Michigan Supreme Court Reverses Court Of Appeals Decision Regarding Statute Of Limitations In Shields v. Shell

On December 27, 2000, the Michigan Supreme Court issued an order reversing the Michigan Court of Appeals in *Shields v. Shell*, and holding that the July 1, 1994 deadline for beginning a cost recovery lawsuit under Part 201 of the Natural Resources and Environmental Protection Act (NREPA) applies only to actions to recover response costs that were incurred before July 1, 1991. However, as pointed out by one Michigan Supreme Court justice, the Court's extremely short order did not address several important issues, including one that may yet prevent Mr. Shields from recovering any money from Shell Oil Company, at least under Part 201 of NREPA.

In October 1999, the Michigan Court of Appeals held that a provision in Part 201 of NREPA bars a private party (and, apparently, the state of Michigan) from recovering any environmental response costs resulting from releases of hazardous substances that occurred before July 1, 1991, unless a court action to recover those costs was filed before July 1, 1994. (See "Delay Prevents Gas Station Owner From Recovering Costs," *Michigan Environmental Compliance Update*, Oct. 1999, Vol. 10, No. 7, p. 1.) Many Michigan environmental lawyers were surprised by the ruling, and believed that the statute barred only the recovery of response costs that had been incurred before July 1, 1991, but allowed the recovery of response costs incurred after July 1, 1991, as long as the party seeking to recover response costs complied with the six year of statute of limitations contained in M.C.L. § 324.20140(1)(a).

At the request of the Michigan Department of Environmental Quality, and with the support of the Michigan Attorney General, the Michigan Legislature amended Part 201 in June 2000, so that the relevant part of the statute now reads: "For recovery of response of activity costs that were incurred prior to July 1, 1991, the limitation period for filing actions under this part is July, 1994." The bill enacted by the Legislature also states that the amendment "is curative and intended to clarify the original intent of the Legislature and applies retroactively." See "New Law Allows Recovery Of Pre-1991 Response Costs, But Not Pre-1991 NRD," *Michigan Environmental Compliance Update*, Vol. 11, No. 6, Sept. 2000, p. 1.

After Governor Engler signed the bill, the attorney for Mr. Shields, with support by the Michigan Attorney General, filed a motion with the Michigan Supreme Court asking it for a peremptory reversal of the Court of Appeals decision; that is, to reverse the lower court's decision without any oral argument.

On December 27, 2000, the Michigan Supreme Court issued a one-paragraph decision peremptorily reversing the Court of Appeals, and returning the case to the Oakland County Circuit Court so that Mr. Shields can proceed with his claim against Shell Oil Company. The order of the Supreme Court does not explain why it rejected the reasoning upon which the Court of Appeals based its decision. The following key sentence in the order indicates that the Supreme Court apparently would have reversed the Court of Appeals even if the Legislature had not amended the statute: "[u]nder either the former or amended version of M.C.L. 324.20140; MSA 13A.20140, it is clear that only actions for recovery of response activity costs *incurred* before July 1, 1991 were subject to the July 1, 1994, limitation period." (Emphasis in original.) The relevant portion of the statute actually referred to "recovery of response activity costs . . . that *accrued* prior to July 1, 1991," rather than response costs "incurred" before July 1, 1991. The brief order doesn't explain why the Supreme Court apparently thinks that the words "accrued" and "incurred" are synonymous. Most dictionaries indicate that those two words mean different things.

The Michigan Court Rules allow the Supreme Court to grant a peremptory reversal only if all seven members of the Michigan Supreme Court agree that the error by the lower court is so clear that an immediate reversal of its order should be granted without oral argument. Considering the requirement for unanimity, it is somewhat surprising that Justice Stephen Markman, who stated that he did "not necessarily disagree with the result" of the order, also wrote that he would have allowed the appeal to proceed further because he believes the Supreme Court should have considered the following important questions:

- Does a subsequent legislature have the authority to declare what a law passed by a prior legislature means, or is that a function that belongs to the judicial branch?
- Did the fact that Shell Oil attempted to remediate the environmental contamination when it excavated and removed the old gasoline tanks have any effect on when the limitations period began to run?
- Assuming that Mr. Shields knew that the property was contaminated, is it proper to interpret a statute of limitations so that the party seeking to recover costs can control when the limitations period begins to run by deciding when, if ever, to perform response activity?

- Should a plaintiff have to incur response costs before recovering under Part 201, or is it sufficient if he simply reduces the selling price of his property to account for response costs that his buyer may incur?

In the last question, Justice Markman may have put his finger on a legal issue that may prevent Mr. Shields from recovering any money from Shell Oil, at least under Part 201 of NREPA. Part 201 only authorizes parties to recover some or all of their response costs from other liable parties: it does not allow the recovery of monetary losses resulting from a reduction in property value. Thus, Justice Markman has identified a potential flaw in Mr. Shields' case which may yet prevent him from recovering any money from Shell Oil.

This is the second time in eight months that Justice Markman has expressed his desire to review interesting legal issues related to the Part 201 cost recovery process, but has been unable to persuade a majority of justices to consider them. (See "Supreme Court Leaves Private Cost Recovery Standards Unclear," *Michigan Environmental Compliance Update*, Oct. 2000, Vol. 11, No. 7, p. 3.)

Shields v. Shell Oil Company, Mich. Sup. Ct. 116286, Dec. 27, 2000.

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