Michigan Court Allows Contribution Action but Rejects "Expert" Allocation Witness

The South Macomb Disposal Authority (SMDA) landfills in Macomb Township, Michigan have spawned numerous cases in both state and federal courts arising from groundwater contamination and disputes over insurance coverage. The most recent decision in this saga refuses to follow a decision by the United States Court of Appeals in New Orleans that restricts the right to bring CERCLA contribution claims to parties who have been sued by the Environmental Protection Agency ("EPA") or a state; it also refuses to hear testimony from a professed "expert witness" on how courts should allocate cleanup costs among responsible parties.

As a result of a citizen suit by the neighbors of the SMDA landfills, the State of Michigan sued SMDA in 1986 and ordered it to clean up its landfills. SMDA then sued its liability insurance carriers to pay the costs of remediating the landfills. The insurance carriers then filed a lawsuit in the United States District Court for the Eastern District of Michigan, not against SMDA but against the cities who are its members, asking the court to require the cities to reimburse the insurance companies their "fair share" of cleanup costs.

In August, 2001, the court ruled that the cities had arranged to dispose of wastes at the landfill, and therefore are liable to the insurers under CERCLA. The court scheduled a second trial to consider the issue of how cleanup costs should be allocated between the cities and SMDA.

Just before the allocation trial, the cities filed a motion asking the court to dismiss SMDA's claim against the cities based on an August 14, 2001 decision by the United States Court of Appeals for the Fifth Circuit (which sits in New Orleans) in *Aviall Services, Inc. v.*

Cooper Indus., Inc. The *Aviall* decision held that §113(f) of CERCLA authorizes a lawsuit by one responsible party to compel another responsible party to pay its fair share of response costs, only when the first responsible party has been sued by EPA or a state under §106 or §107 of CERCLA. The *Aviall* decision caused great concern among environmental lawyers and even at EPA, because that decision may have the unintended effect of making responsible parties refuse to remediate contaminated properties unless EPA or a state sues them under CERCLA. EPA and many state agencies are concerned that voluntary cleanups at brownfield sites and Superfund sites will be discouraged if the *Aviall* decision is accepted by other courts. This concern increased when the Department of Justice filed a brief with the Fifth Circuit asking it to affirm the decision of its panel.

In the SMDA case, the court in Michigan declined to follow the *Aviall* case. It held instead that the key to determining when a party has a contribution claim is whether that party has been compelled to pay or remediate the site, not whether it has been sued by EPA or a state in court under CERCLA. Thus, the court concluded that CERCLA allows a contribution claim under §113(f) even in the absence of a previous lawsuit. Although this decision is not binding on other federal judges, even in Michigan, it will nonetheless provide some encouragement to responsible parties to remediate sites without requiring EPA or the state to sue them.

A second interesting issue that the court decided is whether a court should hear testimony from "experts" on how a court should allocate contribution costs among liable parties. The cities called attorney John Barkett, a well-known environmental attorney from Atlanta, Georgia, who frequently serves as an allocation consultant, to testify concerning how the court should allocate response costs between SMDA and the cities. The court acknowledged that "Barkett is an attorney experienced in performing CERCLA allocation work." Nonetheless, the court

concluded that Mr. Barkett's proposed testimony was essentially them same as the arguments that an attorney for one of the parties, rather than an expert witness, would present to the court. Therefore, the court excluded Mr. Barkett's testimony. This may set a precedent against using allocation consultants as expert witnesses in CERCLA contribution matters.

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

Christopher J. Dunsky

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