionality within each of the features of Apple's trade dress as follows:

1. the rounded covers and rectangular shape maximized the display;

2. the flat, clear surface on the front of the phone facilitated manual touch operation;

3. the display borders are of dimensions to accommodate other components while minimizing overall product dimensions;

4. the changeable icons facilitate differentiation of software applications; and

5. the bottom arrangement of unchanging permanent icons provides quick access to the most commonly used applications.

The court noted that Apple's own executive testified that the design was intended to be beautiful, simple and easy to use [Emphasis added]. Apple also conceded during oral argument that its trade dress improved the iPhone quality in some respects. The court also observed that for the registered trade dress Apple's own user interface expert testified that, "the whole point of an icon ... is to communicate to the consumer... that if they hit that icon certain functionality will occur on the phone" and "rectangular-containers" for icons provide "more real estate" to accommodate the icon design…" [Emphasis added].

The court concluded that Apple's unregistered and registered trade dress utility arose in large part from the combination of icons, so the trade dress as a whole comprised an assembly of functional parts.

For the second prong of the Ninth Circuit analysis, the court held that Apple, while asserting there were alternative designs available with the same functional advantages, failed to establish that these alternatives offered exactly the same functionality as Apple's trade dress. For the third prong of the Ninth Circuit analysis, the court concluded that Apple did not provide sufficient evidence to rebut Samsung's evidence that Apple advertised the functional advantages of its trade dress. In particular, the court observed that Apple's demonstrations of the user interface on the iPhone's touch screen actually promoted the utilitarian/functional advantage of the unregistered trade dress. It also observed that Apple's advertising did not promote strictly ornamental features.

As to the Ninth Circuit's fourth prong, the court concluded that Apple had provided no evidence that the manufacture of its trade dress did not result in a less expensive cost-effective manufacturing process. On this point, the court observed that Apple only offered evidence on iPhone durability, although durability was not within the scope of either claimed trade dress design.[5] Based upon Apple's insufficient evidence, the Federal Circuit reversed the district court's finding of liability for both registered and unregistered trade dress dilution.

Design patent infringement

U.S. design patents differ significantly from U.S. utility patents because they exclusively protect ornamental features of manufactured articles while the utility patents protect functional features. 35 USC § 101, 171(a). A design patent is infringed if, to the ordinary observer, (i) the original design and the accused design appear substantially the same and (ii) this resemblance influences this same observer to purchase the product with the accused design by supposing it to be the product with the original design. Gorham Co. v. White, 81 U.S. 511, 528 (1872). A design infringement analysis must also include a comparison of the accused design element within the prior art. If the accused design includes a feature of the claimed design that departs conspicuously from the prior art, then this accused design is probably deceptively similar to the claimed design, and thereby infringing. Egyptian Goddess, Inc. v. Susa, Inc., 543 F.3d 655, 678 (Fed. Cir. 2008 *en banc).*

Apple's D'677 design patent covers the front face of the iPhone, while the D'87 design patent covers another set of design features. The D'305 design patent covers the ornamental design for a graphical user interface of a display screen or portion thereof. Samsung did not challenge the validity of Apple's design patents *per se*. Instead, Samsung raised defenses to design patent infringement liability which included the jury's improper consideration of the functional elements of the claimed designs.

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Not Your Mom's (trade) Dress: Apple, Inc. v. Samsung Electronics

Samsung raised these defenses in the context of the accuracy and fairness of the jury instructions and sufficiency of the evidence. In particular, Samsung asserted that the design patent jury instructions were prejudicial because they did not clearly instruct the jury to disregard the functional external iPhone features. Samsung also asserted that any similarity between its own phone features and Apple's features was limited to basic or functional elements. Samsung concluded that these functional design features should have been ignored in a design patent infringement analysis.

The Federal Circuit disagreed with Samsung and held that the jury instructions were properly limited to the scope of the ornamental elements of the design patent. The court also concluded that the jury instructions were sufficient, because for design patent infringement, the test is whether the alleged infringing product's appearance would confuse a consumer into purchasing the product from Samsung instead of Apple. The Federal Circuit then affirmed Samsung's liability for design patent infringement.

Discussion and Analysis

The reader may well ask why Samsung's copying of Apple's iPhone features resulted in completely opposite holdings of liability that depended upon which statute was invoked. The answer, in part, lies in the purpose of each statute. The design patent statute exists to protect the new original aesthetic features of a manufactured article. This manufactured article may or may not include functional elements, but the distinction under federal design patent statute is irrelevant. What matters is that the ornamentation of that article is new and original when compared to previous designs. Because the design patent exclusively protects ornamentation the aesthetic iPhone features are protected and functional features are irrelevant.

A previous example of the design patent statute in operation is U.S. Design Patent no.Des.403, 867 that claims the floral border of a mirror. Clearly, a mirror is a manufactured article with a functional element. Similarly to the phone features in the Apple litigation, the design patent protects the floral border and disregards the mirror in the analysis, except as the combined substrate for the floral border. On the other hand, under trade dress law if a floral border on a product has any utility then it cannot be protected by trade dress because utilitarian features are exclusively protected by U.S. utility patents.

For trade dress, protection of the mirror would necessarily be the result, because trade dress law exists to designate a product source, but not to indefinitely protect functional features such as mirrors. Instead, trade dress law protects the source of and quality of products and services. The disadvantage of design patents is their limited lifetime of enforceability, whereas trade dress is renewable on the federal register or otherwise appropriately used and enforceable forever.

In the end, the Apple attorneys salvaged a substantial portion of their original damage award by going the "belt and suspenders route," that is, investing in more than one kind of intellectual protection for one subject matter. Time proved that even though their front line of defense for trade dress did not survive the appeal, the backup plan of several design patents won the day.

Adrienne B. Naumann has practiced intellectual property for almost twenty years in Chicago. She graduated from Chicago-Kent College of Law with high honors. She attended the University of Chicago where she received her bachelor's degree and the University of Illinois where she received her master's degree. Ms. Naumann provides trademark, copyright and patent applications as well as supporting areas of law. http://home.comcast.net/~adrienne.b.naumann/IP/

Endnotes for this article can be found on page 25 of the online edition of Friendly Passages.

Alto Adams Jr. Legal Writing Contest Rules

The Friends of the Rupert J. Smith Law Library invite all students currently enrolled in an accredited Florida Law School to compete in the Second Annual Justice Alto Adams Writing Competition.

Papers should be a scholarly endeavor and must have a legal theme on a topic of your choice. The papers will be judged on legal reasoning, the difficulty or novelty of the legal issue addressed, general standards expected of serious work, and include a reference to a recognized citation system as well as the Fla.R.App.Pro. Rule 9.800. The paper must be long enough to accommodate a well-treated topic but not exceed 5000 words. A student may submit a work that has been written as a school assignment but nothing that has been previously published.

Your papers should be double spaced and submitted electronically by email to lucielaw@bellsouth.net with the subject line "Justice Alto Adams Writing Competition 2015" between September 20, 2015 and March 15, 2016. The winner will be awarded $1000 and published in "Friendly Passages" magazine which is electronically circulated to most members of the Florida Bar. The prize money is sponsored by the Adams family and the St. Lucie Bar Association.

Please email Jim Walker at JimW@jimwalkerlaw.com with any questions. We look forward to receiving your entry.

What Is Vessel Documentation?

By Barbara A. Kreitz Cook, Esq.

"Documentation" is federal registration and certification evidencing U.S. nationality of a vessel for international purposes and of qualification to engage in a specific trade. 46 U.S.C. § 12134. The Certificate of Documentation is a more recognizable form of registration to foreign authorities than a vessel only state registered. Documentation is not conclusive evidence of ownership in a proceeding in which ownership is an issue. 46 U.S.C. § 12134 (3). A vessel operated only for pleasure may be documented and endorsed only for operation as such if the vessel is at least 5 net tons and wholly owned by U.S. citizens or entities. 46 U.S.C. § 12103; 46 U.S.C. § 12114. In general, a documented vessel may be placed under the command only of a citizen of the United States unless the vessel is documented with a recreational endorsement. 46 U.S.C. § 12131. During a national emergency declared by Presidential proclamation, or a period for which the President has proclaimed that the security of the national defense makes it advisable, the Secretary of Transportation may requisition or purchase, or requisition or charter the use of, a vessel owned by citizens of the United States, a documented vessel, or a vessel under construction in the United States. 46 U.S.C. § 56301. Vessel documentation must be renewed annually and new application made upon sale of the vessel. A vessel which is not encumbered by a mortgage may be deleted from documentation at the request of the owner or *sua sponte* by the NVDC on failure to renew. Florida does not issue titles for documented vessels.

The U.S. Coast Guard National Vessel Documentation Center (NVDC), located in Falling Waters, West Virginia, is the entity authorized to issue certificates of documentation for eligible vessels. 46 U.S.C. § 12103. The NVDC operates a website at http://www.uscg.mil/hq/cg5/nvdc. A bill of sale, conveyance, mortgage, assignment, or related instrument that includes any part of a documented vessel or a vessel for which an application for documentation is filed, must be filed to be valid. 46 U.S.C. § 31321 (a)(1) The NVDC is charged with filing and recording and satisfaction of those documents, as well as maritime liens (which are valid regardless of recording), in the order they are filed and maintains appropriate indexes, for use by the public, of instruments filed or recorded, or both. 46 U.S.C. § 31321(e). The record for an individual vessel is identified by the vessel's official number (ON) and name, and the record index for the vessel is an "abstract."

A person providing necessaries to a vessel on the order of the owner or a person authorized by the owner has a maritime lien on the vessel and may bring a civil action in rem to enforce the lien. 46 U.S.C. §31342. "Necessaries" includes repairs, supplies, towage, and the use of a dry dock or marine railway. 46 U.S.C. § 31301 (4). A person claiming a lien on a vessel documented, or for which an application for documentation has been filed, may record notice of that person's lien claim on the vessel. To be recordable, the notice must state the nature of the lien, state the date the lien was established, state the amount of the lien, state the name and address of the person and be signed and acknowledged. 46 U.S.C. § 31343 .

A preferred mortgage is mortgage on a documented vessel or on a vessel for which application for documentation has been made which is in substantial compliance with 46 U.S.C. §31321and is a lien on the mortgaged vessel in the amount of the outstanding mortgage indebtedness secured by the vessel. 46 U.S.C. §31322 (a); 46 U.S.C. §31325(a). When a vessel is sold by order of a district court in a civil action in rem brought to enforce a preferred mortgage lien or a maritime lien, any claim in the vessel existing on the date of sale is terminated, and the vessel is sold free of all those claims. 46 U.S.C. §31326 (a). Each of the claims terminated under subsection (a) of this section attaches, in the same amount and in accordance with their priorities to the proceeds of the sale, except that a preferred mortgage lien has priority over all claims against the vessel (except for expenses and fees allowed by the court, costs imposed by the court, and preferred maritime liens). 46 U.S.C. §31326 (b)(1) . A "preferred maritime lien" is a maritime lien on a vessel arising before a preferred mortgage was filed, for damage arising out of maritime tort, for wages of a stevedore, for wages of the crew of the vessel, for general average, or for salvage, including contract salvage. 46 U.S.C. § 31301 (5).

Barbara A. Kreitz Cook, Esq. is the Fla. Bar Board Certified Admiralty & Maritime Law Chair, Martin County Bar Association Admiralty Law Committee and a member, Fla. Bar Admiralty & Maritime Law Certification Committee.

Love Canal & RCRA: What Could Have Been

By Braulio M. Rodriguez

Endnotes for this article can be found on page 26 of the online edition of Friendly Passages

Introduction

Imagine a child born deaf with a cleft palate, an extra row of teeth, and slight retardation.[1] Imagine another child born with an eye defect.[2] Can you picture it?

Now, imagine the parents of a child who was never born, who died while still inside the womb. A miscarriage, the doctor said, the fifth one in in their community in recent history. Now, imagine when that unborn child's mother, still wincing from heartbreak, learns that she has an above-average white blood cell count – a possible sign of leukemia – and that she, her husband and her neighbors all possibly have been ingesting benzene, a known human carcinogen linked to cancer. Worse, imagine how that family and others in the same community feel when they find out the chemical that is causing their suffering is seeping up from underground and into their very own American Dream: their homes.[3]

This is the story of Love Canal, an area of Niagara Falls, New York that spearheaded the environmental awareness movement, as we know it today. The pain endured by the individuals described above was real, and caused by a lack of regulation of hazardous wastes. The pain could have been avoided. A solution came too late.

Love Canal

This paper will discuss the facts of the Love Canal tragedy and the liability case that resulted, *United States v. Hooker Chemicals & Plastics Corp.*[4] Additionally, this paper will examine the reasoning of the New York district court in deciding that Hooker Chemicals & Plastics Corp. was liable for public nuisance. Further, this paper will argue that had the Resource Conservation and Recovery Act (RCRA) been implemented at the time Hooker Chemicals & Plastics Corp. was in operation, the court would not have had to rely on the common law principle of nuisance. Lastly, this paper will apply the specific sections of RCRA that could have prevented the Love Canal tragedy.

Love Canal: The Background

Why "Love Canal?"

Ironically, creators of "Love Canal" intended the land to be a "model city."[5] It started with inventor William T. Love and his desire to create a city that was ideal for industry.[6] He considered an ideal industrial city to be close to hydroelectric power. Hydroelectric power was the only way to generate electricity at the time and that meant the ideal industrial city needed to be located near a water source.[7] As a result, William T. Love started building his model city by digging a canal that would connect Lake Ontario with the lower Niagara River.[8] The canal would serve to circumvent water around Niagara Falls and create direct-current power, thereby generating electricity to service his "model city."[9] The physical property area where he started digging is what is known today as Love Canal.[10]

Nikola Tesla and the end of "Love Canal"

Inventor Nikola Tesla developed a practical way of producing alternating current electricity. As a result, William T. Love would never realize his dream of creating an industrial city powered by water current. Thanks to Louis Tesla, there was no longer a need to live or work around a water source to have electricity. In addition, new legislation at the time prohibited the diversion of water from the upper Niagara River.[11] Therefore, new technology and new legislation, combined with a looming economic depression, caused William T. Love's financers to back out of funding Love Canal.[12] The unfinished canal site spanned sixteen acres; it was three quarters of a mile long, thirty feet deep, eighty feet wide at the top, and forty-five feet wide at the base.[13] In 1910, the Love Canal property sold at public auction.[14]

Enter: Hooker Chemicals & Plastics Corporation

Sometime after the sale of the Love Canal property in 1910, Hooker Chemicals and Plastic Corporation (Hooker Chemicals) purchased the property and, between 1942 and 1953 dumped industrial and solid chemical wastes underground there.[15] Specifically, they dumped more than 21,800 tons—over 40 million *pounds*—of liquid and solid chemical wastes into the canal site.[16] The substances were designated as hazardous under the Clean Water Act (CWA) and the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).[17] The City of Niagara Falls also used the canal site to dump municipal wastes.[18] Some also reported that the United States Army also used the site for dumping wastes.[19]

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Love Canal & RCRA: What Could Have Been

The Sale

In 1953, despite several years of dumping liquid and solid chemical wastes underground, Hooker Chemicals sealed and sold the property to the City of Niagara Falls Board of Education for one dollar.[20] The City of Niagara Falls Board of Education purchased the property with full knowledge of the events that took place there in years prior. In fact, the deed conveying the Love Canal property specifically advised the following:

> "Prior to the delivery of this instrument of conveyance, the [City of Niagara Falls Board of Education] has been advised by [Hooker Chemicals] that the [Love Canal Property has] been filled, in whole or in part, to present grade level thereof with waste products resulting from the manufacturing of chemicals by [Hooker Chemicals] at its plant in the City of Niagara Falls, New York, and the [City of Niagara Falls Board of Education] assumes all risk and liability incident to the use thereof.[21]

Clearly, the city of Niagara Falls took title to the Love Canal property with knowledge of the dumping that had been going on there for several years. Indeed, they were also aware of the dumping going on there since they also contributed to it by disposing municipal waste at the site. As a result, Hooker Chemicals filed a countersuit against the City of Niagara Falls and the City of Niagara Falls Board of Education arguing that they were each to blame for the losses suffered.[22]

Amazingly, after the transfer of title, the City of Niagara Falls School Board built a school on the property.[23] In addition, the City of Niagara Falls installed sanitary sewer lines under the property.[24] The city also removed thousands of yards of the soil used to cover the wastes dumped in the canal site.[25] They also conveyed a portion of the land to property developers who, in turn, built homes adjacent to the canal site.[26]

Love Canal: The Case

Additional Facts Leading to the Lawsuit

In 1976, after several years of abnormal rains in the Niagara Falls area of New York, the toxic substances that were tucked under the Love Canal property since 1953 finally began surfacing in, among other places, residents' backyards and basements.[27] In addition, there were reports of animals and children being chemically burned, as well as complaints of chemically damaged and corroded shoe soles, fences, plants, trees and shrubbery.[28]

In 1977, a young city reporter for the Niagara Gazette, Mike Brown, further investigated the conditions reported by families in the area.[29] Initially, city officials responded that the conditions residents were complaining about were a mere nuisance, and that there was no serious danger to people.[30] Mike Brown continued to report his findings in a series of articles that got the attention of local residents.[31] In response, residents sprang into action vowing tax strikes[32] and protesting to the point of their arrest.[33]

Despite the residents' efforts, city officials dragged their feet. A possible reason, some suggested, was that the City of Niagara Falls wanted to stay on Hooker Chemicals' good side. After all, when Hooker Chemicals sold the property to the City of Niagara Falls Board of Education, they did not leave town. Rather, Hooker Chemicals had a continued presence in Niagara Falls, providing as many as 3,000 blue-collar jobs and a substantial amount of tax money.[34] Moreover, around the same time concern started growing amongst residents about the toxic wastes, Hooker Chemicals was considering building a $17 million headquarters in downtown Niagara Falls.[35]

Despite the economic benefits Hooker may have provided to the city, residents continued to push for investigation of the conditions. As a result, the New York State Department of Environmental Conservation ran tests that revealed "highly injurious halogenated hydrocarbons."[36] In addition, in May 1978 an Environmental Protection Agency study revealed the presence of benzene, a known cancer-causing agent in humans, in the household air up and down the streets of the Love Canal property.[37] Essentially, residents of the Love Canal area were inhaling the same toxic air that factory workers inhaled, but for longer periods of time and without gas masks.

Finally, on August 2, 1978, the New York State Health Commissioner, Robert Whalen, declared a state of emergency at the Love Canal property and ordered the closure of the 99th Street School and the evacuation of pregnant women and children less than 2 years of age.[38] On August 7, 1978, President Jimmy Carter approved $10 million in financial aid to New York State for purchasing the homes of the people who were evacuated.[39]

After the initial evacuation in 1978, more protests and more studies continued. The studies resulted in more evacuations, little by little, until finally on May 21, 1980, President Carter declared Love Canal a national emergency and released federal funds to evacuate 710 families and house them for up to one year at government expense.[40] After that, he agreed to ask Congress for 3.8 million to fund medical examinations and health studies for people exposed to the contamination in Love Canal.[41]

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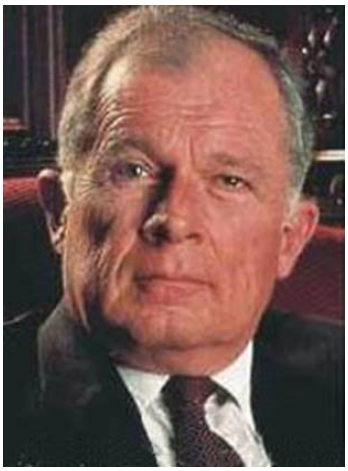
F. Lee Bailey: From Fame to Fall

By Richard Wires

During the latter years of the twentieth century F. Lee Bailey was one of America's leading defense lawyers and perhaps its best-known. For four decades he appeared on defense teams in a series of famous trials. Then suddenly his star plummeted amid evidence of mishandling a client's assets. He was jailed for contempt by a federal judge when he failed to render an accounting and was disbarred in two states. A third state refused to license him to practice. It is a story of self-destruction that seems extraordinary given his knowledge and early achievements in the law.

Francis Lee Bailey was born in Massachusetts in 1933. Dropping out of Harvard to enlist in the Marines during the Korean War, and becoming a Navy jet fighter pilot, Bailey then got special admission to Boston University's School of Law in 1957. His military service substituted for undergraduate credits. He finished at the head of his class in 1960 and a year later began handling high-profile cases. Among them were the second murder trial and acquittal of Dr. Samuel Sheppard in Cleveland, the defense of Albert DeSalvo against charges of being the "Boston Strangler," the prosecution of Dr. Carl Coppolino for murder in New Jersey, the court martial of Captain Ernest Medina for killings at My Lai, the trial of heiress Patty Hearst for helping the Symbionese Liberation Army, and his critical role in challenging the testimony of Mark Fuhrman in O.J. Simpson's trial. In that instance his tough cross-examination made the detective and his evidence seem so unreliable that it helped produce the vote for acquittal. Though his clients were not always fully vindicated, he obtained good results, refuting some charges and getting them lesser sentences. Not all his clients believed he did his best. Patty Hearst thought his closing statements poorly organized, for instance, and suspected that Bailey may have been drinking. She cited his weak representation in appealing for a new trial.



F. Lee Bailey

It was his curious conduct while co-counsel in the 1994 defense of major drug dealer Claude Duboc in a federal court in Florida that brought protracted legal troubles and in time his disbarment. Bailey negotiated with prosecutors a plea bargain for Canadian-born Duboc, one that required his surrender of all assets to the federal government since everything had come from his drug activities, assets which included Duboc's sizable share holdings in BioChem Pharma. The 602,000 shares then had a value of $5.9 million but in time rose to over $15 million. When Judge Maurice Paul accepted Duboc's guilty plea on two counts and the arranged property terms in May 1994, the BioChem stock was entrusted to Bailey, to cover his expected expenses while liquidating Duboc's real estate holdings and whatever legal fees Paul would later approve. The clarity and terms of the arrangement would in time be disputed. Bailey put the stock in his own investment account in a Swiss bank, Credit Suisse, and then used the BioChem shares in order to borrow over $4 million. He placed the funds in his money market account and then his personal checking account at Credit Suisse, in subsequent months spending over $3.7 million of it for personal uses, and later he also deposited $730,000 from sale of other stock owned by Duboc into his own account. Duboc's real estate holdings included two large estates in France. Although their monthly maintenance expenses averaged about $30,000, he delayed selling them, with Baily instead using the property at times.

By January 1996 Duboc wanted new lawyers and Paul approved the motion to replace Bailey, who was notified that he had ten days to submit a full accounting of funds, but Bailey not only failed to heed the judge's order but apparently spent another $300,000. He also informed the Swiss government that the assets originally deposited came from the illegal drug trade, knowing it would freeze the accounts, and letting Bailey claim in consequence that he was unable to produce the assets in federal court. By then he had sold 202,000 shares of BioChem but 400,000 shares remained in the bank. Paul issued a second order to account for either the stock or any substitute assets by 1 February. When Bailey could not do so he was found in contempt, spending over six weeks in jail, until he could produce $2.3 million for the court.

Bailey was seemingly desperate in 1996. His explanations of what had happened did not appear credible. He claimed the deposit of $730,000 from stock sales into his personal account was an inadvertent error but the bank had retained letters from Bailey setting forth his clear instructions. Bailey also wrote to Paul, not sending prosecutors a copy, urging Paul not to approve Bailey's replacement. He then testified at the contempt hearing that he never received or knew about the judge's two orders; yet he had referred to one of the orders in a letter and witnesses confirmed having served him. Bailey argued too that the assignment of the BioChem stock to him had never constituted a "trust." Another assertion was that he was responsible only for the shares' value at $5.9 million. But at the time of his loans and big expenditures in 1994 the BioChem stock had not yet begun to appreciate much in value. His spending could not have come from the increase. By early 1996 as a result of launching a major new drug the

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F. Lee Bailey: From Fame to Fall

shares' value had risen by about $10 million. That was the amount for which the court said he had to account. Eventually the court set Bailey's valid expenses in the Duboc case at $1.8 million after having rejected his claims of nearly $424,000 in additional costs. Clearly he had spent more than the court now allowed. Meanwhile he was also faced with a large bill for unpaid income taxes.

The foregoing information was established by the federal court and by the Florida Bar Association when it too investigated the situation and began disbarment proceedings. Major findings showed violations in handling assets held in trust, commingling of a client's funds with his own, making false statements under oath, knowingly disregarding two court orders, communicating ex parte with a judge about a pending motion, and other breaches of the standards of professional conduct. Nor were there indications of regret about his serious misconduct or any other mitigating factors. In November 2001 the Florida Supreme Court disbarred Bailey: Florida Bar v Bailey, 803 So.2d 683, 694. Massachusetts then initiated disbarment action against Bailey based on reciprocity with Florida's decision. In the meantime his case before the Court of Federal Claims failed when the court ruled against him. After a Massachusetts justice reviewed everything and advised his disbarment, Bailey appealed to the full Supreme Judicial Court, which again reviewed the whole Bailey situation in great detail. It held that Florida's actions were fair and justified, backed the action their own member had proposed, and issued its ruling that Bailey should be disbarred: In the Matter of F. Lee Bailey, Mass SJC-08764.

"I get paid for seeing that my clients have every break the law allows. I have knowingly defended a number of guilty men. But the guilty never escape unscathed. My fees are punishment for anyone."
- F. Lee Bailey

Later yet one more battle would also be lost. In 2012 after Bailey became a state resident he sought admission to the Maine Bar, passing the examination, but the Board of Examiners then denied his application by a vote of 5-4. It found insufficient evidence of the "honesty and integrity" to be expected of a practicing attorney. Bailey's appeal to the state's Supreme Judicial Court for a review of the decision was heard by a justice who deemed admission possible if Bailey paid his tax bill of $2 million. Bailey then asked for reconsideration of his application in 2013, but the Board of Examiners appealed the justice's decision to the full Supreme Court, which in April 2014 voted 4-2 to back the board. Bailey would not practice law in Maine.

During his many decades of successful practice Bailey courted publicity and obviously liked his stardom. He was also a highly paid speaker and wrote a number of books, notably *The Defense Never Rests* and *For the Defense,* and despite his trouble many lawyers studied his cases and admire his work. In recent years he busies himself looking after his personal affairs. Yet he still professes deep interest in the law.

Many observers have found it difficult to understand Bailey's conduct and his apparent lack of self-discipline. He surely knew from the outset that the property entrusted to him was for a specific purpose and that his actions and records would be subject to court review. That he commingled funds and repeatedly used the money and real estate for personal purposes cannot be explained away by his subsequent assertions and claims. Had he simply found so much wealth and power irresistible? Did he eventually become so involved that he could not extricate himself? Certainly the attempts to avoid the federal court's order for an accounting appear to have been desperate acts. But whatever his thinking may have been a once prominent legal career had ended in well publicized disgrace.

Richard Wires holds a doctorate in European History and a law degree. He served in the Counter Intelligence Corps in Germany and is Professor Emeritus of History at Ball State University, where he chaired the department and later became Executive Director of the University's London Centre. His research interests include both early spy fiction and actual intelligence operations. His books include "The Cicero Spy Affair: German Access to British Secrets in World War II."

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Love Canal & RCRA: What Could Have Been

The Lawsuit and the Theory of Liability

By October 31, 1979, over 800 lawsuits were filed against Hooker Chemicals. The lawsuit on which this paper is focused was brought against Hooker Chemicals by the United States and the State of New York. This particular lawsuit boiled down to money: The State of New York and the United States wanted compensation for the money it spent on cleaning up Hooker's mess. Specifically, the United States filed suit against Hooker Chemicals to recover costs incurred in preventing further migration of waste, to relocate the families, and for other actions taken in response to the waste in Love Canal.[42] Their theory of liability was Public Nuisance.[43]

The State of New York and the United States argued that "common law imposes joint and several liability on those responsible for creating public nuisances without the need to show negligence or fault, and regardless of whether the party creating the nuisance still owns the relevant property."[44] Hooker Chemicals, in response, argued that the question whether the disposal of chemical waste is an abnormally dangerous activity, such as would subject it to liability, was a question for the jury; that it should not be liable without a jury determination that it was the proximate cause of the nuisance alleged; and that its liability for the nuisance terminated when the property was sold to the purchaser.[45] Essentially, Hooker Chemicals thought it should not be subject to strict liability and that they were not the ones to blame since they sold the property.

Nevertheless, the court sided with New York State and the United States and held Hooker Chemicals strictly liable for public nuisance. In reaching its decision, the court struggled with the principles of the "impenetrable jungle" of nuisance law,[46] first distinguishing between public and private nuisance, then identifying the development of common law nuisance in New York, and finally relying on two cases to reach its decision.

The first case the court turned to was *State of New York v. Schenectady Chemicals Inc.*, 459 N.Y.S.2d. 971, 976 (Sup.Ct.1983), which held that it is not necessary to show acts of negligence with regard to public nuisance and that "one who creates a nuisance through an inherently dangerous activity or use of an unreasonably dangerous product is absolutely liable for the resulting damages, irregardless of fault, and despite adhering to the highest standard of care." Next, the court examined *Doundoulakis v. Town of Hepstead*, 368 N.E.2d 24, 27 (1977) which set out the guidelines for determining whether an activity is abnormally dangerous.[47]

Applying the guidelines in *Doundoulakis*, as well as the reasoning in *Schenectady*, the court in *Hooker* held that Hooker Chemicals engaged in an abnormally dangerous activity when they dumped toxic waste into Love Canal, thereby creating a public nuisance. In its reasoning, the court stated that "while the New York courts have not explicitly held that the disposal of hazardous wastes by the generator is, in itself, an abnormally dangerous activity requiring the application of strict liability standards, the language employed by the leading cases certainly indicate that such a holding would not be unreasonable in a case such as the instant one."[48] Additionally, the court held that, as a matter of law, Hooker Chemicals was a proximate cause of the public nuisance. Lastly, the court rejected Hooker's defense that they were not liable because they conveyed the property to the City of Niagara Falls Board of Education.

Argument

The Love Canal Tragedy Could Have Been Avoided

The court in *Hooker* struggled to reach a reasoned conclusion. It was forced to use a web of common law to deal with what should have been an open-and-shut case: Hooker came, they irresponsibly dumped, and tragedy resulted. If the Resource Conservation and Recovery Act (RCRA) had been fully implemented at the time Hooker Chemicals dumped toxic chemicals into Love Canal, there would have been a swift finding of liability. Indeed, had RCRA been enacted at the time Hooker Chemicals operated the site at issue in the case, the regulations would have likely prevented any irresponsible dumping altogether.

The Resource Conservation and Recovery Act (RCRA): An Overview

RCRA was a free-standing Act of Congress before it was codified into the United States code.[49] Standing alone, RCRA did not have teeth. As a result, the act required that the Environmental Protection Agency promulgate regulations. The regulations are found in the Code of Federal Regulations and, among other things, apply to those who generate, transport, and dispose of hazardous wastes.

RCRA has ten subtitles, subpart A through J, which have corresponding numbers starting with §1001 for subpart A, etc.[50] Since RCRA was codified in the United States Code as part of the Solid Waste Disposal Act, it was placed in Title 42 of the United States Code and begins in chapter 82 with section §6901.[51] Despite the official codified numbering in the United States Code, practitioners and scholars commonly refer to the lettered subtitles of the original act rather than the code section. For example, subpart A of RCRA will be referred to as subpart A, not 42 U.S.C. §6901. Given these facts alone it is clear to see why at least one court has described RCRA as fraught with "mind numbing complexity."[52]

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Love Canal & RCRA: What Could Have Been

RCRAs Waste Management Section: Subtitle C

The most important RCRA subtitle for the purposes of this paper, and for the context of Hooker Chemicals and the Love Canal tragedy, is Subtitle C. Subtitle C encompasses the hazardous waste regulatory program.[53] Also important in the Love Canal context are RCRAs permit requirements for generators, transporters, and handlers of hazardous wastes. RCRA has a "cradle to grave" management system, which means that regulations apply to generators, transporters, and handlers (disposers) of hazardous wastes.[54] For example, under the "cradle to the grave" scheme, a generator of hazardous waste will be liable for the irresponsible transport and/or disposal of the waste generated. Some of the other RCRA subtitles cover laws that apply to federal facilities, whistleblower protection, regulation of nonhazardous wastes, and a medical waste-tracking program.[55]

Specific RCRA Subtitles that Could Have Applied to Love Canal

It is likely that Hooker Chemicals would have qualified as a generator and a handler of hazardous wastes under RCRA. As a result, the company would have been subject to the RCRA Generator standards under Subtitle C §3002(a). RCRA permit requirements also would have regulated actions taken by Hooker Chemicals in the generation and disposal process, as well as in the closing of the site.

Hooker Chemicals was a generator of hazardous waste under RCRA

According to the Code of Federal Regulations, a generator of hazardous waste is "any person, by site, whose act or process produces hazardous waste . . . or whose act first causes a hazardous waste to become subject to regulation."[56] Hooker Chemicals was in the business of manufacturing pesticides, plasticizers, and caustic soda.[57] The wastes the company produced were clearly wastes the court recognized and accepted as hazardous, not to mention all of the studies that were done prior to the filing of the case. As such, Hooker Chemicals clearly falls under some type of classification of "generator" under RCRA and, therefore, would have been subject to standards and regulations.

Some of the standards and regulations Hooker Chemicals would have had to abide by included: (1) notifying the Environmental Protection Agency (EPA) that they are producing hazardous wastes and obtaining an EPA identification number;[58] (2) keeping records and making periodic reports;[59] (3) establishing waste minimization programs; and (4) preparing waste shipments properly under the RCRA manifest system.[60] In addition, the regulations required that the hazardous waste be properly managed on site and that employee training on dealing with the hazardous waste be conducted regularly. Clearly, if Hooker Chemicals would have been required to notify someone that they were producing hazardous wastes, if they were required to have an identification number, and if they were required to establish a waste minimization program, it would be highly unlikely that they would have irresponsibly dumped toxic waste into Love Canal. Moreover, if these requirements were in place, the court would have had an easier time establishing liability, as Hooker Chemicals would have violated the plain language of the regulations.

Hooker Chemicals Was a TSD Facility Under RCRA

Subtitle C of RCRA authorized the EPA to promulgate regulations that apply to facilities that treat, store, or dispose of hazardous wastes (TSD Facilities). The regulations contain "design, operation, and maintenance requirements" for particular types of disposal facilities.[61] A disposal facility is "a facility or part of a facility at which hazardous waste is intentionally placed into or on any land or water, and at which waste will remain after closure."[62] An example of a disposal facility is a landfill. Hooker Chemicals intentionally buried hazardous wastes underground and the hazardous wastes remained there after closure. Clearly, the actions by Hooker Chemicals fall under the definition of a TSD facility pursuant to the Code of Federal Regulations.

In 1984, Congress amended RCRA to add additional regulations to TSD facilities that disposed of hazardous wastes in land. The amendments increased regulations such that land disposal of hazardous waste were virtually eliminated.[63] Specifically, the amendments stated that a hazardous waste may not be disposed of in land unless the EPA first either: "1) finds that such disposal will not adversely affect health or the environment or 2) requires pretreatment of waste by a specified technology to reduce its adverse effects."[64] Indeed, lives would have been changed if, before toxic wastes were dumped into Love Canal, Hooker Chemicals had been required to check with the EPA to determine whether the waste would adversely affect the surrounding environment and, if so, whether it could be treated to reduce its effect.

RCRA Permits Could Have Saved Lives

Anyone who has ever tried to build or even renovate on a parcel of land is well aware of the myriad of permit requirements of their local permitting authority. Those who do not comply with permit requirements generally are unable to build anything. The same analysis can be applied to disposal facilities governed by RCRA. Disposal facilities that do not comply with RCRA permitting requirements are generally unable to continue operation. If Hooker Chemicals had had to comply with the stringent RCRA permit requirements, lives could have been saved.

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Love Canal & RCRA: What Could Have Been

Permitting requirements for landfills include, among other things, design requirements, operating requirements and monitoring requirements. For example "design requirements include specifications for liner and leachate collection systems; operating requirements include removal of storm water; and monitoring requirements include sampling and analysis from a specified system of groundwater wells."[65] If a facility does not comply with the permit requirements, there will be a schedule that provides a time by which to achieve compliance.[66] If that time is not met, the permit could be revoked and the landfill will subsequently face the consequences of operating illegally. It is also important to note that RCRA requires permits after closure of a landfill. This requirement ensures that the landfill is closed properly and safely and avoids the risk of contamination or damage to public health.

If Hooker Chemicals had been regulated by permits, it is very likely that they would not have been able to dispose of the waste so irresponsibly and lives could have been changed. Moreover, the court could have looked to the violation of the permit requirements as a basis for liability rather than relying on common law nuisance.

Conclusion

The Love Canal tragedy was just one example of the irresponsible actions of industry at the time. Love Canal was not the biggest or the worst toxic spill in American history. Rather, it was the one that garnered the most attention. The fact that Love Canal and the surrounding area were meant to be a model industrial city, a beacon of progress, is almost inconceivable.

Hooker Chemicals was a generator of hazardous waste. It was also a disposer of such wastes. Unfortunately, its actions went unregulated for too long. Had RCRA been implemented at the time Hooker Chemicals conducted business, it would have regulated the way Hooker Chemicals generated toxic waste as well as regulated the way it disposed of it. Many cringe at the prospect of additional governmental regulations and claim that they destroy American lives. However, in this case, it is clear that government regulations would have done the opposite.

Endnotes for this article can be found on page 26 of the online edition of Friendly Passages.

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Attorney Disqualification When a Non-Lawyer Employee Switches Sides

the employee had not revealed confidential information to her new employer who had specifically instructed her not to discuss her knowledge of the case.

In *Stewart v. Bee-Dee Neon & Signs, Inc*., 751 So. 2d 196 (Fla. 1st DCA 2000), the employee, a paralegal/ legal assistant, was assigned a worker's compensation claimant's case in her former firm. She came into contact with privileged materials. No evidence was presented that she had any contact with the case at her hiring firm, or that she disclosed any confidential information to anyone. The hiring firm instructed her to maintain the confidentiality of information acquired about former employers' clients. The employee was not assigned to the case. The court found that disqualification was improper.

The court decided against a rule of automatic disqualification and against the shifting burden adopted by the Fourth and Third District Courts. "The burden of proving that disqualification is required rests at all times upon the movant …" *Id.* at 207. First, the former firm must present credible evidence that the non-lawyer employee was exposed to confidential information that is material to the representation of the former firm's client in the pending matter. This raises two rebuttable presumptions: that the employee did obtain such information, and that the employee has or will disclose it to the hiring firm. The burden then shifts to the hiring firm to rebut one of these presumptions. If it convinces the court by the greater weight of the evidence that the employee did not acquire any confidential information, the firm will not be disqualified. If the court is not convinced, it must consider whether the employee disclosed material to the hiring firm. The burden is placed on the former firm to show the employee did disclose material confidential information, or that the employee will be working on the matter, or that the new firm is not taking adequate measures to ensure nondisclosure. Unless the former firm proves this, the motion for disqualification will be denied.

The Fifth District has considered the circumstance of the non-lawyer employee changing sides in two cases: *City of Apopka v. All Corners, Inc*., 701 So.2d 641 (Fla. 5th DCA 1997), and *Lansing v. Lansing*, 784 So. 2d 1254 (Fla. 5th DCA 2001). In *City of Apopka,* the secretary did not work on the case at the hiring firm and she was instructed not to disclose any information. The hiring law firm was not disqualified. In *Lansing*, the employee worked on a dissolution case for the husband when with her former employer, a solo practitioner, and also worked on the case for the wife for the subsequent employer, also a solo practitioner. She was not instructed not to work on the file. Not surprisingly, the District Court found that the husband's motion for disqualification should have been granted because adequate screening measures were not implemented and she was permitted to work on the

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Attorney Disqualification When a Non-Lawyer Employee Switches Sides

matter. The court expressly adopted the standard of the First District Court as stated in *Stewart v. Bee-Dee Neon & Signs, Inc., supra.*

Waiver

The right to seek disqualification may be a waived if the former client fails to make a motion for disqualification within a reasonable time after discovery of the grounds. See *Yang Enterprises, Inc. v. Georgalis,* 988 So. 2d 1180 (Fla. 1st DCA 2008) (failure to object to a purported conflict of interest for six years during ongoing litigation was a waiver); Case v. City of Miami, 756 So. 2d 259 (Fla. 3d DCA 2000) (the moving party originally consented to the plaintiff's choice of counsel but then sought to disqualify counsel approximately seven years later when the case had been set for trial); Birdsall v. Crowngap, Ltd., 575 So. 2d 231 (Fla. 4th DCA 1991) (a delay of four months was not unreasonable because the moving party thought the case might have been abandoned); Balda v. Sorchych, 616 So. 2d 1114 (Fla. 5th DCA 1993) (the moving party had known of the conflict for more than three years); Snyderburn v. Bantock, 625 So. 2d 7 (Fla. 5th DCA 1993) (the motion was not too late because the moving party had at least advised the lawyer of the conflict as soon as it had become known).

Review

An order granting or denying a motion to disqualify counsel is reviewable by certiorari. See Rombola v. Botchey, 2014 WL 444002 (Fla. 1st DCA 2014); Frye v. Ironstone Bank, 69 So. 3d 1046 (Fla. 2d DCA 2011); Moriber v. Dreiling, 95 So. 3d 449 (Fla. 3d DCA 2012); Lieberman v. Lieberman, 160 So. 3d 73 (Fla. 4th DCA 2014); Eccles v. Nelson, 919 So. 2d 658 (Fla. 5th DCA 2006). 5 Fla. Prac., Civil Practice § 6:4 (2015-2016 ed.)

Judge F. Shields McManus is a Nineteenth Judicial Circuit Court Judge appointed in 2007 and elected in 2010. Since then he has been assigned to many divisions and has a broad judicial experience. Judge McManus is a graduate of FSU and FSU College of Law. He is active in the legal community and has sat on several boards and served as president. Additionally, Judge McManus is active in educational, charitable and civic organizations in Stuart and Martin Counties.

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U.S. Army Corps of Engineers v. Hawkes: Protecting Property Rights at the Supreme Court of the United States

(Endnotes)

2. See Rapanos v. U.S., 547 U.S. 715, 721 (2006)("[t]he average applicant for an individual permit spends 788 days and $271,596 in completing the process, and the average applicant for a nationwide permit spends 313 days and $28,915—not counting costs of mitigation or design changes").

3. Belle Company remains pending before the Supreme Court of the United States on a motion for reconsideration and will likely remain so until the Court rules on Hawkes on the merits.

4. Before Sackett, every circuit court to have addressed that question has answered in the negative. See Laguna Gatuna, Inc. v. Browner, 58 F.3d 564 (10th Cir. 1995) (EPA compliance order); S. Ohio Coal Co. v. Office of Surface Mining, Reclamation, & Enforcements, 20 F.3d 1418 (6th Cir. 1994) (same); Rueth v. EPA, 13 F.3d 227 (7th Cir. 1993) (same); S. Pines Assocs. v. United States, 912 F.2d 713 (4th Cir. 1990); and Hoffman Group, 902 F.2d 567 (7th Cir. 1990) (same).

5. This portion of the article largely derives from co-author Damien Schiff's "Fairbanks Northstar Borough v. United States Army Corps of Engineers: Can a Landowner Seek Judicial Review of a Jurisdictional Determination (JD) Under the Clean Water Act?," published in the ABA's Water Quality and Wetlands Committee Newsletter, January 2009, at 6.

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Not Your Mom's (trade) Dress: Apple, Inc. v. Samsung Electronics

(Endnotes)

1. 786 F.3d 983 (Fed. Cir. 2015).

2. Dilution occurs whenever a third person's use of a famous mark blurs or tarnishes that mark, regardless of the presence or absence of actual or likely (i) confusion (ii) competition, or (iii) economic injury. 15 U.S.C. section 1125(c) (1).

3. Secondary meaning indicates that the trade dress is actually recognized by the consuming public as designating the source of the product or service.

4. Functional features always provide a utilitarian purpose.

5. Apple did not find any Ninth Circuit decisions in which product configuration was protected under trade dress law.

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Love Canal & RCRA: What Could Have Been

(Endnotes)

1. Eckardt C. Beck, *The Love Canal Tragedy*, 5 EPA J. 17 1979.
2. *Id*.
3. *Id*.
4. *United States v. Hooker Chemicals & Plastics Corp.*, 722 F. Supp. 960, 961 (W.D.N.Y. 1989).
5. Eckardt C. Beck ,*The Love Canal Tragedy*, 5 EPA J. 17 1979.
6. Jay S. Albanese, *Love Canal Six Years Later: The Legal Legacy*, 48 Fed. Probation 53 1984.
7. *Id*.
8. *Id*.
9. *Id*.
10. *Id*.; *see also* Eckardt C. Beck, *The Love Canal Tragedy*, 5 EPA J. 17 1979.
11. *United States v. Hooker Chemicals & Plastics Corp.*, 722 F. Supp. 960, (W.D.N.Y. 1989).
12. *Id*.
13. *Id*.
14. Jay S. Albanese, *Love Canal Six Years Later: The Legal Legacy*, 48 Fed. Probation 53 1984; *see also* Eckardt C. Beck, *The Love Canal Tragedy*, 5 EPA J. 17 1979.
15. *United States v. Hooker Chemicals & Plastic Corp.*, 722 F. Supp. 960 (W.D.N.Y. 1989).
16. *Id*.
17. *Id*.
18. *Id*.
19. Associated Press, Military Linked to Love Canal: State Probe Charges Dumping of Poison, Boston Globe, May 29, 1980, Retrieved from http://ezproxy.barry.edu/login?url=http://search.proquest.com/docview/293982202?accountid=27715
20. *United States v. Hooker Chemicals & Plastic Corp.*, 722 F. Supp. 960 (W.D.N.Y 1989).
21. *Id*.
22. Associated Press, *US/World In Brief: Love Canal Countersuit File*d, Boston Globe, October 29, 1980 retrieved from http://ezproxy.barry.edu/login?url=http://search.proquest.com/docview/294014981?accountid=27715.
23. *United States v. Hooker Chemicals & Plastic Corp.*, 722 F. Supp. 960 (W.D.N.Y. 1989).
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25. *Id*.
26. *Id*.
27. D. McNeill, *Niagara falls area being eaten away by chemicals children and dogs burned at play outside N.Y. homes*, The Globe and Mail, August 3, 1978, retrieved from.
28. *Id*. Michael H. Brown, *Love Canal and the Poisoning of America*, The Atlantic Dec. 1979.
29. Michael H. Brown, Love Canal and the Poisoning of America, The Atlantic Dec. 1979.
30. *Id*.
31. *See generally* Mike Brown, *Evacuation mulled at dump site*, Niagara Gazette, August 1, 1978; Mike Brown, *The System Flounders while residents fume*, Niagara Gazette, July 30, 1978; Mike Brown, *Loves idea became nightmare*, Niagara Gazette, August 3, 1978; Mike Brown, *Tests show toxics in canal's north end*, Niagara Gazette, August 6, 1978.
32. Jerauld E. Brydges, *Canal residents vow a tax strike*, Niagara Gazette, August 3, 1978.
33. Mike Brown, *Canal protesters arrested*, Niagara Gazette, December 11, 1978.
34. Michael H. Brown, *Love Canal and the Poisoning of America*, The Atlantic Dec. 1979.
35. *Id*.
36. *Id*.
37. *Id*. *See also*. Love Canal Special Collection, University of Buffalo Special Collection
38. Mike Brown, *Evacuation of kids urged*, Niagara Gazette, August 2, 1978.
39. Love Canal Special Collection, University of Buffalo Special Collection.
40. Associated Press, *Residents of New York's Love Canal have won a round*, Boston Globe, May 22, 1980.
41. Associated Press, *Carter seeks aid for love canal*, N.Y. Times, October 25, 1980.
42. U.S. v. Hooker Chemicals & Plastics Corp. 722 F. Supp. 960 (W.D.N.Y 1989).
43. *Id*.
44. *Id*.
45. *U.S. v. Hooker Chemicals & Plastics Corp.*, 722 F. Supp. 960 (W.D.N.Y 1989).
46. *Id*, *citing Copart Industries, Inc. v. Consolidated Edison Co.,* 362 N.E.2d 968, 969 (1977).
47. *Doundoulakis v. Town of Hempstead*, 368 N.E.2d 24, 27 (1977); *citing* Restatement (Second) of Torts §520 ((a) the existence of a high degree of risk of some harm to the person, land or chattels of others; (b) the likelihood that the harm that results from it will be great; (c) inability to eliminate the risk by the exercise of reasonable care; (d) extent to which the activity is not a matter of common usage; (e) inappropriateness of the activity to the place where it is carried on; and (f) extent to which its value to the community is outweighed by its dangerous attributes.
48. *U.S. v. Hooker Chemicals & Plastics Corp.*, 722 F. Supp. 960 (W.D.N.Y. 1989).
49. Jeffrey G. Miller & Craig N. Johnston, The Law of Hazardous Waste Disposal and Remediation (Thompson/West, 2nd ed. 2005).
50. *Id*.
51. *Id*.
52. *American Mining Congress v. EPA*, 824 F.2d 1177 (D.C.Cir.1987).
53. Jeffrey G. Miller & Craig N. Johnston, The Law of Hazardous Waste Disposal and Remediation (Thompson/West, 2nd ed. 2005).
54. *Id*.
55. John G. Sprankling & Gregory S. Weber "The Law of Hazardous Wastes and Toxic Substances In a Nutshell" (Thompson/West 2007) pg. 182.
56. 40 C.F.R. §260.10 (2015).
57. Michael H. Brown, *Love Canal and the Poisoning of*

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America, The Atlantic, Dec. 1979.
58. 40 C.F.R. §262.12 (2015).
59. 40 C.F.R. §262.40 (2015).
60. 40 C.F.R. §262 Appendix (2015).
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65. Jeffrey G. Miller & Craig N. Johnston, The Law of Hazardous Waste Disposal and Remediation (Thompson/West, 2nd ed. 2005), pg. 249.
66. John G. Sprankling & Gregory S. Weber, "The Law of Hazardous Wastes and Toxic Substances In a Nutshell" (Thompson West 2007), pg. 249.