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# RCRA Citizen Suits and State Courts: Jurisdictional Trap After *Davis v. Sun Oil Company*<sup>1</sup>

A. MARK SEGRETI, JR.<sup>2</sup>

## Introduction

The common occurrence of a leaking underground storage tank and the resulting contamination of soil and groundwater can lead to the navigation of the not so pristine waters of jurisdiction and federalism when a plaintiff seeks to enforce both common law and citizen enforcement rights under the Resource Conservation and Recovery Act (RCRA).<sup>3</sup> It is not unusual to first discover the problem when the owner of real estate is trying to sell the property and the prospective purchaser's due diligence leads to the discovery of the contamination from a prior owner. The owner is faced with losing a valuable sale of the property unless counsel can find a way to remedy the contamination.

This article discusses the remedies available and the problem of splitting the cause of action between state and federal courts, a procedural issue addressed for the first time by the United States Court of Appeals for the Sixth Circuit in *Davis v. Sun Oil Company*.<sup>4</sup> The issue in *Davis* was whether there was concurrent federal and state court jurisdiction over RCRA citizen suits to abate environmental hazards.<sup>5</sup> The plaintiff in *Davis III* lost the claim under RCRA because the Court of Appeals for the Sixth Circuit became the first circuit court to hold that a RCRA citizen suit

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1. 148 F.3d 606 (6th Cir. 1998).

2. Member, Ohio Bar. J.D. (*cum laude*), The Ohio State University College of Law; practices environmental law and litigation at Haffey & Segreti, Dayton, Ohio. The author was counsel for Davis, the plaintiff, in the litigation discussed herein.

3. 42 U.S.C. §§ 6901-6992k (1995).

4. *Davis v. Sun Oil Co.*, 148 F.3d 606 (6th Cir. 1998) [hereinafter *Davis III*], *aff'g* 953 F. Supp. 890 (S.D. Ohio 1996) [hereinafter *Davis II*], *cert. denied*, 525 U.S. 1018 (1998).

5. Section 6972(a)(2) of RCRA provides for an abatement action and states: "Any action brought under paragraph (a)(1) of this subsection shall be brought in the district court for the district in which the alleged violation occurred or the alleged endangerment may occur." *Id.*

could be brought in state court and the state court judgment barred the federal claim.<sup>6</sup>

### I. The Factual Setting of Petroleum Contamination

In *Davis*, the owners discovered gasoline contamination on the property they had purchased from Sun Oil Company, which had previously operated a Sunoco gasoline station on the property.<sup>7</sup> Although the tanks had been removed by Sun prior to the sale, the connecting pipes had been left in the ground.<sup>8</sup> Four years after the purchase, Davis attempted to sell the valuable corner property to United Dairy Farmers for the operation of a mini-mart and gasoline station.<sup>9</sup> The contract was conditioned on the property being environmentally clean.<sup>10</sup> The prospective purchaser performed Phase I and Phase II<sup>11</sup> environmental assessments and discovered the gasoline contamination.<sup>12</sup> Davis notified Sun Oil and the Bureau of Underground Storage Tank Regulations (BUSTR)<sup>13</sup> of the contamination.<sup>14</sup> Sun Oil then agreed to enter the property and remedy the contamination it had caused. It entered, but did not completely remedy the contamination, leaving contaminated soil and groundwater.<sup>15</sup> As a result, the contract for the sale of the property was lost.<sup>16</sup>

The soil and groundwater testing, conducted before and after Sun entered with its consultants, found high levels of benzene, toluene, ethylbenzene and xylenes, collectively known as BTEX.<sup>17</sup> Sun refused to complete the cleanup and filled in its excavation of one former tank cavity.<sup>18</sup>

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6. 148 F.3d at 612.

7. See *Davis v. Sun Refining & Mktg. Co.*, 671 N.E.2d 1049 (Ohio App. 1996).

8. *Id.* at 1053.

9. *Id.*

10. *Id.*

11. As part of "due diligence" in purchasing real estate, the purchaser performs an environmental assessment. A "Phase I" assessment is a review of public records concerning the property. A "Phase II" assessment is more intrusive, and involves borings into the soil, sampling, and laboratory analysis.

12. *Davis*, 671 N.E.2d at 1053.

13. See OHIO REV. CODE ANN. § 3737.87 (West 2001).

14. *Davis*, 671 N.E.2d at 1053.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

## II. Legal Avenues Available for the Present Owners

In 1984, Congress amended RCRA in response to a growing national problem of soil and groundwater contamination from sources such as underground storage tanks and pipelines.<sup>19</sup> Part of RCRA dealt specifically with such tank systems and addressed the repair and replacement of them.<sup>20</sup> Many neighborhood service stations of the 1950s and 1960s stored gasoline underground to avoid the potential fire and explosion hazards associated with a surface tank.<sup>21</sup> Most tanks were made of steel and not particularly designed to prevent corrosion and deterioration.<sup>22</sup> As a result, the subsequent deterioration led to gasoline leakage.

Leaking tanks can cause soil contamination in the area just under the ground surface, and contamination of nearby groundwater.<sup>23</sup> Gasoline is also known to migrate, with the groundwater, off the property to other locations.<sup>24</sup> It can be a threat to drinking water, as well as a substantial risk to property and persons who come in contact with it. In the *Davis* case, the owner knew the problem was caused by the former owner's service station, but sometimes finding the culprit is not so easy.

The common law causes of action in nuisance and trespass often fit the bill for environmental harm. Many courts apply these torts only when there is an interference with the use of property or damage to property by a nearby landowner or someone else.<sup>25</sup> Although some states, like Ohio, have statutory nuisances, they usually do not apply.<sup>26</sup> Ohio also defines a common law nuisance as a "civil wrong arising or resulting from the invasion of a legally protected interest."<sup>27</sup>

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19. H.R. CONF. REP. NO. 98-1133, at 79, 128, (1984), *reprinted in* 1984 U.S.C.C.A.N. 5649, 5699. *See also* R. L. Meehan, *A Natural History of Underground Fuel Tank Leakage*, 5 ENVTL. CLAIMS J. 339 (1993).

20. Title VI of the Solid Waste Amendments, Pub. L. No. 98-616, § 601, 99 Stat. 3221 (1984) (codified at 42 U.S.C. § 6991).

21. OFFICE OF UNDERGROUND STORAGE TANKS, U.S. EPA, PROPOSED REGULATIONS FOR UNDERGROUND STORAGE TANKS (1987).

22. *Id.*

23. *See* H.R. CONF. REP. NO. 98-1133, at 128, *reprinted in* 1984 U.S.C.C.A.N. 5699.

24. *See* *Rudd v. Electrolux Corp.*, 982 F. Supp. 355 (M.D.N.C. 1997).

25. *See* RESTATEMENT (SECOND) OF TORTS § 821D (1979). Much of the reasoning is based on the limitations on vendor liability inherent in the common law doctrine of caveat emptor, precluding a nuisance claim. *See* *Berry v. Armstrong Rubber Co.*, 780 F. Supp. 1097, 1103 (S.D. Miss. 1991), *aff'd*, 989 F.2d 822 (5th Cir. 1993), *cert. denied sub nom.* *Cooper v. Armstrong Rubber Co.*, 510 U.S. 117 (1994).

26. Many state nuisance statutes deal with "lewdness," prostitution, and the like.

27. *Taylor v. City of Cincinnati*, 55 N.E.2d 724, 725 (Ohio 1944).

In other jurisdictions, the application of private nuisance to a prior owner is unclear. Private nuisance is defined in section 821(D) of the Restatement (Second) of Torts as "a nontrespassory invasion of another's interest in the private use and enjoyment of land."<sup>28</sup> In *Philadelphia Electric Co. v. Hercules, Inc.*,<sup>29</sup> the United States Court of Appeals for the Third Circuit held that private nuisance was not designed to permit "a purchaser of real property to recover from the seller . . . for conditions existing on the very land transferred."<sup>30</sup> The court concluded that nuisance liability requires a "finding that [defendant's] conduct violates a protected interest of the neighbor-plaintiff."<sup>31</sup> Actually, the court was invoking the doctrine of *caveat emptor* as an impediment to a suit against the prior owner.<sup>32</sup> Sections 351 and 352 of the Restatement describe the rule that appears to preclude liability of a vendor for leaking underground tank systems.<sup>33</sup> The nuisance cause of action did not contemplate a vendee suing a land vendor for the vendor's past conduct on the land.<sup>34</sup> The Ohio nuisance law does not make this distinction. The civil wrong is the unlawful release of petroleum from a tank. Also, the failure to cleanup the contamination is a civil wrong under statutory law.<sup>35</sup> Nevertheless, courts may adopt the *Hercules* rationale and decline to apply nuisance law against the real estate vendor.<sup>36</sup>

Usually the length of time between the purchase of the property and the discovery of the contamination prevents use of the equitable doctrine of rescission to recover the purchase price from the vendor. In *Davis*, the value of the property had increased substantially since its purchase from the gasoline company,<sup>37</sup> and rescission was not a solution. The *Rylands v. Fletcher*<sup>38</sup> type strict liability claims for "abnormally dangerous" activity most likely do not apply because the gasoline is underground and not an explosion risk in most cases. The six factors listed in the Restatement

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28. RESTATEMENT (SECOND) OF TORTS § 821D.

29. 762 F.2d 303 (3d Cir. 1985).

30. *Id.* at 313.

31. *Id.* at 314 n.9, (quoting 5 POWELL ON REAL PROPERTY § 704, at 320).

32. *See id.* at 312-14.

33. RESTATEMENT (SECOND) OF TORTS § 351, 352 (1965).

34. *Philadelphia Electric Co.*, 762 F.2d at 315.

35. *See* OHIO REV. CODE ANN. § 3737.89(A) (West 2001).

36. The state court in *Davis* dismissed the nuisance law claim. *See Davis v. Sun Refining & Mktg. Co.*, 671 N.E.2d 1049, 1054 (Ohio App. 1996).

37. *See id.* at 1052-53.

38. L.R. 3 H.L. 330 (1868).

for determining abnormally dangerous activity appear not to apply.<sup>39</sup>

The state statutes implementing RCRA regulate the storage tanks, but most often do not provide for a private cause of action; thus, there probably is no state statutory claim for relief. The state regulatory agencies often require a site assessment and order the responsible party to perform it to determine the extent of the contamination. After approval of the studies, the responsible party must prepare a remedial action plan to perform the cleanup; however, these statutes typically provide enforcement only by the agency and do not set forth a private cause of action.<sup>40</sup> RCRA, however, does contain a citizen suit provision.<sup>41</sup> A citizen can file suit against the person or entity contributing to the contamination if it poses (or may pose) "an imminent and substantial endangerment to health or the environment."<sup>42</sup> The United States Supreme Court, however, has held that the provision does not allow the recovery of damages.<sup>43</sup> Thus, the citizen suit provision is only available for injunctive relief, the assessment of civil penalties to be paid to the government, and other appropriate relief.<sup>44</sup>

Another possible route for liability is common law fraud. In *Davis*, the plaintiffs alleged that Sun committed fraud when it told Davis that the tanks were removed, but left the piping that connected the tanks to the service station islands.<sup>45</sup> Federal law defines the underground storage system to include the connecting pipes.<sup>46</sup> By the time the plaintiffs inspected the excavation, Sun had filled it in and covered it over.<sup>47</sup> The fraud claim was based on fraudulent concealment and misrepresentation.<sup>48</sup> The representation that the tanks had been removed and the fact that the excavation was then promptly covered, were sufficient to support the trial court finding of fraud.<sup>49</sup> Had there been no representa-

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39. See RESTATEMENT (SECOND) OF TORTS § 520 (1976).

40. *Davis*, 671 N.E.2d at 1053.

41. 42 U.S.C. § 6972 (1995).

42. *Id.* § 6972(a)(1)(B).

43. See *Meghrig v. KFC Western, Inc.*, 516 U.S. 479 (1996).

44. The federal district court agreed that civil penalties were available in a citizen suit, but payable to the government. See *Davis II*, 953 F. Supp. 890, 893 n.5 (S.D. Ohio 1996). The trial judge did not note that the daily civil penalties would be an incentive to cleanup the property.

45. *Davis v. Sun Oil Co.*, 929 F. Supp. 1077 (S.D. Ohio 1996) [hereinafter *Davis I*].

46. 42 U.S.C. § 6991(1) (1995).

47. See *Davis v. Sun Refining & Mktg. Co.*, 671 N.E.2d 1049 (Ohio App. 1996).

48. *Id.* at 1051.

49. *Id.* at 1058.

tion of fact, the claim for fraud would not have been available. In asserting a fraudulent concealment claim, a plaintiff may argue that the vendor concealed an artificial condition on the property that has resulted in physical harm, however, such a claim is usually limited to personal injuries.<sup>50</sup>

### III. Legal Action Taken in *Davis v. Sun* Against the Prior Owner

#### A. State Court Action

In *Davis*, the prospective purchaser sent a copy of its Phase II sampling report to BUSTR, the state agency that regulated underground storage tanks.<sup>51</sup> BUSTR ordered Sun to perform a site assessment.<sup>52</sup> Under the Ohio statute, the responsible person is the "person who is the owner or operator of an underground storage tank system."<sup>53</sup> Since the tanks were operated prior to the adoption of the state regulations, the statute defines the responsible person as the last owner prior to "discontinuation of its use."<sup>54</sup>

Nevertheless, there was no private claim in the statute for *Davis*. They filed suit against Sun in state court, first stating that Sun had acted contrary to unspecified state and federal laws in not cleaning up the property, and requested relief.<sup>55</sup> Faced with the threat of dismissal, *Davis* later amended the complaint to assert that Sun was guilty of common law fraud, private nuisance, and breach of the letter contract.<sup>56</sup> The letter allowing Sun access to the site had included the promise that it would remedy the contamination on the site.<sup>57</sup>

Sun moved for summary judgment arguing that the letter was not a contract and that a common law nuisance action could not lie in favor of a vendee of real estate against the vendor.<sup>58</sup> The trial court held that the letter was a contract,<sup>59</sup> but dismissed the common law nuisance claim.<sup>60</sup> The court essentially adopted the *Hercules* approach and limited the private nuisance action to con-

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50. See RESTATEMENT (SECOND) OF TORTS § 353 (1977).

51. *Davis v. Sun Refining & Mktg. Co.*, 671 N.E.2d at 1053.

52. *Id.*

53. OHIO REV. CODE ANN. § 3737.87(N) (West 2001).

54. *Id.* § 3737.87(H).

55. *Davis III*, 148 F.3d 606, 608 (6th Cir. 1998).

56. *Davis v. Sun Refining & Mktg. Co.*, 671 N.E.2d at 1049.

57. *Id.* at 1050.

58. *Id.*

59. *Id.*

60. *Id.*

duct by someone other than a prior owner of the same property.<sup>61</sup> In the meantime, Sun had not performed the site assessment and the state agency again ordered it to do so.<sup>62</sup> Davis amended the complaint again to request that the court grant specific performance of the letter contract and order the cleanup.<sup>63</sup>

### B. Federal Court Action under RCRA

In the meantime, Davis was concerned that they may have rights under RCRA, and did not want to forfeit those rights. Davis sent notice to Sun and the governmental agencies, as required by 42 U.S.C. § 6972(b).<sup>64</sup> Thereafter, they filed their citizen suit in the federal district court for the district in which the alleged imminent and substantial endangerment had occurred.<sup>65</sup>

The federal district court and the parties agreed to stay the federal action pending resolution of the state court action.<sup>66</sup> The parties sought to avoid duplication and thought the state court action could moot the dispute or at least limit the issues in the federal court case. Sun had asserted the defense of *res judicata* in its answer, but did not object to the stay or the demand that the federal claim be included in the state court action.<sup>67</sup> In addition, Sun did not demand that the federal district court dismiss the RCRA action.

### C. State Court Judgment

After several days in state court, the magistrate recommended, and the trial court agreed, that Sun committed fraudulent concealment when it did not remove the entire underground storage tank system and left the gasoline lines in the ground that had connected the tanks to the pump stations.<sup>68</sup> The lines were concealed when Sun covered the excavations prior to the purchase.<sup>69</sup> The court awarded Davis damages equal to the amount that they had spent attempting to cleanup the gasoline

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61. *Id.*

62. *Davis III*, 148 F.3d at 608.

63. *Davis v. Sun Refining & Mktg. Co.*, 671 N.E.2d at 1054.

64. *See Davis I*, 929 F. Supp. 1077, 1078 (S.D. Ohio 1996).

65. *Id.*

66. *Davis III*, 148 F.3d at 608.

67. *See Davis III*, 148 F.3d at 613-615 (Boggs, J., concurring in part, dissenting in part).

68. *Davis v. Sun Refining & Mktg. Co.*, 671 N.E.2d at 1054.

69. *Id.* at 1053.



contamination themselves,<sup>70</sup> and punitive damages in the amount equal to attorneys' fees and consultant fees paid up until the time of trial.<sup>71</sup> The court also granted specific performance of the letter contract, ordering Sun to complete the cleanup within one year and to post a \$400,000 performance bond to assure completion of the cleanup in a timely manner.<sup>72</sup>

The state court denied Davis' request for damages due to the lost sale of the property.<sup>73</sup> The court reasoned that because the contract gave the buyer the option to terminate, and the property was still marketable if cleaned up, the sale was not lost.<sup>74</sup> The court, however, did not address the claim of fraud for Sun's concealment of the gasoline contamination it found when, after being granted access to the property, it excavated one tank cavity, found contamination in the walls of the cavity, stopped work, and then back filled the cavity and left.<sup>75</sup>

The trial court's judgment included a factual finding that the benzene contamination greatly exceeded state requirements.<sup>76</sup> Petroleum hydrocarbons were also found to exceed state limitations.<sup>77</sup> The parties informed the federal district court judge in the RCRA action of the state court judgment, but continued the stay of proceedings, pending an appeal by Sun.<sup>78</sup> Sun did not insist that the RCRA action be dismissed. Nor did they assert *res judicata* or splitting of the cause of action.

#### D. State Court Appeals

Sun appealed the trial court judgment to the state court of appeals and did not perform according to the order of the trial court.<sup>79</sup> Sun requested a stay, but since it never posted a bond, a stay was never granted. On appeal, Sun argued that BUSTR had exclusive jurisdiction over underground storage tanks and that the state trial court had no jurisdiction to order a cleanup.<sup>80</sup> In effect, Sun argued that by having a state regulatory agency, com-

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70. *Davis III*, 148 F.3d at 608.

71. *Davis v. Sun Refining & Mktg. Co.*, 671 N.E.2d at 1054.

72. *Id.* at 1055.

73. *Id.* at 1060-61.

74. *Id.*

75. *Id.* at 1049.

76. *Id.* at 1050.

77. *Davis v. Sun Refining & Mktg. Co.*, 671 N.E.2d at 1050.

78. *Davis III*, 148 F.3d at 608.

79. *Davis v. Sun Refining & Mktg. Co.*, 671 N.E.2d at 1054.

80. *Id.*

mon law claims were preempted.<sup>81</sup> Davis argued that common law actions were not preempted by state laws and state law did not prevent the trial court from enforcing contracts and awarding damages for fraud. Davis pointed out that the trial court had ordered Sun to clean up according to BUSTR standards, and therefore, there was no conflict.<sup>82</sup>

The state court of appeals affirmed the trial court in almost all respects, except it found that the trial judge's one-year deadline for completion of the cleanup had the *potential* to conflict with the existing state regulations for a cleanup of leaking underground storage tanks.<sup>83</sup> No state agency regulation set a timetable for cleanups. The regulations, however, set forth the step by step process, which requires agency approval of site assessment, determination of the extent of contamination, preparation of a remedial action plan, performance of the work, and closing of the site.<sup>84</sup> The Ohio Court of Appeals, even without an actual conflict, eliminated the one-year deadline.<sup>85</sup> It modified the trial court order to require that the cleanup be done expeditiously, in accordance with the regulations of the state agency.<sup>86</sup> The decision was a major victory for Sun and left the enforceability of the specific performance order in question.<sup>87</sup>

After the appeal, Sun filed the performance bond that was already a year late. The trial court had not acted on Davis' motion for contempt that was pending during the appeal. Sun paid the damage portion of the trial court judgment and five months later prepared another site assessment for submittal to BUSTR. Sun still had not determined the extent of contamination at the site, which was essential for BUSTR approval of the remedial action plan.

#### E. RCRA Summary Judgment in Federal Court

##### (1) *Plaintiff's Motion for Collateral Estoppel*

The federal court judge was informed of the state court judgment.<sup>88</sup> The immediate inquiry was whether the federal action

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81. *Id.*

82. *Id.*

83. *Davis v. Sun Refining & Mktg. Co.*, 671 N.E.2d at 1055.

84. OHIO ADMIN. CODE § 1301:7-9-13 (Anderson 2001).

85. *See Davis v. Sun Refining & Mktg. Co.*, 671 N.E.2d at 1055.

86. *Id.* at 1061.

87. *See id.*

88. *Davis I*, 929 F. Supp. 1077, 1078 (S.D. Ohio 1996).

would be dismissed and if any additional forms of relief were available.<sup>89</sup> The plaintiffs were concerned because Sun had not started work on the cleanup. Thus, they requested that the federal district court, based on the state trial court's factual finding of high levels of benzene, grant summary judgment as to liability for contamination that "may present an imminent and substantial endangerment to health or the environment."<sup>90</sup> Davis requested that the court find in his favor on a collateral estoppel theory against Sun, even though the precise issue was not before the state court.<sup>91</sup> Davis argued that the logical effect of the state court's finding was that the contamination "may present an imminent and substantial endangerment."<sup>92</sup>

Davis relied on case law that interpreted the citizen suit provision of RCRA as not to require an actual endangerment to health or the environment, but that such a threat may be present. Section 6972(a)(1)(B) uses the language "*may* present an imminent and substantial endangerment."<sup>93</sup> Endangerment itself means a "threatened or potential harm and does not require proof of actual harm."<sup>94</sup> Federal courts have accepted this interpretation.<sup>95</sup> Nevertheless, the federal district court denied the motion and simply found that the precise issue had not been decided by the state court.<sup>96</sup> Both parties had offered affidavits of experts. Davis' chemical engineer relied on the Environmental Protection Agency (EPA) and other guidance documents when he stated that the listed quantities of benzene certainly present the potential for imminent and substantial harm.<sup>97</sup> Sun's expert stated that the amounts were not, in fact, an imminent and substantial harm to health or the environment.<sup>98</sup> It was the plaintiff's position that they only had to show the actual *threat* of imminent and substantial endangerment, not an actual imminent and substantial endangerment.<sup>99</sup> The district court appeared not to recognize the difference and merely stated that the experts were in conflict.<sup>100</sup>

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89. *Id.*

90. *Id.* (emphasis omitted).

91. *Id.* at 1080.

92. *Id.* (emphasis omitted).

93. 42 U.S.C. § 6972(a)(1)(B) (2001) (emphasis added).

94. *Dague v. City of Burlington*, 935 F.2d 1343, 1355-56 (2d Cir. 1991).

95. *See id.*

96. *See Davis I*, 929 F. Supp. at 1077, 1082.

97. *Id.*

98. *Id.*

99. *See id.* at 1081; *see also Davis III*, 148 F.3d 606, 609 (6th Cir. 1998)

100. *See Davis I*, 929 F. Supp. at 1032

The critical point in the plaintiff's motion, that the statute did not require actual harm but only an actual threat of harm, was overlooked, or at least not discussed. The district judge stated that he needed details as to the extent of the contamination before he could grant summary judgment on the "imminent and substantial endangerment" issue.<sup>101</sup> The case was set for trial.

(2) *Sun's Cross-Motion for Summary Judgment*

Sun then filed a cross-motion for summary judgment and argued that the case should be dismissed because the state agency had exclusive jurisdiction and Davis already had all the relief he could obtain.<sup>102</sup> Sun also argued that BUSTR had primary jurisdiction, which precluded the RCRA citizen suit.<sup>103</sup> Sun did not argue that the state court had jurisdiction over the RCRA claim or that Davis should have included it in the state court action.<sup>104</sup> Rather, Sun argued that the state court had granted Davis complete relief and, therefore, the state court judgment precluded the RCRA action.<sup>105</sup> Sun also argued that the doctrine of primary jurisdiction favored deferring to the state agency and not deciding the RCRA citizen suit.<sup>106</sup> Sun further argued against any award of restitution damages and against the availability of civil penalties in a civil citizen suit under RCRA.<sup>107</sup>

The trial court judge, just before trial, issued a decision and granted summary judgment for Sun, but not on the grounds Sun had argued.<sup>108</sup> Ironically, in light of Davis' prior attempt to use collateral estoppel offensively against Sun, the district court found that the federal RCRA citizen suit was barred by the doctrine of *res judicata*.<sup>109</sup> On the other points, it specifically found that the citizen suit allowed for civil penalties, but not restitution damages, which Davis had not requested.<sup>110</sup> The district court did not

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101. *Id.*

102. *Davis II*, 953 F. Supp. at 892-94.

103. *See id.* at 896 n.7.

104. *See id.* at 892-94.

105. *See id.* at 893.

106. *See id.* at 896, n.7.

107. *See Davis II*, 953 F. Supp. 890, 892 (S.D. Ohio 1996).

108. *See id.* at 892, 894, 896.

109. *Id.* at 896.

110. *See id.* at 892. The United States Supreme Court had just decided that restitution was not available in a RCRA citizen suit. *See Meghrig v. KFC Western, Inc.*, 516 U.S. 479 (1996). The district court in *Davis II* found that the civil penalties provisions of RCRA, 42 U.S.C. § 6928(a) and (g) were made applicable to citizen suits in 42

see the coercive effect of such penalties and commented that they would be payable to the government, not Davis.<sup>111</sup>

The district court dismissed the major issue because it determined that Davis could have brought the RCRA citizen suit in state court with the common law claims.<sup>112</sup> It reasoned that the state courts had concurrent jurisdiction with the federal district courts over such claims. As indicated, Sun had not made this argument. It had argued *res judicata* because Davis already was given full relief. It was understood that all claims should be litigated in one action where possible. However, it was generally accepted that there was exclusive federal court jurisdiction over the RCRA citizen suit.<sup>113</sup> The district court decision was new law and contrary to the holding by a district court in New Jersey that had addressed the issue twelve years earlier.<sup>114</sup> The district court had not given the parties the opportunity to brief this precise issue.<sup>115</sup>

In fact, the Eighth Circuit Court of Appeals flatly stated in *Blue Legs v. Bureau of Indian Affairs*<sup>116</sup> that "RCRA places exclusive jurisdiction in federal courts for suits brought pursuant to section 6972(a)(1)." The Eighth Circuit holding in *Blue Legs* was recognized as good law in *Fletcher v. United States*,<sup>117</sup> *Kerr-McGee Corp. v. Farley*,<sup>118</sup> (decided after the district court ruling in *Davis*); and *Reservation Telephone Cooperative v. Three Affiliated Tribes of the Fort Berthold Reservation*.<sup>119</sup> In addition, other courts have recognized exclusive federal court jurisdiction. For instance, the court in *White & Brewer Trucking, Inc. v. Donley*,<sup>120</sup> held that *Burford* abstention was inappropriate when the federal action in which abstention was sought contained RCRA claims over which federal courts have exclusive jurisdiction.<sup>121</sup>

The 1986 federal court decision in *Middlesex County* held there was exclusive federal court jurisdiction, interpreting the

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U.S.C. § 6972(a). *Davis II*, 953 F. Supp. at 892 (citing *Clorox v. Chromium Corp.*, 158 F.R.D. 120, 128 (N.D. Ill. 1994); *Dep't of Energy v. Ohio*, 503 U.S. 607 (1992)).

111. See *Davis II*, 953 F. Supp. at 893 n.5.

112. *Id.* at 896.

113. *Id.* at 894.

114. See *Middlesex County Bd. of Chosen Freeholders v. New Jersey*, 645 F. Supp. 715, 719 (D.N.J. 1986).

115. See *id.* at 715.

116. 867 F.2d 1094, 1098 (8th Cir. 1988).

117. 116 F.3d 1315, 1327 (10th Cir. 1997).

118. 115 F.3d 1498, 1502 (10th Cir. 1997).

119. 76 F.3d 181, 185-86 (8th Cir. 1996).

120. 952 F. Supp. 1306 (C.D. Ill. 1997).

121. See *id.* at 1312.

word "shall" in 42 U.S.C. § 6972(a) as mandatory to the court where the action must be brought.<sup>122</sup> It also relied on language in the legislative history of RCRA as an indication of congressional intent that the federal courts have exclusive jurisdiction.<sup>123</sup> The primary congressional committee supporting the bill reported that:

Although the Committee has not prohibited a citizen from raising claims under state law in a [Section 6972] action, the Committee expects courts to exercise their discretion concerning pendent jurisdiction in a way that will not frustrate or delay prompt abatement of imminent and substantial endangerments.<sup>124</sup>

It is presumed that Congress is familiar with the decisions of the United States Supreme Court.<sup>125</sup> Under established judicial doctrine, pendent jurisdiction relates to annexing state law claims to federal question jurisdiction.<sup>126</sup> It only applies in federal court.<sup>127</sup> Of course, it could apply even if the federal jurisdiction was not exclusively federal.<sup>128</sup> However, the Congressional comment indicates that the federal courts were charged to process these citizen actions to abate "imminent and substantial endangerments."<sup>129</sup> It did not want the addition of state law claims to "frustrate or delay the primary goal of this provision, namely, the prompt abatement of imminent and substantial endangerments."<sup>130</sup> Virtually all the environmental literature that addressed the subject relied on the decision in *Middlesex County* and indicated that there was exclusive federal court jurisdiction. One article stated, "[c]itizen suit provisions uniformly provide that

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122. *Middlesex County Bd. of Chosen Freeholders v. New Jersey*, 645 F. Supp. 715, 719 (D.N.J. 1986).

123. *Id.* at 719.

124. H.R. CONF. REP. NO. 98-198, at 53 (1984), *reprinted in* 1984 U.S.C.C.A.N. 5612.

125. For example, the doctrine of strict construction of statutes in derogation of the common law is based on this presumption. See 3 SUTHERLAND, STATUTORY CONSTRUCTION 75, § 58.03 (6th ed., 2000).

126. *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966).

127. *Id.*

128. *Id.*

129. H.R. REP. NO. 98-198, at 53 (1984), *reprinted in* 1984 U.S.C.C.A.N. 5612.

130. *Middlesex County Bd. of Chosen Freeholders v. New Jersey*, 645 F. Supp. 715, 719 (D.N.J. 1986) (quoting H.R. CONF. REP. NO. 98-198, at 53, (1984), *reprinted in* 1984 U.S.C.C.A.N. 5612).

both action forcing and private enforcement actions are to be brought in the federal district courts.”<sup>131</sup>

The history of the citizen enforcement action in federal courts supports the conclusion of the commentators. The first major overhaul of the environmental laws was the Clean Air Act of 1970 (CAA).<sup>132</sup> The CAA established the basic provision for a citizen suit and allowed for private enforcement.<sup>133</sup> The provision in the CAA was virtually copied in the Federal Water Pollution Control Act of 1972 (CWA)<sup>134</sup> and the Noise Control Act<sup>135</sup> adopted in 1972.

In 1974, Congress copied the provision again in the Safe Drinking Water Act<sup>136</sup> and utilized virtually the same language and concepts.

In the context of this series of federal environmental legislation, congressional concern was that state and local enforcement of pollution standards had been slow, at best. The United States Supreme Court recognized the role of federalism involved in environmental regulation in *Train v. Natural Resources Defense Council, Inc.*<sup>137</sup> as Congress “taking a stick to the states.”<sup>138</sup> The assumption was that environmental reform had to be forced at the federal level. In 1976, Congress enacted the first versions of RCRA<sup>139</sup> and the Toxic Substances Control Act.<sup>140</sup> The provisions in each Act specified that citizen enforcement actions must be brought in the federal district courts.<sup>141</sup>

In 1980, Congress enacted the Comprehensive Environmental Response Compensation Act (CERCLA),<sup>142</sup> known as “Superfund.” It did not have a citizen enforcement provision since liability for recovery of response costs belonged to both the government and private parties.<sup>143</sup> However, in 1986, Congress added a citizen en-

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131. B. Boyer & E. Meidinger, *Privatizing Regulatory Enforcement: A Preliminary Assessment of Citizen Suits Under Federal Environmental Laws*, 34 *BUFF. L. REV.* 833, 848 (1995).

132. 42 U.S.C. §§ 7601-7627 (1970).

133. *Id.* § 7604.

134. 33 U.S.C. § 1365 (1995).

135. 42 U.S.C. § 4911 (1995).

136. 42 U.S.C. § 300j-8 (1995).

137. 421 U.S. 60 (1975).

138. *Id.* at 64.

139. 42 U.S.C. §§ 6901-6992k (1995).

140. 15 U.S.C. §§ 2601-2692 (1995).

141. *See* 15 U.S.C. § 2619(a); 42 U.S.C. § 6972(a) (1995).

142. 42 U.S.C. §§ 9601-9675 (1995).

143. 42 U.S.C. § 9607(a) (1995).

forcement provision, to be brought in the federal courts, and copied the basic citizen suit provision into 42 U.S.C. § 9659., P.L. 99-499, tit. II, sec. 206. None of these federal environmental statutes specifically use the phrase “exclusive federal jurisdiction” in the citizen suit provisions. However, all contemplate only federal court litigation.

The amendments to RCRA in 1984 added a unique citizen enforcement action to the basic citizen suit provision.<sup>144</sup> It provided for injunctive relief to abate a dangerous threat where hazardous materials were present.<sup>145</sup> No other federal environmental statute provides for such a citizen action. All other citizen suit provisions authorize a citizen to enforce a permit or regulation, or a mandatory duty imposed on the agency. In section 6972(a)(1), Congress actually authorized a citizen to obtain appropriate relief to abate an environmental problem based on the disposal of hazardous substances.<sup>146</sup> Congress stated that the action “shall be brought in the district court for the district in which” the endangerment is alleged to occur.<sup>147</sup>

Without any assessment of the history of citizen suit provisions and the federalism background, despite the fact that the case had been stayed by agreement for more than one year and that Sun had never sought to have it dismissed because of the pendency of the state court action, the district court dismissed on the eve of trial.<sup>148</sup> Strangely, the court equated the words “shall be brought in the district court for the district in which the . . . alleged endangerment may occur” with a venue provision, calling it a “specific venue provision.”<sup>149</sup> It reasoned that since the words could just as easily be a venue provision, it was compelled by the Sixth Circuit decisions to hold that state court jurisdiction was not ousted by Congress.<sup>150</sup> In other words, since the language was ambiguous, it found that the presumption in favor of concurrent state and federal court jurisdiction must stand.<sup>151</sup>

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144. See Superfund Amendments & Reauthorization Act of 1986, Pub. L. No. 99-499, tit. II, § 206, 100 Stat. 1613 (1986) (codified as amended at 42 U.S.C. § 9659 (1995)).

145. *Id.*

146. 42 U.S.C. § 6972(a)(1) (1995).

147. *Id.* § 6972(a) (1995).

148. See *Davis II*, 953 F. Supp. 890, 896 (S.D. Ohio 1996).

149. *Id.* at 895.

150. *Id.* at 896.

151. *Id.*



This rationale, found in dictum in many older cases, had reappeared in the 1990 decisions of the Supreme Court. The Court followed the doctrine that there is a presumption of concurrent state court jurisdiction since state courts are courts of general jurisdiction and federal courts are courts of limited jurisdiction.<sup>152</sup> Congress must overcome the presumption before there is exclusive federal court jurisdiction.<sup>153</sup> In *Yellow Freight System, Inc. v. Donnelly*,<sup>154</sup> and *Tafflin v. Levitt*,<sup>155</sup> the Supreme Court discussed prior decisions and found that general language that merely confers jurisdiction on the federal district courts is not sufficient to overcome the presumption.<sup>156</sup> The Court followed prior rulings that had looked for express language in the statute, clear and compelling legislative history, or strong evidence that state court jurisdiction would disrupt the statutory scheme.<sup>157</sup> It found none of these attributes in the Title VII language, stating that the district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties.<sup>158</sup>

The Sixth Circuit decision in *Holmes Financial Associates v. Resolution Trust Corp.*<sup>159</sup> saw the need for "an explicit withdrawal of concurrent jurisdiction" before the state courts are divested of jurisdiction to hear a federal claim.<sup>160</sup> The court called for an affirmative and express revocation of concurrent jurisdiction before there could be a finding of exclusive jurisdiction.<sup>161</sup> The district court stated that it was bound by *Holmes* since the words "shall be brought in the district court of the district in which the alleged endangerment may occur" were ambiguous, i.e., it could mean jurisdiction or it could mean venue.<sup>162</sup> The Supreme Court's reasoning in the presumption of concurrent state court jurisdiction and competence was traceable to earlier statements in *Howlett v. Rose*.<sup>163</sup> The general rationale is that state courts are courts of general jurisdiction and have jurisdiction unless it is specifically

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152. See, e.g., *Tafflin v. Levitt*, 493 U.S. 455 (1990).

153. *Id.*

154. 494 U.S. 820 (1990).

155. 493 U.S. 455 (1990).

156. *Donnelly*, 494 U.S. 820; *Tafflin*, 493 U.S. 455.

157. See generally *Donnelly*, 494 U.S. 820; *Tafflin*, 493 U.S. 455.

158. *Yellow Freight Sys., Inc. v. Donnelly*, 494 U.S. 820.

159. 33 F.3d 561 (6th Cir. 1994).

160. *Id.* at 565.

161. *Id.*

162. *Davis II*, 953 F. Supp. 890, 895-96 (S.D. Ohio 1996).

163. See 496 U.S. 356, 370 n.17 (1990) (citing *Minneapolis & St. Louis R. Co. v. Bombolis*, 241 U.S. 211, 222 (1918)).

excluded.<sup>164</sup> Federal courts are courts of limited jurisdiction, having only such jurisdiction as conferred upon them by Congress.<sup>165</sup> Thus, unless Congress removed state court jurisdiction over a federal claim, it was presumptively there, based on our system of federalism.<sup>166</sup>

#### F. Federal Court of Appeals

The United States Court of Appeals for the Sixth Circuit affirmed the district court.<sup>167</sup> All the judges agreed that section 6972(a)(1)(B) of RCRA did not meet the *Holmes* test for finding exclusive federal court jurisdiction.<sup>168</sup> The Court of Appeals, with very little discussion of the statutory language, equated the “shall be brought” language in RCRA with the “shall have” in Title VII as discussed in *Yellow Freight*,<sup>169</sup> and found it insufficient to overcome the presumed jurisdiction of the state courts.<sup>170</sup> The Sixth Circuit did not spell out that the language in RCRA designated that the action “shall be brought in the district court for the district” it merely stated that “shall” is the same as “shall” without discussing the contexts.<sup>171</sup>

In addition, the court did not discuss its prior holding that the designation of court of jurisdiction means that the jurisdiction is exclusive. The decision in *Greenpeace, Inc. v. Waste Technology Industries*,<sup>172</sup> did not involve the issue of concurrent or exclusive jurisdiction in the state and federal trial courts. It did, however, involve the designation in the CAA of the court where review of EPA permit decisions were to take place.<sup>173</sup> The Sixth Circuit panel in *Greenpeace*, stated that, “[b]y specifying that review of the Administrator’s permit decisions may be had in the court of appeals,”<sup>174</sup> Congress has established exclusive jurisdiction with the courts of appeals to review permit decisions, and not concurrent jurisdiction with the trial courts.<sup>175</sup>

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164. See, e.g., *Donnelly*, 494 U.S. 820; *Tafflin*, 493 U.S. 455; *Holmes*, 33 F.3d 561.

165. See, e.g., *Donnelly*, 494 U.S. 820; *Tafflin*, 493 U.S. 455; *Holmes*, 33 F.3d 561.

166. See, e.g., *Donnelly*, 494 U.S. 820; *Tafflin*, 493 U.S. 455; *Holmes*, 33 F.3d 561.

167. The court published a *per curiam* opinion with J. Boggs dissenting in part. See *Davis III*, 148 F.3d at 613.

168. *Davis III*, 148 F.3d 606, 615 (6th Cir. 1998).

169. See *Davis III*, 148 F.3d at 612; (citing *Donnelly*, 494 U.S. at 823).

170. See *id.*

171. *Id.*

172. 9 F.3d 1174 (6th Cir. 1993).

173. See *Greenpeace*, 9 F.3d at 1174.

174. *Id.* at 1180.

175. *Id.*

In the *Davis* case, one justice dissented stating that it was unfair to apply *res judicata* when Sun had acquiesced in the pendency of the two actions at the same time.<sup>176</sup> The dissenting justice argued that Sun had waived the argument by agreeing to the splitting of the cause of action.<sup>177</sup> Such a waiver is set forth specifically in section 26 of the Restatement of Judgments.<sup>178</sup> Section 26 provides that there is an exception to the general rule against claim splitting that would extinguish the claim. It states:

(1) When any of the following circumstances exists, the general rule of [section] 24 does not apply to extinguish the claim, and part or all of the claim subsists as a possible basis for a second action by the plaintiff against the defendant:

(a) The parties have agreed in terms or in effect that the plaintiff may split his claim, or the defendant has acquiesced therein . . . .<sup>179</sup>

As indicated previously, the parties had agreed to stay the proceeding in the trial court.<sup>180</sup>

The comment to the Restatement of Judgments section is informative of the reasoning behind the decision: "[A] main purpose of the general rule stated in [section] 24 is to protect the defendant from being harassed by repetitive actions based on the same claim. The rule is thus not applicable where the defendant consents, in express words or otherwise, to the splitting of the claim."<sup>181</sup> The other two judges on the panel reasoned that merely asserting the defense of *res judicata* in an answer within the short form pleading pursuant to Rule 8 of the Federal Rules of Civil Procedure was sufficient to keep Sun from acquiescing in the splitting of the claim.<sup>182</sup> They acknowledged that the doctrine of *res judicata* has many nuances, but, nevertheless, left the burden with the plaintiff to figure out what nuances may possibly apply, even before a judgment was reached in the state court action.<sup>183</sup>

The dissent found that the general assertion of the defense was too ambiguous in light of the numerous conferences continu-

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176. See *Davis III*, 148 F.3d at 613 (Boggs, J., dissenting).

177. *Id.* at 613 (Boggs, J., dissenting).

178. See RESTATEMENT (SECOND) OF JUDGMENTS § 26 (1982).

179. See *id.* § 26(1)(a).

180. See *Davis III*, 148 F.3d at 606.

181. *Id.* (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 26 cmt. (1982)).

182. *Id.* (Boggs, J., dissenting).

183. See *id.* at 613 (Boggs, J., dissenting).

ing the stay of the federal action by agreement.<sup>184</sup> It compared the case to the First Circuit decision in *Diversified Foods, Inc. v. First National Bank of Boston*,<sup>185</sup> where the defendant had specifically pleaded that there was an improper “split of their causes of action, having previously filed in a different court another complaint arising out of the same transaction.”<sup>186</sup> Since the defendants had made such a plain objection, there could be no acquiescence.<sup>187</sup> The comment in the Restatement of Judgments states, “[T]he failure of the defendant to object to the splitting of the plaintiff’s claim is effective as an acquiescence in the splitting of the claim.”<sup>188</sup> Sun had not raised the objection in the many conferences with the trial court judge about continuing the stay, ruling on motions, and scheduling a trial date.<sup>189</sup> Nevertheless, the two circuit court judges found that pleading *res judicata* in the answer was sufficient to avoid the exception to the claim-splitting rule.<sup>190</sup> The majority states, “[w]e conclude, moreover, that the defense was not waived in the district court. Having stated in its answer that ‘[P]laintiffs’ claims are barred by the doctrine of *res judicata*,’ defendant may rely on this defense and we find no error in the district court’s determination.”<sup>191</sup>

The dissent also noted the unfairness of throwing *Davis* out of court based on concurrent jurisdiction when, as the dissenting judge stated, “no court, so far as I can tell, had ever held that RCRA cases could be brought in state court, and that numerous courts had either held or assumed that jurisdiction was exclusively federal.”<sup>192</sup> In other words, *Davis*’ good faith belief that there was exclusive federal court jurisdiction might excuse not bringing the RCRA claim with the state claims in state court.<sup>193</sup>

The two judges in the majority took a more legalistic approach and stated that the assertion of the defense was notice of all aspects of *res judicata* even though there was an agreed stay.<sup>194</sup> The majority required nothing more of Sun. They placed

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184. See *id.* at 615 (Boggs, J., dissenting).

185. 985 F.2d 27 (1st Cir. 1993).

186. *Id.* at 29.

187. See *Davis III*, 148 F.3d at 606.

188. *Id.* at 613 (Boggs, J., dissenting).

189. See *id.* at 606.

190. *Id.* at 612.

191. *Id.*

192. *Id.* at 614.

193. See *Davis III*, 148 F.3d at 615 (citing *Diversified Foods, Inc. v. First Nat’l Bank of Boston*, 985 F.2d 27 (1st Cir. 1993)).

194. *Id.* at 612.

no significance on the fact that Sun had not even raised its defense based on concurrent state court jurisdiction and that the issue was raised *sua sponte* by the trial court in its ruling just before the scheduled trial.<sup>195</sup> The appellate judges did express regret that the trial judge did not make more of an inquiry into the issue, but did not think the oversight was a denial of fairness or justice for Davis.<sup>196</sup> Davis never briefed the concurrent jurisdiction issue in the state court.

As indicated, the Sixth Circuit gave short treatment to the argument that RCRA does indeed provide for exclusive federal court jurisdiction. The court did not even discuss the history of similar citizen suit provisions or the repeated references in the statute to the action as “in the United States District Court.”<sup>197</sup> In fact, the court made a comparison of the mandatory language in Title VII discussed by the Supreme Court in *Yellow Freight*, that is misleading at best, and on review, clearly wrong.<sup>198</sup> The court equated the language “shall be brought in the district court for the district” with the Title VII language that the federal courts “shall have” jurisdiction.<sup>199</sup> However, it did not quote the entire passage, but merely repeated that the word “shall” was insufficient in *Yellow Freight*, and, therefore, insufficient here.<sup>200</sup> The court did not consider the total phrase “shall be brought in the district court for the district,” apparently not seeing the significance of a mandatory designation of a court, as opposed to merely conferring jurisdiction on the court by stating that the courts “shall have” jurisdiction.<sup>201</sup> Also, the court did not consider its own decision, in another context, that stated that the legislative designation of review of specific matters by the court of appeals

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195. *See id.* at 606.

196. *See id.* at 612-13.

197. Section 6972 of RCRA describes the abatement of environmental endangerment action several times as an action under subsection (a)(1)(B) in a court of the United States. Section 6972(b)(1)(B) refers to the intervention of right in an (a)(1)(B) action in a court of the United States. The same appears in section 6972(b)(1) for actions to enforce permits. Section 6972(b)(2)(E) provides for intervention of right specifically in an (a)(1)(B) abatement action in a court of the United States. If exclusive federal jurisdiction was not intended, the language grants intervention of right in federal court, but not in state court actions. Section 6972(b)(2)(F) requires notice be sent to the Attorney General and the Administrator of EPA in an action brought under (a)(1)(B) in a court of the United States. Again, under the Sixth Circuit reasoning, such notice is required in federal actions, but not in state court actions.

198. *See Davis III*, 148 F.3d at 612.

199. *Id.*

200. *Id.*

201. *See id.*

made review of those matters within the exclusive jurisdiction of the court of appeals, as opposed to the district courts.<sup>202</sup> It would appear that the designation of the court where the action "shall be brought" in section 6972 is quite similar to the designation of the court of appeals in the CAA amendments. Arguably, the court should have at least addressed the question of whether the designation intended exclusive jurisdiction.

The Sixth Circuit did not discuss the fact that this particular citizen suit provision is unique among the environmental statutes because it is not an action to enforce a permit, regulation or standard, but is an action to abate the actual contamination on a property. The "imminent and substantial" language was actually added in the 1984 amendments to RCRA.<sup>203</sup> Congress was concerned that this type of action not be delayed and that prompt relief be available in the federal district court.<sup>204</sup> Nevertheless, the Sixth Circuit seemed to focus solely on its own decision in *Holmes*, a decision under the Resolution Trust, where Congress had specified that some actions were within exclusive federal court jurisdiction and others were not, as the required interpretation of the Supreme Court doctrine.<sup>205</sup> The court did not even mention the exact language of RCRA. Arguably, it found the standard so high that no discussion was necessary. Of course, the dissenting judge did say that it was clear that Davis should have been on notice that they could file in state court.<sup>206</sup> The judge stated that the argument of concurrent jurisdiction was not that compelling.<sup>207</sup> In fact, the defendant had never made the argument at all. Nevertheless, the judge concurred with the majority on that issue.<sup>208</sup>

One would think that there would be some discussion of the language used by Congress and why it referred to the action as an "(a)(1) action in the United States district court" at several points.<sup>209</sup> In addition, the court could have addressed the fact that intervention was allowable in the United States district court

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202. See *Greenpeace, Inc. v. Waste Tech. Indus.* 9 F.3d 1174 (6th Cir. 1993).

203. See 42 U.S.C. §§ 9601-9675 (1995).

204. See H.R. REP. NO. 98-198, pt.1 at 49 (1983).

205. *Holmes Financial Associates v. Resolution Trust Corp.*, 33 F.3d 561, 565 (6th Cir. 1994).

206. *Davis III*, 148 F.3d at 614 (Boggs, J., dissenting).

207. *Id.* at 613 (Boggs, J., dissenting).

208. See *id.*

209. See *id.* at 615 (citing *Diversified Foods, Inc. v. First Nat'l Bank of Boston*, 985 F.2d 27 (1st Cir. 1993)).

action and so important that if there was concurrent jurisdiction, there was no such intervention of right in state court.<sup>210</sup> The same is true of the required notice of the action. Congress required that the Administrator of EPA and the Attorney General have notice, presumably to decide whether to intervene in the action "in the United States district court."<sup>211</sup> However, if Davis had filed in state court, such notice would not have been required under the letter of the statute.<sup>212</sup> Nevertheless, the Sixth Circuit did not even discuss this language or attempt to downplay its significance.

Sun argued that section 6972(a) used the same language as Title VII and quoted the language.<sup>213</sup> However, it was referring to another sentence in section 6972(a) *conferring* remedial jurisdiction on "the" district court.<sup>214</sup> Sun made the incongruent argument that this language was the same as the Title VII language, acting as if the sentence requiring that the action "shall be brought in the district court for the district" did not exist.<sup>215</sup> The Sixth Circuit did not mention the argument. Nevertheless, the court did not detract from its analysis by discussing the statutory language that referred to the United States district courts in different contexts in section 6972. Since Congress did not say "exclusive federal jurisdiction," then there was concurrent jurisdiction.<sup>216</sup>

As indicated, the dissent's only question was whether it was fair to Davis to bar the RCRA claim when both parties had agreed to the stay.<sup>217</sup> The district court had not considered fairness at all. The majority of the three-judge panel reasoned that it was unfortunate, and the district court could have done more, but simply pleading *res judicata* was sufficient despite Sun's conduct.<sup>218</sup> Only the dissenting judge in the Sixth Circuit found the unfairness to be substantial.<sup>219</sup> In the final analysis, Davis lost the leverage of possible civil penalties under RCRA that would help to persuade Sun to promptly clean up the gasoline contamination.

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210. 42 U.S.C. § 6972(b)(E) (1995).

211. *Id.* § 6972(b)(F).

212. *See id.* § 6972(b).

213. *See Davis III*, 148 F.3d at 612.

214. 42 U.S.C. § 6972(a).

215. *See Davis III*, 148 F.3d at 612.

216. *See id.*

217. *See id.* at 614-15 (Boggs, J., dissenting).

218. *See id.* at 613 (Boggs, J., dissenting).

219. *See id.* at 614 (Boggs, J., dissenting).

On the other hand, Davis faced the possibility of having to pay Sun's attorney fees under section 6972.<sup>220</sup> The district judge exercised his discretion and denied Sun's request following the "good faith" standard for plaintiffs in such cases.<sup>221</sup>

Davis is left with contempt in the state court action where they could possibly recover attorney fees, but would have to contest the matter on appeal, especially if the state court ordered the performance bond forfeited by the failure to comply with the state court of appeals ruling. Any leverage of daily civil penalties under RCRA has been lost. Sun requested approval of a risk assessment by the state agency, that, if granted, would mean the issuance of a "no further action" letter that would require only the conversion of an on site water well to city water. The solution for Davis is to sell the site to a sophisticated buyer who will accept the judgment against Sun or the prospect of approval by the state agency in the future, without any additional cost.

As a result of reliance on existing case law, and the clear language of the statute when he filed his RCRA action, Davis lost the benefit of the federal statute and the "imminent and substantial endangerment" claim. Now, any property owner facing the same situation must be alert to the joinder of claims question and the prohibition against splitting the cause of action when pursuing the "quickest" remedy available.

Since the United States Supreme Court denied certiorari,<sup>222</sup> the Sixth Circuit decision stands as the highest court interpretation of this provision of RCRA. A landowner, facing a prior owner who has contaminated the property, must join both state and federal claims if there is an imminent and substantial endangerment issue. In making the decision of forum selection, there are considerations in the decision other than where the fastest relief can be obtained. If the case was filed in federal court and the contamination was found to be severe, but not "imminent and substantial," then the federal district court could dismiss the RCRA claim and refuse to accept pendent jurisdiction over the state law claims. Valuable time would pass without relief. Thus, unless the state court judge would be hostile to the plaintiff, the state court may be

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220. 42 U.S.C. § 6972(e) (1995).

221. *See, e.g.,* PaineWebber Income Prop. Three Ltd. P'ship. By and Through Third Income Prop. v. Mobil Oil Corp., 916 F. Supp. 1239 (M.D. Fla. 1996).

222. 525 U.S. 1018 (1998).



the best avenue for relief, despite the congressional choice that the RCRA action "shall be brought in the district court."<sup>223</sup>

### Conclusion

Where a landowner finds gasoline contamination due to the prior owner's activities, and the level of contamination is such that it may be an endangerment to health or the environment, if the owner has a state law claim against the prior owner, the action may be filed in state or federal court, but must include both the state law claims and the RCRA claim. Of course, the sixty-day notice prerequisite of the RCRA action<sup>224</sup> may mean filing the state law claim and then amending it after the notice time period has passed, in order to add the RCRA claim. In any given case, the "may present an imminent and substantial endangerment" condition of RCRA section 7002(a)(1)(B) may be easier to show than what the state law requires. If it is a nuisance claim, it may be "substantial and unreasonable" interference with the use of the property. If it is fraud, it may be the strict requirements of misrepresentation of fact and reliance. If there is a contract for remediation, the language must be construed to assess whether it is as stringent as the RCRA standard. In *Davis*, the contract called for cleanup of the contamination caused by Sun.<sup>225</sup> That leaves open the question of whether levels of gasoline below state action levels would have to be met. The state trial court avoided the issue by ordering that the cleanup satisfy the state action levels.<sup>226</sup> Presumably, those state levels would be easier to meet than "may present an imminent and substantial endangerment." However, the issue may not have to be addressed if the action levels are exceeded. On the other hand, the motive in *Davis*, to have daily civil penalties accrue as an incentive for a prompt cleanup, is the practical hammer that may be the best weapon to force a prompt cleanup. In light of *Davis*, landowners can no longer wait to bring a RCRA action in federal court in case the state court action fails to rectify the contamination problem, or where the state court order is so vague that its enforcement is nullified. Concurrent jurisdiction presents the very real threat of losing a claim for splitting the cause of action.

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223. 42 U.S.C. § 6972(a)(2) (2001).

224. *Id.* § 6972(b)(1)(A) (2001).

225. *Davis v. Sun Refining & Mktg. Co.*, 671 N.E.2d 1049 (Ohio App. 1996).

226. *Id.*