Court Accepts Expert's Testimony That Macomb County Household Waste Is Hazardous

One of the longest-running Superfund controversies is whether normal household waste (also known as municipal solid waste) contains hazardous substances, and whether municipalities that collect household waste from their residents and dispose of it in a landfill incur liability under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) as a result of such disposals. A federal judge in Detroit recently held that municipalities are liable in such circumstances, at least when the plaintiff supports its claims with sufficient factual evidence and expert testimony.

Five cities in Macomb County, Michigan formed the South Macomb Disposal Authority (SMDA) to own and operate two landfills in Macomb Township. The cities collected municipal waste from their residents and disposed of it in the landfills during the early 1970s. In 1986, the State of Michigan ordered SMDA to remediate groundwater contamination associated with the landfills. SMDA sued its liability insurance carriers for reimbursement of its remediation costs. SMDA's insurers, in turn, sued the cities seeking contribution under CERCLA, arguing that each city had arranged to dispose of municipal wastes from its residents at the landfills, and that those wastes contained materials which are considered hazardous substances under CERCLA.

The cities admitted that about 85% of the waste at the landfills was municipal solid waste generated by their residents; however, the cities contended that the waste did not contain any hazardous substances.

The insurers undertook an extensive effort to prove that the wastes collected by the cities were indeed hazardous. The insurers took 136 depositions from residents and employees of the cities, plus 75 written statements from residents, employees, and elected officials, regarding the

types of wastes which they had either deposited for collection, or observed in the collection system, during the years that the two landfills were operating. The insurers retained Rena M. Pomaville, Ph.D., as an expert witness. Dr. Pomaville reviewed all the depositions and written statements and evaluated whether any of the materials the residents had placed in the trash were known to contain CERCLA hazardous substances. Dr. Pomaville then organized and summarized the information contained in the depositions and statements of the residents. For example, Dr. Pomaville's summary showed that one resident had placed aluminum foil in her trash, and that aluminum foil contained the hazardous substance aluminum. Another resident had discarded "empty" laundry detergent boxes, which, according to government sources, contained the hazardous substances methylene chloride, tetrachloroethylene and sodium. Each of those hazardous substances had been discovered in leachate at the landfills.

Dr. Pomaville also conducted a hands-on study of garbage generated in Palm Beach, Florida, during which she looked through garbage to determine how many discarded containers were truly empty. As the result of that study, she concluded that very few discarded containers were completely empty of product.

Armed with the 136 depositions, the 75 written statements, and Dr. Pomaville's expert testimony, the insurers asked the court to rule before trial that each city was liable under CERCLA because it had arranged to dispose of hazardous substances at the landfills. The court noted that to prove liability under CERCLA, plaintiffs "need only prove that the Defendant Cities deposited only the slightest amount of hazardous material" in the landfills, and ruled that "Dr. Pomaville has more than satisfied this burden." The court bolstered its opinion by noting that counsel for the cities had acknowledged previously that each city was a "generator" of waste under CERCLA, and had admitted that once a party had been designated as a "generator" under

CERCLA, then it "has no defenses." Counsel for the cities argued that the court took those statements out of context, but the court disagreed.

The cities attempted to refute Dr. Pomaville's testimony with testimony by Dr. James Dragun. He did not directly refute the information in the depositions or written statements, or Dr. Pomaville's analysis, but he testified that before drawing conclusions one needs to know the precise chemical composition of a product, how the product's container was treated before disposal, and how much time the product or container spent in the landfill. The court ruled that Dr. Dragun's testimony may be relevant to the amount of hazardous substances that each city deposited, and thus relevant to the question of how response costs should be allocated among all liable parties, but was not relevant to CERCLA liability. The court also note that in previous testimony, Dr. Dragun had confirmed that many household products like paint remover, degreasers, aerosols, soaps, scouring compounds, and pesticides contained hazardous substances.

The court concluded that there was no genuine issue of fact as to whether any of the cities had deposited hazardous substances at the landfills, and therefore ruled that the cities are liable under CERCLA for the costs of remediating the landfills.

The court rejected a motion by the insurers to require the cities to pay the insurers' attorney fees and costs incurred in taking 136 depositions, 75 witness statements, and expert witness depositions. The insurers argued that the cities unreasonably refused to admit that the trash they had collected contained hazardous substances, and the costs of proving that point could have been avoided. The court denied the motion because the insurers failed to show that the cities' refusal to admit the point was not truthful based on the information available to them.

***American Special Risk Ins. Co. et al. v. City of Centerline et al.*,** Case No. 97-CV-72874-DT (E.D. Mich.).

Christopher J. Dunsky