Ninth Circuit Rules That Passive Migration Of Hazardous Substances Is "Disposal" Under CERCLA

The United States Court of Appeals for the Ninth Circuit recently held that the passive migration of hazardous substances constitutes on-going "disposal" so that a former owner who acquired property after the hazardous substances had been dumped there, and later sold the property, is liable for remediation costs under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). There is now a 3-2 split among five federal courts of appeals on this issue.

Between 1945 and 1983, Unocal Corp. leased certain property located in Carson, California, and operated a number of oil wells, pipelines, storage tanks, and oil production facilities on it. Unocal disposed of a large quantity of tar-like material in some wetlands on the property. In 1977, a partnership known as Carson Harbor Village Mobile Home Park (Partnership) acquired the property and operated a mobile home park on a portion of it. The Partnership did not generate or actively dispose of any hazardous substances on the property, nor did it disturb or physically handle any of the tar-like material which Unocal had disposed of in the wetlands. A corporation known as Carson Harbor Village, Ltd. ("Carson Harbor") acquired the property some time after 1983.

When Carson Harbor sought to expand its mobile home park operations, it discovered the tar-like material that Unocal had placed in the wetlands. After discussing the situation with the California Regional Water Quality Control Board ("RWQCB"), Carson Harbor removed and disposed of over 1,000 tons of tar-like material, and obtained a "no further action letter" from RWQCB. Carson Harbor then sued Unocal, the Partnership, and several other parties under CERCLA to recover its cleanup costs.

Under CERCLA, a person who did not own the contaminated property at the time the cost recovery lawsuit was filed, is liable only if he owned it "at the time of disposal of any hazardous substance" on the property. 42 U.S.C. § 9607(a)(2). Carson Harbor argued that the slow migration of hazardous substances from the tar into the surrounding soil constituted "disposal" during the Partnership's period of ownership. The district court rejected this argument and dismissed the case against the Partnership before trial, because Carson Harbor had failed to show that any "disposal" of hazardous substances had occurred on the property during the time that the Partnership owned it.

Carson Harbor appealed to the United States Court of Appeals for the Ninth Circuit. In 1992, the Fourth Circuit had ruled that passive migration of hazardous substances constitutes "disposal." Since then, the First Circuit, the Second Circuit, and the Sixth Circuit (which has jurisdiction over Michigan) declined to adopt the Fourth Circuit's reasoning and ruled that such passive migration of hazardous substances does not constitute "disposal" under CERCLA. Surprisingly, the Ninth Circuit decided, by a two-to-one vote, to join the Fourth Circuit on this issue. The Ninth Circuit based its decision largely on grounds of public policy, contending that CERCLA liability should be construed broadly in order to achieve CERCLA's remedial purposes. The Ninth

Circuit held that imposing liability on interim owners for passive migration of hazardous substances does not mean that such owners cannot qualify for the innocent landowner defense, holding that "this defense applies even though wastes were passively migrating during a defendant's ownership so long as he or she acquired the property after the hazardous wastes were first placed on the property."

This decision is surprising because the law on passive migration had appeared to be relatively well settled in favor of non-liability for interim landowners who did not actively dispose of waste while they owned the property. Such a disagreement among federal courts of appeals often leads to a review by the United States Supreme Court. *Carson Harbor Village, Ltd. v. Unocal Corporation et al.,* 2000 W.L. 1290337 (Sept. 14, 2000).

This article was prepared by Christopher J. Dunsky, a partner in our Environmental Department, and previously appeared in the November, 2000 edition of the Michigan Environmental Compliance Update, a monthly newsletter prepared by the Environmental Department and published by M. Lee Smith Publishers.