

THE WINNERS

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George Plews

Litigations net over \$130 million

Mediation plays a key role in breaking down issues, resolving insurer/ policyholder disputes

By Kelly Lucas



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George Plews one of the founding partners of Plews Shadley Racher & Braun.

The 1980s were a decade of revelation for many industries operating in the United States.

The fallout of environmental policies, considered standard operating procedure throughout much of the 20th century, was being uncovered. Soil and water supplies polluted by processing or disposal systems had to be cleaned up. Government agencies looked to the companies considered responsible for the contamination, and those companies looked to their insurance carriers. The issues of liability that needed to be addressed were as numerous as the potential clean-up sites.

While Indianapolis attorney George Plews does not claim to be clairvoyant, he does recognize professional opportunity looming in the distance. While the pollution now at issue may have been the result of conduct considered legitimate in the 1960s or 70s, somebody would have to shoulder clean-up costs. It doesn't take a crystal ball to realize that the environmental disasters being uncovered would require legal expertise to rectify.

"The liability obligation arises even though materials may have been taken to sites lawfully a number of years ago and disposed of in precise accordance with the standards that were in place at the time," Plews said. "Subsequently, Superfund and other statutes have said we are still going to charge parties that placed materials here, or engaged or are alleged to have engaged somebody to place materials here, with the cleanup."

Since the late 1980s, Plews Shadley Racher & Braun has provided legal counsel to a number of well-known Indiana companies. *Dana*, *Lear*, *Recticel* and *Inland*, the shorthand titles for cases that now play key roles in Indiana environmental law decisions, have, along with several other environmental cases, returned over \$130 million for environmental cleanup. The legal journeys, some taking nearly a decade to complete, culminated in the last 15 months in settlements exceeding \$100 million.

The dollars for environmental cleanup are vital. But from a legal standpoint, explains Plews Shadley attorney Donna Marron, the body of law developed over the last decade resulting from these decisions and others has invalidated many of the defenses that insurance companies assert against environmental claims.

For instance, Marron points out that it is typically cheaper for a company to clean up a site than to let a government agency do it. However, insurance companies often claimed that no damages were involved if the business did not have to pay an agency to conduct a cleanup. When a demand by a government agency is considered a lawsuit and whether clean-up costs incurred by a company are, in fact, damages for purposes of coverage were questions addressed by this evolving body of case law.

"The clear thing that emerges from all the decisions taken as a whole is that the Indiana courts – the trial courts and appellate courts – want these claims paid," Plews said. "They want them paid and the claims treated like any other covered claim."

Indiana law is probably as protective of policyholder rights and the obligation of insurance companies as any other state."

The Plews approach

One of the first things George Plews will say when asked how he won a case is that "he" did not. Teamwork is at the core of the environmental firm's strategy.

When they formed Plews Shadley in 1988, founding partners George Plews, who was a partner at Baker & Daniels, and Sue Shadley, who had recently left the Indiana Department of Environmental Management, sought out attorneys who, in addition to a legal background, had life and professional experience that would expand their firm's storehouse of knowledge. That, coupled with experience prosecuting environmental and insurance coverage cases, Plews said, is invaluable whether representing a plaintiff or defendant.



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The Plews Shadley Racher & Braun environmental team includes (seated) George Plews, (left to right) Donna Marron, Peter Racher, Jeff Featherstun, Jeff Claffin, (not pictured) Fred Emhardt & Jeff Townsend.

Marron, for example, holds a doctorate from Berkley in geology. Like others in the firm, she says that her science background lets her communicate more effectively with experts, recognize and pinpoint technical issues, and analyze reports associated with contamination and cleanup.

While a number of "pioneer" environmental contamination and coverage cases came to fruition in 2001, Plews explains that the development occurred over a number of years, even before the cases were filed, in the sense that the firm was working steadily on the development of the law in the area of insurance coverage for environmental liabilities.

"We have been able to combine good law – clarifying law – on key issues and then do good hard discovery work followed by mediation."

No double take required – he said mediation.

While mediation is an accepted part of the litigation process in Indiana, many out of state attorneys involved in large-scale environmental cases may have

initially raised an eyebrow or two at the prospect of mediating these disputes.

Mediation is credited with providing many of the key actors in these litigations, particularly insurance companies, with a better understanding of the nature of Indiana law.

"It is a whole different mindset or process that I try to adopt for these larger cases," Indianapolis attorney/mediator Bill Baten explains. "What it really boils down to is preparation, preparation, preparation."

When a case is complex, as environmental matters often are, parties often express surprise about the positions being taken by the other side, Baten explained. The work that occurs before the parties get to the table provides clarity and an opportunity for one side to explain its stance.

Baten mediated the *Recticel*, *Inland*, and *Lear* cases.

Baten begins the process by having a conversation with a lawyer from each party involved to get a sense of the individual standpoint. Often, he says, he requests preliminary information such as key pleadings in order to get a grip on the issues at hand. This process is followed by a conference call allowing all involved lawyers to agree to a timetable and pinpoint who should attend the mediation session.

In the *Lear* case, Marron recalls, Baten set up a damages presentation led by lawyers who had previously defended Lear in the government's environmental contamination action against the company.

"*Lear* was interesting because the biggest part of the cleanup – about seven miles of floodplain that has PCB contamination in the sediment – is not done yet, no one really knows what the cost will be," Marron said. "The insurance company was really buying piece of mind."

Because the information disclosed was confidential, the mediation provided an opportunity for all parties in this complicated case to get on the same page as a result of listening to the various points of view, she adds.

Warsaw attorney/mediator Tom Lemon, who mediated the Dana Corp. case, learned early the intricacies of managing large mediations involving upwards of 50 litigants and over 60 individual clean-up sites. Like Baten, he created a schedule detailing when each defendant would have a private discussion with the plaintiff. That, he says, kept attorneys from sitting around in hotel rooms waiting their turn. After primary issues were resolved, parties could be reorganized, Lemon explains, grouping carriers who were similarly situated.

Large-scale environmental mediations like these do not happen overnight. Many of the cases take months, even years, to work through and, like other types of litigation, often settle on the courthouse steps. Attorneys and mediators agree, however, that the process, which has brought in many out of state attorneys, has produced mediation converts.

"When you consider the success rate of cases settled on the day of mediation – about 85 percent – you understand that you and your client should attend a mediation as prepared to resolve the case as if going to trial," Lemon said.

A client should know goals, negotiating strategy and be fully appraised of what is going to happen at the mediation. It is up to the attorney, Lemon says, to assure this has occurred and to know the adversary's likely position.

The cost savings of taking a case to mediation is difficult to calculate. Given the preparation of experts, compilation of reports, trial process and likely appeals, any of these cases, Plews said, would have likely cost seven figures to try.

Instead, he says, in each case the firm has been able to return more than 10 times the amount invested back to the clients.

"In addition to dollar savings, there is a feeling that when you mediate something you are in some sense in control of the results – both sides have some reasonable degree of control about how it finally comes out," Plews said. "You take the accidental nature out of the result. For a lot of clients, that is a more satisfying result."

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