How *Not* To Bring A Citizen Suits Action Under RCRA

For the practicing lawyer, *KFC Western* teaches a simple but valuable lesson—to recover under RCRA §6972(a), make sure you allege in your complaint that the contamination at the site in question *presently* poses an "imminent and substantial endangerment" to health or the environment. Obviously, in order to pass Rule 11 muster and set up a successful recovery action, the claim must be verifiable and at least minimal testing should be performed at the site. This should be discussed thoroughly with the client and its technical consultant. Lawyers should also consider *other* recovery alternatives under statutes and common law. Although RCRA §6972(a)(1)(B) applies to both present and past generators, transporters, owners, and operators involved in the movement of solid waste, it is prospective in nature and applies to present contamination. One possibility is an action under CERCLA/Superfund's provisions. As pointed out by Justice O'Connor in *KFC Western*, CERCLA/Superfund's citizen suits provision, 42 U.S.C. §9607(a)(4)(B), permits the recovery of "necessary costs of response, incurred by any other person consistent with the national contingency plan." CERCLA/Superfund Section 9613(f)(1) further permits "any person" to "seek contribution from any other person who is liable or potentially liable" for such costs. One should also examine state environmental statutes governing clean water and solid waste management. Frequently, statutes authorize private recovery suits. Finally, creative applications of common law and equitable causes of action (*e.g.*, trespass, negligence, nuisance, unjust enrichment) may also afford relief, and should not be ignored.

CONCLUSION

KFC Western is a solid piece of judicial writing because it is faithful to the goals and language of RCRA as it has evolved since 1976. However, it is obviously disappointing to businesses because it rejects the Ninth Circuit's 1995 expansion of the citizen suits provision to recover past costs. In a sense, the opinion also reflects disillusionment with current policies on voluntary cleanups. The Court seemed to be thinking along these lines by its gratuitously raising but not addressing, the situation "in which a private party seeks a mandatory injunction for another party to pay cleanup costs *after* an RCRA suit has been properly commenced." *Id.* at 1256. In making a "call" for such an issue—when it was not obligated to do so in order to reach the result in the Meghrig-KFC Western dispute—the Court may have been influenced by the view that federal legislation, and particularly CERCLA/Superfund, has failed to encourage or provide incentives for private parties to conduct cleanups on a voluntary or cooperative basis. If responsible parties believed that the potential of a mandatory injunction under RCRA would expose them to reimbursement of cleanup costs *after* an RCRA suit was initiated, they may indeed be less inclined to litigate in the first place and resolve these disputes on a consensual basis. ◆

[1] For a good summary of the development of §6972(a)(1)(B) through the Ninth Circuit's opinion in *KFC Western* in 1995, *see*, A. Miller, "Expanded Use Of RCRA Citizens Suit Provision For Business And Property Owners To Recovery Cleanup Costs," Vol. 121 *Pittsburgh Legal Journal* (June 8, 1995).

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