Chicago-Kent Law Review

Volume 65
Issue 3 *Symposium on the Seventh Circuit as a Commercial Court*

Article 3

October 1989

Foreword: The Seventh Circuit as a Commercial Court

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FOREWORD: THE SEVENTH CIRCUIT AS A COMMERCIAL COURT

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INTRODUCTION

This issue of the *Chicago-Kent Law Review* focuses on the Seventh Circuit as a commercial court. As the reader will soon discover, this is not a traditional review of decisions of interest to commercial lawyers. Nor is it even a presentation of highlights and coming attractions. Rather the idea is to conduct a sort of thought experiment on how well the Seventh Circuit weighs the realities of doing business in reaching decisions in three distinctly different areas of law, all of which have an impact on commerce.

The three areas on which this symposium focuses on may be seen as falling on a continuum from the very private to the very public. At the private law end is the article by Richard Speidel of Northwestern University, which deals with decisions relating to warranties under Article Two of the Uniform Commercial Code.[1] Somewhere in the middle of the continuum comes the article by Dennis Honabach and Roger Dennis, of the District of Columbia Law School and Rutgers-Camden respectively, dealing with the semiprivate law of corporations and, in particular, the market for corporate control.[2] Finally, the article by Barry Kellman, of DePaul University, deals with the commercial implications of the very public law of the environment.[3] All of these topics are of vital importance to individual firms and thus to commerce in general as, indeed, are many areas of law not ordinarily thought of as commercial.

The practicing lawyer will find little in the way of black letter law here to guide his or her next presentation on the twenty-seventh floor of 219 South Dearborn.[4] Nevertheless, this symposium may be of more in-

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1. Speidel, *Warranty Disputes in the Seventh Circuit Under Article Two, Sales: Advantage Seller?*, 65 CHI.-KENT L. REV. 813 (1989).

2. Dennis & Honabach, *The Seventh Circuit and the Market for Corporate Control*, 65 CHI.-KENT L. REV. 681 (1989).

3. Kellman, *The Seventh Circuit on Environmental Regulation of Business*, 65 CHI.-KENT L. REV. 757 (1989).

4. The Court of Appeals for the Seventh Circuit sits on the twenty-seventh floor of 219 South Dearborn Street in Chicago, Illinois.

terest and even of use to the commercial lawyer, or at least to litigators of commercial disputes, than would be a catalogue of recent Seventh Circuit decisions. After all, this symposium cannot predict what issues will next come before the court. What this symposium can do, however, is offer some impressions of how the judges on the Seventh Circuit think.

It is important to disclose the limitations of this undertaking. A federal appeals court is in no position to make much law on its own, particularly in the commercial area. For the most part, the cases that come before it are either governed by state law or fall within the jurisdiction of some federal agency. Moreover, the selection of cases that come before the court is largely determined by accidents of geography and the jurisdictional choices of the parties. There is simply no assurance that the sample of cases coming before any given circuit reflects a realistic mix of commercial controversies. Finally, as Judge Easterbrook points out in the *Afterword*,[5] the court does not sit en banc. Thus, no three judge panel can be sure that the remaining judges will agree with or acquiesce in any given legal innovation. Indeed, the problem is compounded by the fact that there are twelve other circuits addressing the same and similar questions. While the Seventh Circuit applies its own precedents first, it does not take lightly the prospect of creating a conflict with another circuit.[6]

Nonetheless, this symposium assembles a fair cross-section of commercial subject matter. The law of warranty is almost exclusively state law. The law relating to corporations and securities often presents a mixture of state and federal questions; and while it sometimes involves the Securities and Exchange Commission and even the Commodity Futures Trading Commission, just as often the court will be called on to render its decision without the guidance or interference of any agency. The law relating to the environment, of course, is almost exclusively federal and is almost invariably administered by some government agency.

I. PRIVATE COMMERCIAL LAW—THE LAW OF WARRANTY UNDER THE U.C.C.

The first main article by Richard Speidel of Northwestern reviews the decisions of the Seventh Circuit in warranty disputes under Article Two of the Uniform Commercial Code (U.C.C.).[7] Speidel finds that sell-

5. Easterbrook, *Afterword: On Being a Commercial Court*, 65 CHI.-KENT L. REV. 877 (1989).

6. *See* 7TH CIR. R. 40(f) (Petitions for Rehearing) (opinions that would create a split in the circuits must be circulated to the entire court for majority approval before publication).

7. There is, of course, little question that warranty disputes fall within the ordinary under-

ers prevail in warranty disputes in the Seventh Circuit much more frequently than one would expect. He is critical of the court for what he sees as incomplete or unsound Code methodology. For example, he finds what could almost be called a pattern of disfavor for consequential damages that, in his view, violates the delicate balance struck in the Code.[8] The comment on Speidel's piece by Paul Rogers and Lee Elizabeth Michaels of Southern Methodist University largely confirms Speidel's thesis that in the Seventh Circuit sellers enjoy an unusual advantage when it comes to warranty disputes under the Uniform Commercial Code.[9] They do not, however, necessarily agree with the reasons offered by Speidel. For example, they point out that the Code itself seeks to be both uniform and adaptable to changing commercial circumstances. In order to decide how often the courts should intervene to provide a remedy in connection with a warranty dispute, it is important to recognize how the law of warranty functions in the commercial setting. Warranty issues only arise when someone has suffered a disappointment and the parties have failed to settle the matter.[10] The failure to settle is a crucial fact. If the parties have gone to the litigation mat, presumably they are willing to consider the possibility that their commercial relationship will be forever ruined and that word of the dispute may lead others not to do business with one or the other or possibly both of them. In short, in a warranty dispute we are often dealing with a failed relationship. This is true even of apparently one-shot deals since buyer and seller must assume that at least some future partners will hear of the dispute especially if it ends up in court.

The upshot of all of this is that the law of warranty in the commercial setting functions primarily as a mechanism for after the fact settling up between the parties. It is unlikely to have much effect on the planning of a transaction or on a series of transactions. Indeed, a too expansive interpretation may have a deleterious effect on the evolution of business. If buyers are under the impression that they will be protected in cases in which they have made their plans for the goods known to the seller, they may prefer to let the seller take the risk of getting it wrong, rather than considering the obvious alternative of integrating upstream and producing the difficult to specify good in-house.

In other words, the theory of the firm may come into play here. If it

standing of the category "commercial law." Hence, the traditionalist reader may prefer to look here first for a traditional picture of the commercial prowess of the Seventh Circuit.

8. Speidel, *supra* note 1, at 837-39.

9. *Id.* at 818.

10. *Id.* at 817.

is fairly easy for the buyer to communicate his or her needs to the seller and to determine when those needs have been met, then the production of the goods in question will continue to be handled on a contract basis. However, if it is difficult to specify the required performance, and if warranty disputes arise frequently, it may make more sense for the buyer to buy the seller rather than the goods. In short, letting the loss lie where it falls may be unjust in particular cases, but in the grander scheme of things, it may sooner induce business to organize itself more appropriately.

While the seller ordinarily knows the product better, the buyer ordinarily knows better the use to which it will be put. No amount of legislation will assure that the parties will communicate well with each other. The real waste, then, is in duplication of effort. That is, holding the seller liable because of mere knowledge or notice of what the buyer plans to do with the goods requires the seller to duplicate efforts that have already been made by the buyer, or at least should have been made. If the buyer knows what he or she wants, why not simply require that it be specified in the contract?

In short, it is hard to resist the idea that when it comes to bilateral contracts, the parties' own bargain should prevail. There are no particular bargaining problems in such bilateral contracts situations other than the ever present possibility that the bargaining power of the parties is disparate. However, the Code itself refuses to recognize inequality of bargaining power as a problem. What, then, is the point of an elaborate, one might even say Byzantine, system of checks and balances designed for all commercial settings?

The easy answer is the one that is often given in connection with the law of corporations. That is, the U.C.C. provides a standard form agreement for the parties to a transaction. It is efficient because it allows the parties to avoid much of the cost of contracting by providing them with an off-the-rack contract. They may, of course, alter the contract if necessary within broad bounds. Thus, it might seem we have the best of both worlds: a standard form contract for those who find it satisfactory or are unwilling or unable to modify it, together with freedom to opt out of virtually the entire thing for parties who prefer to negotiate their own agreements.

But standardization can be inefficient. Clearly, if we found that a particular term of the commercial code is more often opted out of than left in place, we would have to ask whether it makes sense to retain it as a standard term. Indeed, alarms should sound long before the half way

point is reached. One might even argue that if a code provision must *often* be opted out of, it is likely to catch a fair number of actors off guard. Of course, it could be argued that frequent opting out merely indicates that we have got the standard term wrong. It may also mean, however, that having *any* standard term is a bad idea. Indeed, this seems like a distinct possibility in the commercial area. The party with the bargaining power will sometimes be the seller and sometimes the buyer. Since most commercial actors subject to the U.C.C. are both buyers of supplies and sellers of products, a generic law of warranty, for example, making the seller liable if the seller knows or has reason to know of the buyer's particular purpose for the goods, can just as easily lead to an unjust result as to a just one.

So what do we get in return? As far as one can tell, it is a series of new catch phrases like "basis of the bargain" together with some general rules giving deference to commercial practice that may in the end do little but add a layer of formality to the litigation of commercial disputes. Thus, the Seventh Circuit may well be trying to confine the effects of the Code more than the courts of the other circuits. It may be too that there is a certain distrust of the Code and code systems at work. On the other hand, there is also the inevitable tension with the notion that the judiciary should be restrained. In the area of private contracting, however, the notion of judicial restraint has a potentially double meaning. It could mean that the courts should attempt to apply the U.C.C. as much as possible according to its letter. It could also mean, however, that the courts should attempt to enforce the bargains actually entered into by the parties with a minimum of interference from legislatively imposed standards. It occurs to me that what may be happening to commercial law in the Seventh Circuit is rather similar to the Holmes epoch a little more than a century back. It has been suggested after all that although Holmes is viewed as a scholar of the common law, much of what he did was completely disconnected from precedent, instead being motivated by the pragmatism and later positivism that was beginning to boil at Harvard after the Civil War.[11]

Rogers and Michaels in their comment on Speidel have done considerable original spadework.[12] They conclude that the Seventh Circuit has not been especially influential in the decisions of other circuits. This is not particularly surprising. Indeed, as a rule, a federal appeals court or-

11. Rogers & Michaels, *Article Two Warranty Disputes in the Seventh Circuit: Advantage Seller or Disadvantage Court?*, 65 CHI.-KENT L. REV. 849 (1989).

12. *See* G. GILMORE, THE AGES OF AMERICAN LAW 41-67 (1974).

dinarily looks to its own decisions first. That is as it should be: despite the consequences of creating a split in the circuits, it is clearly worse to create intracircuit inconsistencies. This leads one to wonder whether the decisions of this or of any circuit are at least in part a reflection of local conditions. Is it conceivable that the unusual advantage enjoyed by sellers in the Seventh Circuit, which sits in the heart of the Rust Belt, is in some small way a result of the need to retool? In other words, is it not possible that the court is motivated, or at least influenced, by the fact that the states that compose the Seventh Circuit are in dire need of economic revitalization?

II. SEMI-PRIVATE COMMERCIAL LAW—CORPORATION LAW AND THE MARKET FOR CORPORATE CONTROL

Corporation law is the focus of the article by Dennis Honabach and Roger Dennis, of the District of Columbia Law School and Rutgers-Camden respectively. Their perspective is historical, a characterization that is reinforced by the title of the comment thereon by Douglas Branson,[13] a self-styled corporate paleontologist who studies what he sees as the relics of an earlier era when fiduciary duty flourished and the Visigoths of law and economics were isolated in Hyde Park.[14]

There can be little doubt that the Seventh Circuit has been a leader in the development of corporation and securities law. Some of the very biggest names in the pantheon of Supreme Court cases have been reversals of Seventh Circuit decisions. While some might regard that as embarrassing, it also indicates that the court has been innovative. And this tendency predates the advent of Judges Posner and Easterbrook on the court by several years.

Unlike the law of warranty, corporation law is fraught with obstacles to contracting, some of which are natural and some of which are judicially imposed. In the first place, it is exceedingly difficult for thousands of scattered shareholders to coordinate their efforts to influence corporate policy, in part because it is expensive, and indeed wasteful, to duplicate the communications facilities of the corporation, and in part because even if one or a few shareholders were willing and able to foot the bill for communicating with the rest, the rest would derive a large part of the benefit from the efforts of the volunteers. The result is that unless the volunteers expect to gain something special for their per-

13. Branson, *A Corporate Paleontologist Looks at Law and Economics in the Seventh Circuit*, 65 CHI.-KENT L. REV. 745 (1989).

14. The University of Chicago is located in the Hyde Park area of Chicago.

sonal efforts over and above the enhancement in share value that all will enjoy, or at least unless they stand to be paid back their expenses plus some sort of bonus for risking their own money, many campaigns to influence the direction of the corporation will simply never get started.

Secondly, in addition to the strong disincentives for shareholders to try to influence the direction of the corporation, there is the judicially created Business Judgment Rule that provides that in the absence of a conflict of interest the courts will not second guess the decisions of management as long as they are the product of adequate investigation and deliberation and are not irrational. Several justifications have been offered for this rule, and all of them are good. First, hindsight litigation is inappropriate in connection with forward-looking business decisions that typically are made under conditions of uncertainty. Second, shareholders voluntarily assume the risk of bad judgment and therefore should not be allowed to complain about it when it happens. That is, the shareholder invests in stock in hopes of the higher returns that come with taking greater risk. To compensate the shareholder for mere bad judgment would thus be to confer a windfall. Third, to hold management liable for those decisions that turn out to be bad will incline management to choose business strategies that minimize the possibility of loss rather than those that maximize overall return. In other words, a project that offers a modest return but little chance of loss may be preferred over a project that offers the possibility of spectacular returns and substantial losses, even though the positive returns may far outweigh the losses. Moreover, since most shareholders are diversified, they would clearly prefer the corporation to follow the path that leads to the most wealth irrespective of the possibility of substantial losses at individual firms. Again, to allow them to sue after the fact because a particular decision turned out to be unwise would be a windfall.

There is, however, yet another reason why shareholders should not play an active role in influencing corporate policy, which is, in essence, that too many chefs spoil the broth. The reason that management has the power to manage is not simply that it is too cumbersome to put ordinary business decisions up to a vote of the shareholders. It is, rather, that shareholder voting on forward looking decisions is inherently undependable. More often than not a corporation faces many choices in formulating a business strategy. The decision does not tend to take a binary form, that is, of X or not X. Instead it involves choices among many attractive alternatives. Voting is an unreliable way to choose in such situations. The outcome will often depend on the order in which

the alternatives are presented. Thus, even if such matters were put up to a vote, management could often engineer the outcome it desired.

All this means that management will ordinarily be free to run the corporation pretty much without serious interference from the shareholders. The cost of the scheme, however, is that management is also free to take steps that, while couched in business justifications, may be primarily designed to keep management in office. As Honabach and Dennis point out, the Business Judgment Rule has been a problem for those influenced by the methods of law and economics.[15] On the one hand, the Business Judgment Rule makes sense. Indeed, most would argue that even the level of judicial interference allowed by the rule is excessive since the market should take care of disciplining those who make more than their share of bad decisions. On the other hand, to the extent that the rule shields takeover defenses from challenge, it seems to allow management to insulate itself from market discipline. Thus, the courts have found themselves on the horns of a dilemma.

Honabach and Dennis have looked for some sign that the Seventh Circuit is in the process of re-inventing the Business Judgment Rule. They conclude that Judge Posner might have been thinking along such lines in his *CTS Corp. v. Dynamics Corp. of America*[16] opinions but that in the end he felt constrained to fall back on traditional fiduciary duty analysis.[17]

Given that Judges Posner and Easterbrook have been especially active in this area, it is remarkable how consistent the court's recent decisions have been with its earlier decisions. Although the decision in *Panter v. Marshall Field & Co.*[18] was highly supportive of the Business Judgment Rule and gave corporations almost carte blanche to engage in defensive tactics, it was a thoughtful decision and was cited in virtually every important takeover case nationwide for years as the quintessential statement of the rule. What was far more important than the rule, however, was the reasoning that lay behind it. The Seventh Circuit had, in effect, laid out for all to see the central problem that arises in connection with a takeover, namely, whether to characterize the question as a duty of care question, in which case the Business Judgment Rule would almost certainly lead to management victory, or whether to characterize

15. Dennis & Honabach, *supra* note 2, at 682-83.

16. Dynamics Corp. of America v. CTS Corp., 794 F.2d 250 (7th Cir. 1986), *rev'd*, 481 U.S. 69 (1987) [*CTS I*]; Dynamics Corp. of America v. CTS Corp., 805 F.2d 705 (7th Cir. 1986) [*CTS II*].

17. Dennis & Honabach, *supra* note 2, at 684-85.

18. 646 F.2d 271 (7th Cir.), *cert. denied*, 454 U.S. 1092 (1981).

the issue as a duty of loyalty issue, in which case management would be required to justify its resistance.

Ultimately the Delaware Supreme Court answered the question by inventing a new, intermediate level of scrutiny for takeover cases. However, Honabach and Dennis see signs of discontent on the Seventh Circuit. They suggest that doing away with the distinction between the duty of care and the duty of loyalty may be the course favored by the Seventh Circuit.

The Seventh Circuit has also been in the thick of the battle over the constitutionality of state takeover statutes. Indeed, the Seventh Circuit has enjoyed a virtual monopoly in such cases. In *Edgar v. MITE Corp.*[19] the United States Supreme Court ultimately upheld the Seventh Circuit's decision declaring the Illinois takeover statute unconstitutional as an undue burden on interstate commerce. However, later in *CTS Corp. v. Dynamics Corp. of America*[20] the Supreme Court reversed the Seventh Circuit's holding that the Indiana control share statute was unconstitutional on the same grounds (as well as on grounds of preemption). Then in *Amanda Acquisition Corp. v. Universal Foods Corp.*[21] the court upheld the Wisconsin business combination statute and the Supreme Court, mercifully, denied certiorari.

These decisions emanating from the various states composing the Seventh Circuit have addressed each major form of state takeover statute. Thus the court has had the rare privilege of being able to speak, and to speak earlier than most other courts, on a range of statutes designed to deal with a single major problem of corporate governance.

The last decision, however, is not easily understood. *Amanda* dealt with the Wisconsin business combination statute, which in essence prohibits an acquiring corporation for a period of three years from merging with its target, buying its assets, liquidating it, or engaging in any number of other similar transactions unless the approval of the target board is obtained in advance of the bidder's acquiring a ten percent stake in the target. The merger ban applies even if the bidder acquires every last share of the target, though it is unclear who would sue to enforce it in such a case. Moreover, the Wisconsin law is mandatory. A Wisconsin corporation cannot opt out of it as is the case with other state takeover statutes.

When *Amanda* was decided, both *MITE* and *CTS* were on the

19. 457 U.S. 624 (1982), *aff'g* 633 F.2d 486 (7th Cir. 1980).
20. 481 U.S. 69 (1987), *rev'g* 794 F.2d 250 (7th Cir. 1986).
21. 877 F.2d 496 (7th Cir.), *cert. denied*, 110 S. Ct. 367 (1989).

books. *MITE* continues to stand for the proposition that a state cannot unduly burden interstate commerce by setting up a hearing procedure to pass on the fairness of a bid made for a company with a significant presence in the state. Admittedly, the biggest problem with such a statute is that it governs bids for companies that may be incorporated in other states and thus presents the possibility of wildly conflicting regulations of various states governing a single tender offer. *CTS* stands for the proposition that a state statute that requires a vote of the shareholders to enfranchise a bidder who has obtained a control position is consistent with the kind of regulation that has traditionally been the business of the states. While a statute that forbids mergers unless approved before the bidder acquires control is also somewhat consistent with traditional state regulation, it is inconsistent with the idea upheld in both *MITE* and *CTS* that the market for corporate control should remain free of undue impediments imposed by the states. Yet *Amanda* is curiously silent on the question whether the statute there is more like the statute struck down in *MITE* or more like the statute upheld in *CTS*. It is as if the court simply took the Supreme Court's decision in *CTS* as a signal that all state takeover statutes should thereafter be upheld.

Douglas Branson, the self-styled corporate paleontologist who provides the commentary on the Honabach and Dennis piece, finds their views disturbing on two levels. First, he does not buy into some of the more important premises of economic analysis in connection with corporation law. He doubts that investors are as diversified as they are often presumed to be and doubts that they should necessarily always be diversified. He does not think that the market is efficient as often as it is assumed to be; nor does he think the market for corporate control works all that well in connection with many smaller companies.

Second, Branson does not believe that even those judges who are inclined to economic analysis would ultimately be comfortable following the dictates of that school. Branson thus takes issue with the idea that Judge Posner only reluctantly fell back on fiduciary duty analysis rather than proceeding wholeheartedly to construct a new corporate norm based on the distinction between control cases and all other cases. Branson's theory, which may be correct, is that Judge Posner has been overcome, as it were, by the reality of his role as a judge.

Somewhat inconsistently, Branson is critical of state takeover law and of the Seventh Circuit for having upheld the Wisconsin business combination statute in *Amanda*. This is only a minor, or perhaps illusory, inconsistency. Branson seems to be of the view that a vigorous market for corporate control among larger companies is highly desirable

and that the market should be unimpeded by state takeover legislation.[22] As he points out, state takeover legislation is a quick, effective, and relatively cheap way for the biggest companies to protect themselves from takeover without the need for a shareholder vote and without the negative publicity and negative impact on share prices that often go with adopting company-specific takeover defenses.

Honabach and Dennis see the *Amanda* decision as fraught with double entendre. They are of the view that it is really a call for federal legislation. There may be some truth in this, but the better view might be that Judge Easterbrook meant what he said: Competition among the states will eventually winnow out those laws that prove bad for shareholders.[23] The alarm has been sounded before about the race to the bottom in corporation law, but as it turns out the frontrunning Delaware is not so bad a place for shareholder rights after all. Studies show that when a company reincorporates there, it enjoys an immediate and permanent increase in the price of its stock.

III. PUBLIC COMMERCIAL LAW—THE LAW OF THE ENVIRONMENT

The third main article, authored by Barry Kellman of DePaul, is a review of recent environmental law decisions by the Seventh Circuit. Admittedly, environmental law is not ordinarily thought of as a commercial law subject. Nonetheless, environmental law is a particularly good crucible in which to conduct a commercial law thought experiment. Environmental law is, of course, instinct with public policy. How strictly such laws are written and enforced is a direct expression both of how important our society thinks a clean environment is relative to further development and of how much we are willing to spend of both public money and idled resources to further that goal. However, environmental law is also intensely commercial both in theory and in the details of its administration.

Theoretically speaking, environmental law is the quintessential expression of the notion that a business should bear all the identifiable costs of its activities; this assures that its product will be appropriately priced and that the free use of public goods will not subsidize the growth of businesses beyond what society would want if made to bear the full costs. Thus, a court that is particularly well-attuned to this idea and that is also a respected commercial court may often surprise one side or the other of

22. Branson's worries about diversification, the efficient market, and the market for corporate control are primarily in connection with smaller companies. *See* Branson, *supra* note 13, at 752.

23. *Amanda*, 877 F.2d at 507 (Easterbrook, J.).

a controversy. In any event, it is especially interesting to see a court that is regarded by some as radically conservative deal with questions in connection with which conservative theory dictates what would often seem to be a traditionally liberal result.

Practically speaking, environmental law is intensely administrative. That is, although it is imbued with public policy, the policy decisions have already been made by Congress. What is left for the courts is to review how well the Environmental Protection Agency (or other body) has carried out its mission. Here the truly commercially sensitive court can probably be expected to scrutinize administrative decisions for the benefits intended by Congress relative to the costs entailed by the methods employed by the agencies. At the very least, a commercially sensitive court should favor certainty and the concomitant ability to plan one's affairs over delay and failure to decide.

It seems fair to say that Kellman is disappointed with the performance of the Seventh Circuit on environmental issues. He sees a conflict between judges who would require expansive environmental impact statements and judges who would ignore any factors that cannot be assigned a dollar value. While somewhat encouraged by the trend toward strict scrutiny of agency action and the striking lack of deference to agency expertise, Kellman is clearly discouraged by the apparent inability of even potentially activist judges to force reluctant agencies to act. Furthermore, he is distressed by the impression that nothing ever seems to get answered. On this last point at least, Susan Franzetti, who comments on the Kellman piece, seconds the emotion.[24] As she sees it, the Seventh Circuit is not a particularly hospitable place for business because it is too difficult to get a straight answer, and thus investment decisions are rendered riskier than they need to be. In short, as far as business is concerned, any answer would be better than no answer at all.

Kellman is also somewhat critical of the court for refusing to extend liability for clean up costs to a supplier of hazardous raw materials on the theory that the supplier is "disposing" of the materials. In Kellman's view, if the Seventh Circuit had followed the arguable lead of the Eighth Circuit, it would have lengthened the list of those who may be liable for the nation's hazardous waste sites.[25] That is certainly true, but it does not necessarily follow that cleanup would therefore proceed more rapidly. It might be that the longer the list of potentially liable parties,

24. Franzetti, *Comment on the Seventh Circuit's Environmental Regulation of Business*, 65 CHI.-KENT L. REV. 803 (1989).

25. Kellman, *supra* note 3, at 798-99.

the greater the likelihood that they will sue each other over who is *really* to blame. It is also likely that some firms, perhaps even many, will "get it wrong" at the planning stage. Some will incorrectly reckon that they will be liable for less and others will figure that they will be liable for more than will turn out to be the case when the smoke clears. It may well be, then, that the planning process and the clean up process as well will proceed more swiftly and surely if the burden is placed on fewer rather than more parties. The party with the burden, of course, will be able to build into its prices the costs of the risks it bears. The end result is thus to replace uncertainty and litigation with contracting and perhaps insurance. These same considerations no doubt came into play in the court's recent decision in *City of Bloomington v. Westinghouse Elec. Corp.*,[26] where the court, speaking through Judge Cummings and joined by Judge Easterbrook over the dissent of Judge Cudahy, refused to extend liability to Monsanto, a supplier of PCBs, under Indiana tort law. The argument there had been that Monsanto participated in the tort by attempting to advise and monitor Westinghouse's handling of the PCBs. The court quite rightly rejected that argument with the observation that to penalize Monsanto for its good faith efforts to limit the hazard would discourage suppliers of toxic materials from making any effort to avoid misuse of their products by their customers. In short, the Seventh Circuit's decisions in this area have been quite laudable.

I would like to thank all of the symposium contributors for their considerable efforts in connection with this project. Each of the articles and comments that appears here ventures well beyond what would have been necessary to assemble a mere review of recent events and trends in the Seventh Circuit. Without exception, the authors and commentators have striven to understand the philosphy and dynamics of this court of appeals and have, I believe, succeeded in jointly producing a truly insightful work. I would like also to thank the staff of the *Chicago-Kent Law Review* for their tireless efforts.

26. 891 F.2d 611 (7th Cir. 1989).