Is Causation Now An Element Of Liability In CERCLA Contribution Cases?

A decision by the United States Court of Appeals for the Sixth Circuit, which has jurisdiction over federal cases in Michigan, may result in confusion regarding what a non-government plaintiff must prove to recover a portion of its cleanup costs in a contribution action against another liable party under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). The decision may be interpreted as meaning that a CERCLA contribution plaintiff must show that a release of hazardous substances by the defendant caused the cleanup costs that the plaintiff incurred to be greater than they would have been had the defendant not released its hazardous substances. If that is what the opinion means, it would be contrary to an earlier decision by the Sixth Circuit and contrary to decisions by other federal courts.

The case involves property located outside Cleveland, Ohio. In 1960, the owners of the property constructed a warehouse and a septic system to handle sanitary waste. From 1974 to about 1980, the owners leased the property to Acme, Inc. (Acme), which used the property to rebuild automobile air conditioner parts. Acme used chlorinated solvents to clean the old parts as the first step in rebuilding them. At first, Acme discharged its manufacturing wastes into the septic system at the property. Later, Acme discharged its untreated wastewater directly onto the surface of the property, and then through a pipe into a stream. Acme also stored spent solvents, waste oil, sludge, and spent caustics in 55-gallon drums outside the warehouse on the property. Some of the drums leaked wastes onto the property. As a result, chlorinated solvents contaminated the soil and groundwater. Acme abandoned a number of 55-gallon drums of waste on the property when it ceased operating in 1980.

In 1982, Benjamin Merkel and Henry Merkel (Merkels) purchased the property and used it to store automobiles. They did not investigate the environmental condition of the property before purchasing it, perhaps because CERCLA had been enacted only two years before they purchased the property. Twenty-five 55-gallon drums of waste were on the property when they purchased it. In 1984, the Merkels upgraded the septic system by installing a leachfield through which sanitary wastes could percolate into the ground. While constructing the leachfield, the Merkels moved large quantities of soil in the area where Acme had stored the drums. The court's opinion suggests that the Merkels may have released some of the chlorinated

solvents in the soil when they constructed the leachfield, but it is not clear on that point. In 1987, the Merkels removed and disposed of several drums of waste oil that Acme had left on the property.

In 1988, the Merkels sold the property to Bob's Beverage, Inc. ("Bob's"). Bob's, like the Merkels before, did not investigate the environmental condition of the property before purchasing it. The opinion states that there was fuel oil in the soil on the property when Bob's purchased it, but it does not indicate whether the fuel oil had been released by Acme, the Merkels, or someone else. Shortly after purchasing the property, Bob's leased it to Ullman Oil, Inc. ("Ullman"), which used it for office space and to store petroleum products. Neither Bob's nor Ullman ever used or disposed of chlorinated solvents on the property.

In November, 1988, Bob's discovered that the drinking water on the property and on nearby properties had been contaminated with chlorinated solvents and heavy metals. Ullman notified the Ohio Environmental Protection Agency (OEPA) and arranged to provide alternative water supplies for itself and for its neighbors. Under a consent order with OEPA, Bob's conducted a Remedial Investigation/Feasibility Study (RI/FS) for the property.

In 1997, Bob's and Ullman sued the Merkels and Acme under CERCLA to recover their response costs. The Merkels filed a cross-complaint against Acme, alleging that Acme was responsible for all the contamination. After a trial, the district court entered a judgment against Acme for $411,467.00. The opinion does not indicate what percentage of the total response costs this figure represents. The trial court also held that the Merkels were not liable under CERCLA, on grounds that any release of hazardous substances that may have occurred during their ownership of the property had not caused Bob's and Ullman to incur any response costs.

On appeal, Bob's and Ullman argued that the trial court committed an error of law when it held that the Merkels were not liable because they did not cause Bob's or Ullman to incur response costs. Bob's and Ullman supported their position by citing cases from the First, Second, Third, and Eighth Circuits, all holding that a party who seeks to recover environmental response costs under CERCLA does not need to prove that the hazardous substances released by the defendant caused harm to the environment, or caused environmental response costs to be greater than they would have otherwise been.

Unfortunately, the Sixth Circuit's analysis of the cases cited by Bob's and Ullman, and its response to the argument concerning causation, are unclear and may lead to substantial confusion on where the Sixth Circuit stands on this important issue. The court began its analysis by stating that Bob's "is correct in recognizing that it does not need to establish that the [Merkels'] waste caused or contributed to the response costs." At that point, the Sixth Circuit seemed to be consistent with decisions by other courts. However, the court continued its discussion by quoting the following sentence from the Eighth Circuit's 1995 decision in *Control Data Corp. v. S.C.S.C. Corp.*, 53 F.3d at 935: "CERCLA focuses on whether the defendant's release or threatened release caused harm to the plaintiff in the form of response costs." The Sixth Circuit then noted that the trial court had found

> that there was no evidence that any release that occurred during the ownership of the [Merkels'] caused any increase in the response costs later incurred by [Bob's and Ullman]. In fact, with the release of [chlorinated solvents] from the soil resulting from the replacement of the septic system, the [Merkels'] may have reduced the response costs of [Bob's and Ullman], albeit infinitesimally.

Unfortunately, the Sixth Circuit's opinion does not explain how the Merkels' upgrading of the septic system, and the attendant moving of contaminated soil, may have reduced the cleanup costs; therefore, it is difficult to determine whether this part of the court's decision makes sense.

The court concluded this portion of its opinion by stating that "because [Bob's and Ullman] have failed to demonstrate that a release by the [Merkels] affected the . . . response costs, [Bob's and Ullman] *have failed to prove their cost recovery cause of action*." (Emphasis added.) The sentence quoted above appears to hold that a plaintiff must prove, as part of its CERCLA liability case, that a release of hazardous substances by the defendant somehow caused an increase in the plaintiff's response costs. If this is what the Sixth Circuit meant, its decision parts company with the decisions of other federal courts of appeals that have held that the effect of a defendant's wastes on response costs is <u>not</u> a necessary element of a plaintiff's liability case, and is nothing more than an issue that a court may consider in allocating response costs among the parties. Surprisingly, the court did not even mention its own decision in *Kalamazoo River Study Group v. Menasha Corp*., decided in October, 2000. In that decision, the Sixth Circuit reversed a district judge who dismissed a CERCLA liability case against a defendant on grounds that the very miniscule amounts of hazardous substances that the defendants discharged could not have realistically increased the response costs incurred by the plaintiff. See, "Sixth Circuit Overrules 'Threshold of Significance' Defense

to CERCLA Liability," 11 *Michigan Environmental Compliance Update* (Dec. 2000). The fact that one of the three judges who decided the *Bob's Beverage* case was a member of the three judge panel that decided the *Kalamazoo River Study Group* case, makes it even more surprising that the court failed to cite that case and recognize that it was controlling authority.

After its analysis of the causation issue, the court went on to address the second issue raised by Bob's and Ullman on appeal. Under CERCLA, a former owner of contaminated property is liable if it owned or operated the property at a time when hazardous substances were "disposed of" on it. Bob's and Ullman argued that hazardous substances were "disposed of" on the property during the time the Merkels owned it because 1) hazardous substances were "disposed of" when the Merkels replaced the septic tank and disturbed substantial quantities of soil contaminated with chlorinated solvents, and 2) hazardous substances were "disposed of" when the Merkels owned the property because chlorinated solvents were passively migrating through the soil and groundwater during that time, and because the Merkels had knowledge of that fact. The Sixth Circuit analyzed this argument in depth, and recognized that it had ruled in *United States v. 150 Acres of Land* last year that the passive migration of hazardous substances on a property does not constitute a "disposal." Whether the disturbance of previously contaminated soil constitutes a new "disposal," however, is a more difficult issue. The court decided that the facts in this case justified the trial court's holding that there was no evidence of a "disposal," because the chlorinated solvents were already present on the site, and because there
was no evidence that the Merkels' construction of the leachfield had caused any cross contamination.

Bob's Beverage, Inc. v. Acme, Inc., No. 00-3045 (6th Cir. Sept. 4, 2001)

Christopher J. Dunsky