

April 9, 2010

Client Alert

Federal Court Denies Summary Judgment for Insurer

By: Jonathan P. Emenhiser and Frederick D. Emhardt

The law usually doesn't allow a party to litigate the same factual or legal issue more than once. If a person has already had a fair opportunity to litigate the question, then the issue is deemed resolved in a subsequent case. However, it is frequently hard to tell if an issue has been previously litigated -- as illustrated by a recent ruling denying an insurer's motion for summary judgment against our clients, the Trustees of the Third Site Superfund site in Boone County, Indiana.

The Third Site Trust Fund has spent millions of dollars on investigation, environmental engineering and cleanup costs and is likely to spend millions more before the situation is resolved to EPA's satisfaction. The Trustees filed suit to recover those clean up costs from the Jonathan Bankert family, which owned and operated the former Envirochem Corporation as well as the real estate where Third Site is located. Auto Owners Insurance Company had issued liability insurance to the Bankert Family and Envirochem. Auto-Owners argued, among other things, that the doctrine of *res judicata* (meaning: "thing decided") precluded its liability for coverage because of judgments in a 1984 coverage action Auto-Owners initiated concerning the Envirochem Corporation ("ECC") Superfund Site. The ECC Site is immediately next-door to Third Site. In 1984, shortly after EPA identified ECC as a Superfund site, Auto-Owners sued Envirochem and the Bankerts, among others, seeking a declaration that it had no coverage obligations as to ECC. The Auto-Owners lawsuit resolved in a default judgment in 1990 as to Envirochem and certain other parties and an agreed judgment entered in 1991 as to other parties, including the Bankerts. Auto-Owners argued that the judgments in the ECC case meant there could be no liability for Third Site because contamination at Third Site was allegedly connected to operations at the ECC site. However, the evidence showed that Third Site and ECC are not only geographically distinct Superfund sites but that there is no groundwater or other underground connection between contaminants at ECC and contamination found at Third Site. EPA had not known about separate contamination at the Third Site area and had not yet asserted any Third Site cleanup claims at the time of the judgments in the ECC matter. Judge Richard Young held that questions of fact precluded his determining that the 1990 default judgment or the 1991 agreed judgment in the Auto-Owners ECC litigation had any preclusive effect on the Trustees' 2008 lawsuit against the Bankerts and Envirochem Corporation concerning Third Site.

Judge Young also addressed another issue raised by Auto-Owners: whether coverage for Third Site was precluded by the fact that Envirochem long-ago ceased doing business and was administratively dissolved. While Envirochem no longer has assets associated with existing businesses (equipment, cash, accounts receivable, etc.) it did have an asset occasionally overlooked when analyzing the collectability of judgments: liability insurance policies. Envirochem's insurer, Auto-Owners, claimed that it was entitled to the protection of the Indiana two-year limitations period for claims against dissolved corporations, as provided by Ind. Code § 23-1-45-7. Judge Young rejected Auto Owners' argument because Envirochem had not followed the statutory procedures for properly dissolving a corporation and thus was only administratively dissolved. "A corporation administratively dissolved continues its corporate existence but may not carry on any business except that necessary to wind up and liquidate its business and affairs and notify claimants," Judge Young wrote. "Thus, a corporation administratively dissolved may not benefit from the two-year statute of limitations set forth in Indiana Code § 23-1-45-7 because no notice of its dissolution was given to its creditors." *Norman W. Bernstein and Peter M. Racher, as Trustees of the Third Site Trust Fund v. Patricia A. Bankert et al.*, Cause No. 1:08-cv-0427-RLY-DML.