THE INDIANA LAWYER

IndyBar: Proving A Claim Under Indiana's Environmental Legal Action Statute

April 9, 2025 | From IndyBar

KEYWORDS **ENVIRONMENTAL ISSUES** / **INDIANAPOLIS BAR ASSOCIATION**

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By John D. Moriarty, Plews Shadley Racher & Braun LLP

John Moriarty

Indiana's Environmental Legal Action (ELA) Statute allows a person to bring a lawsuit against a person that "caused or contributed" to the release of a hazardous substance or petroleum that poses a risk to human health or the environment. Ind. Code § 13-30-9-2. The central requirement in an ELA claim is showing that the responsible party caused or contributed to the release. The ELA statute does not define "caused or contributed." However, several Indiana cases discuss the actions that lead to liability under the ELA.

In *Reed v. Reid*, the Indiana Supreme Court analyzed an ELA claim. *Reed v. Reid,* 980 N.E.2d 277 (Ind. 2012). The plaintiff David Reed purchased soil for a parking lot from North Vernon Drop Forge (Forge). *Id.* at 283. The soil was mixed with chromium and other heavy metals. *Id.* The Supreme Court noted that the phrase "cause or contributed" requires some involvement with the hazardous substance by the responsible party. *Id.* at 289. The Forge entered into an agreed order with IDEM admitting that the Forge "caused and/or allowed the disposal of solid waste in a manner which created a threat to human health or the environment." *Id.*

The Court found that the agreed order constituted an admission by the defendant that it caused or contributed to the release. However, there was still a disputed issue of fact as to whether the chromium was at a high enough level to pose a threat to human health or the environment. *Id.*

Active Involvement With The Hazardous Substance Is Required To Establish Liability

Absent an admission, active involvement with the hazardous substance is required to incur liability under Indiana's Environmental Legal Action Statute. *5200 Keystone Ltd. Realty, LLC v. Filmcraft Labs, Inc.,* 30 N.E.3d 5, 14 (Ind Ct. App. 2015). In *Keystone*, the plaintiff purchased a property with a history of multiple owners and multiple businesses

over 50 years. *Id.* at 6. The plaintiff filed an ELA lawsuit against prior property owners after finding the soil and groundwater was contaminated with chlorinated solvents and petroleum. *Id.*

The first property owner, A.C. Demaree, Inc., used chlorinated solvents and petroleum products in its dry cleaner for 25 years. *Id.* A subsequent tenant, Filmcraft operated a photo processing company on the property for the next 26 years. *Id.* A default judgment was entered against the dry cleaner, Demaree and a trial proceeded against the second property owner, Filmcraft.

With minor exceptions, Filmcraft's operations did not involve the use of chlorinated solvents or petroleum hydrocarbons. The exception was that Filmcraft used a single four inch tube of white grease over the span of 26 years. The Court found that the single tube of grease was not the cause of the chlorinated solvent and petroleum contamination. *Id.* at 8.

The Court stated it was up to the plaintiff to present evidence that Filmcraft used the particular contaminants, and that the plaintiff did not present evidence that Filmcraft used products containing the contaminants. *Id.* at 14. Rather the evidence was that the earlier owner Demaree used the chlorinated solvents and petroleum found at the site. *Id.*

Landlords Not Involved In The Tenant's Business May Avoid Liability

In general, landlords will not incur ELA liability as long as: (1) the landlord was not involved with the hazardous substance and (2) the landlord was not aware of the release of hazardous substance. *Neal v. Cure*, 937 N.E.2d 1227, 1234 (Ind. Ct. App. 2010). In *Neal*, the Cures leased their building and property to Masterwear, a drycleaner using PCE to wash industrial garments. The Neals operated an automobile repair shop near the Cures' building. The Neals found PCE on their property that originated from the Cures' property and filed an ELA claim again the Cures. *Id. at 1234.*

The Cures introduced evidence that they were not involved in their tenants' dry cleaning business and that the Cures had no knowledge of the release of PCE. The Court of Appeals held that the ELA requires an affirmative act and that "the statute does not permit an ELA action against landlords who were not involved in the alleged release of hazardous substances and had no knowledge of the release." *Id.* at 1235.

However, in *JDN Props. LLC v. VanMeter Enters, Inc.*, 17 N.E.3d 357 (Ind Ct. App. 2014), the Court held that mere ownership of land *may* result in ELA liability where the landlord had knowledge that a tenant was causing petroleum contamination, the landlord did nothing to stop the contamination, and the landlord sold the property without disclosing the contamination. *Id. at 361.* The Court concluded that a landlord in such a situation may be said to "contribute" to the release even though the landlord did not actively use the hazardous substances. *Id.* at 362.

The takeaway from these cases is that mere ownership of a property or business is not enough to establish liability under Indiana's Environmental Legal Action Statute. Rather, the plaintiff must show the defendant was actively involved with or used the hazardous

substances or that the defendant knew of a release of hazardous substances and failed to remediate the release.•

John D. Moriarty *is a partner with Plews Shadley Racher & Braun LLP where his practice represents policyholders in insurance coverage matters and plaintiffs and defendants in environmental and other litigation matters. He is an at-large member of IndyBar's Environmental Law Section's Executive Committee. He received his undergraduate degree from Indiana University, his MBA from the University of Notre Dame, and his JD from the Indiana University Robert H. McKinney School of Law.*