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CASE SUMMARIES

CLEAN AIR ACT

The Environmental Protection Agency ("EPA") issued a final rule under the Clean Air Act ("CAA") which required states in the northeastern United States to adopt the strict motor vehicle emissions standards of California. Petitioners, Virginia and associations representing automobile manufacturers and dealers, sought judicial review of the final rule, arguing that the plain language of the statute mandated that each state in the region adopt the California standards. The Court agreed, that the substitute program was no alternative at all. The Court concluded that each state in the region had an implementation plan which required states to adopt the more stringent California emission standards by conditioning approval of revised state implementation plans upon the new standards.

The EPA's involvement in this case began with the agency's attempt to regulate and reduce ozone levels in the "Northeast Ozone Transport Region." Prior to the final rule in question, each state in the region had an implementation plan in place to control air pollution. However, EPA declared that all of these state plans were inadequate to comply with the requirements of the CAA and all were in need of revision. EPA then acted on the recommendation of the "Northeast Ozone Transport Commission" and declared that each state in the region was required to enact a Low Emission Vehicle ("LEV") program similar to the standards used in the state of California. The California standards are much more restrictive than those federally mandated and limit the amount of nitrogen that an automobile may emit. Under the new rule, approval of a state's revised plan would be contingent on the state adopting either these new standards or a "Substitute Program," which would result in even more restrictive measures than the California standards.

The first issue that the Court addressed was whether EPA actually conditioned approval of the revised plans on the adoption of the LEV standards. EPA argued that the fact that a substitute program was offered showed that the agency's approval was not conditional. Petitioners argued, and the Court agreed, that the substitute program was no alternative at all. The substitute program required far more restrictive means than the California standards, and imposed "unreasonable and impracticable measures" on the states. EPA, in essence, gave the states only one viable option. The Court concluded then that the approval of EPA was conditional on the states adopting the LEV standards.

The next question for the Court was whether EPA had the authority to condition its approval on the states adopting means chosen by the agency. The agency relied on the plain language of CAA section 110 as evidence of its authority. Particularly, EPA relied on CAA subsection 110(k)(5), which was added to the CAA in the 1990 amendments. This provision of CAA authorizes EPA to require states to revise their state implementation plans "as necessary" to correct inadequacies in failing to attain or maintain national ambient air quality standards or in failing to mitigate adequately interstate pollution transport. Petitioners pointed to the legislative history of the CAA as evidence that EPA did not have the authority it claimed to possess. The Court agreed with Petitioners, holding that section 110(k)(5) did not authorize EPA to require states to include control measures or a mix of measures selected by EPA. Instead, the Court found that the "as necessary" language merely restricted EPA from requiring a state to go through wholesale revision of its entire plan.

The next question examined by the Court was whether CAA section 184 actually did grant EPA the authority which the Court had concluded section 110 of the Act did not grant the agency. Section 184 gives EPA general authority to order states to include control measures in their state implementation plans pursuant to recommendations by regional ozone commission made up of states' governors. Once again, EPA argued that the plain language of CAA subsection 184(c)(5) required the states to include any control measures approved by the EPA in the states' revised plans. Virginia believed that the entire section was unconstitutional. The Court agreed with EPA's interpretation of the statute, but delayed ruling on the constitutional claim until it had decided the preceding question on EPA authority.

Finally, the Court looked to other sections within the CAA to determine if EPA was barred from requiring the states to adopt the LEV standards. Petitioners argued that CAA section 177, when read with CAA section 202(b)(3)(C), provided such a bar. CAA section
202(b)(3)(C) prevents the EPA from requiring new emission standards, before the model year 2004, that are more restrictive than those already provided for by federal statute. CAA section 177 provides that any state may adopt new emission standards if they are identical to the California standards and are adopted at least two years before they are to take effect. EPA denied that it violated the statute, claiming that the states themselves will decide whether or not to impose the standards on their citizens. The Court disagreed, stating that EPA had attempted to force the states into using the states’ independent authority to change the emissions standards. The Court pointed to legislative history that stated that “no one will force the State to make a judgment. It is left up to the state.” Therefore, the Court concluded, EPA was barred from requiring the states to change their emission standards until the model year 2004.

In vacating the rule in question, the Court held that EPA conditioned its approval of the a state’s revised implementation plan on the particular state adopting California’s LEV standards. In addition, the Court held that CAA section 110 did not give the EPA authority to condition its approval on the state adopting control measures chosen by the EPA. The Court did, however, conclude that CAA section 184 gave the EPA this type of authority. CAA section 184 could not be used however to circumvent CAA section 177, which when read with CAA section 202, prevented the EPA from prescribing new vehicle emission standards until after the model year 2004.

-by Christopher Bertel

CLEAN WATER ACT


Public Interest Research Group of New Jersey (“PIRG”) and Friends of the Earth (“FOE”), two nonprofit environmental organizations, brought an action against Magnesium Elektron, Inc., (“MEI”) under the Clean Water Act’s citizen suit provision, 33 U.S.C. Section 1365(a). The suit alleged that MEI had repeatedly violated its National Pollution Discharge Elimination System (“NPDES”) permit by discharging excess salt, total organic carbon (“TOC”), and heated wastewater into Wickecheoke Creek, a body of water which flows into the Raritan Canal and the Delaware River. The suit was brought on behalf of members of the two environmental groups who fished and recreated in the River and Canal. The suit also alleged monitoring and reporting failures by MEI.

In the United States District Court for the District of New Jersey, Plaintiffs sought a declaratory judgment on their standing to sue. PIRG submitted affidavits from four members alleging decreases in their use and enjoyment of the waterways caused by the members’ knowledge of MEI’s excess pollution. These decreases in use included lessening of nature studies and avoiding consumption of water taken from the Delaware River or fish taken from the Canal or River. The District Court found the four affidavits sufficient to show actual injury to members of the groups, and thus concluded that the groups had standing to sue. In addition to the 123 discharge violations to which MEI stipulated, the District Court found 27 separate discharge violations and issued a permanent injunction against MEI’s violation of its permit. MEI appealed this determination, and the Third Circuit affirmed without opinion. The case was then remanded to the District Court for a penalty hearing.

At the penalty hearing, the District Court fined MEI more than two and a half million dollars. During the hearing, the Court accepted the testimony of MEI’s expert limnologists, who found that MEI had not in fact injured Wickecheoke Creek, but may have actually improved oxygen and nutrient levels through the TOC discharges. Despite the District Court’s adoption of this evidence as true and correct, the Court denied MEI’s motion to reconsider the penalty and awarded PIRG and FOE half a million dollars in attorneys’ fees. MEI appealed the decision.

MEI argued on appeal that since its excessive discharges did not damage the creek, PIRG lacked standing to sue. The United States Third Circuit Court of Appeals divided the standing issue into three sub-elements for appeal: whether the “law of the case” doctrine precluded the appellate court’s reconsideration of the standing issue; whether the groups had standing to sue for the reporting violations; and whether the groups had standing to sue for the discharge violations.

PIRG argued that the Third Circuit lacked authority to reconsider the case’s standing issue. PIRG based this contention on the law of the case doctrine by which courts must resist reviewing issues resolved earlier to encourage consistency and judicial efficiency. MEI countered that the evidence presented by its expert during the penalty hearing undermined the District Court’s decision on standing in the first phase of the litigation.
The Third Circuit applied its own "extraordinary circumstances" test from *Bridge v. U.S. Parole Commission*, 981 F.2d 97, 103 (3d Cir.1992), extending the Supreme Court's decision that courts should not revisit issues unless "extraordinary circumstances" exist. While the Third Circuit Court recognized the need for judicial efficiency and consistency, it found that constitutional standing requirements "trumped" those policy concerns.

MEI's initial argument on appeal was that Plaintiffs lacked organizational standing to bring the citizen suit because their members suffered no actual injury. This argument was buttressed by the District Court's adoption of the testimony of MEI's expert during the penalty hearing. PIRG offered three arguments to support its claim of standing. First, under the Clean Water Act, PIRG asserted that Congress intended to grant standing before there was clear evidence of actual damage in order to maintain waterways in pristine condition. Second, Plaintiffs alleged that mere knowledge of excess emissions damaged members through waterway enjoyment diminution. Finally, PIRG asserted that standing exists where a showing of possible adverse effect is offered under the Clean Water Act.

The Court initially set out the constitutional requirements for organizational standing, and proceeded to analyze PIRG's arguments in light of those requirements. The Court quickly held that the congressional intent argument was without merit, noting that the Constitution's Article III case or controversy clause limits Congress' ability to "create private causes of action in the absence of actual or threatened injury."

Turning to PIRG's attempt to establish injury, the Court found no damage in the members' knowledge of excess pollution. First, the Court cited Supreme Court precedent denying standing to generalized public grievances which individual plaintiffs share. The knowledge-of-violation injury claimed could not be distinguished from the general public's concern with the pollution, the Court found. The Court compared PIRG's members to "concerned bystanders" with no more standing to sue than an environmentalist on the west coast.

Further, the Court noted that the members' affidavits offered no proof of injury to the River such as increases in salinity, decreases in fish population, or negative changes in the River's ecosystem. Rather, the Court emphasized, the members' complaints focused on reduced recreation and enjoyment—facts that did not support the requirement of harm or threat of harm. The Court interpreted the Clean Water Act's language "may be adversely affected" as limited by the constitutional injury requirement in Article III requiring "threat of imminent injury." Based on the cold record before it, the Court found no reasonable basis for inferring an imminent threat to the use and enjoyment of the creek, canal, or river. To the contrary, the Court noted, the record supported a finding that the emissions, while excessive and potentially dangerous, caused no noticeable damage to the waterways downstream and substantially contributed to the ecosystem through an influx of missing nutrients and dissolved oxygen.

Finally, MEI argued that where no standing based in damage existed, neither did standing exist to initiate claims deriving from monitoring and reporting violations. Agreeing with MEI, the Court found without merit PIRG's claims that MEI's failure to report affected members' enjoyment of the river. The claims alleged that members could not determine whether to eat fish or drink water from the river without assessment of the pollution levels. Finding no foundation for standing, the Court observed no evidence from PIRG on how, if reported, the information would have aided members in determining the water's potability or the fish's fitness of consumption. Leaving open possible EPA or state claims, no standing could be found to support member claims.

Finally, the Court addressed the question of whether Plaintiffs had standing to bring a citizen suit for MEI's failure to monitor and report properly. PIRG's claims were found to lack the damage or imminent threat of damage required to allow members to sue for these violations.

The Third Circuit Court of Appeals found that through applying its elaborated circumstances test based in the Supreme Court's analysis of the law of the case doctrine, courts may revisit issues previously decided where the interests of justice demand. Additionally, the Court tested PIRG's organizational standing to sue against the three prong test from *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1977). Finding no injury, the Court held that under the test's requirements, members lacked individual standing to sue, and, therefore, the organization lacked constitutional sufficiency to continue the case. The Court was clear, without showing individual harm, concern over pollution emissions is insufficient to sue under the Clean Water Act.

-by Richard A. Hill
CERCLA

State of California v. Montrose Chemical Corp. of California, et al., and United States v. Montrose Chemical Corp. of California, et al., 104 F.3d 1507 (9th Cir. Jan. 17, 1997).

In 1990, the United States and the State of California each brought action under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") against Montrose Chemical Corporation ("Montrose") and its successor companies for alleged harm to the environment. The Plaintiffs sought natural resource damages and clean-up costs under sections 9607(a)(4)(C) and 9607(a)(4), respectively. The government Plaintiffs claimed that the regulations promulgated (within the three-year period) had harmed the marine environment in and around the San Pedro Channel and nearby harbors of southern California. The District Court for the Central District of California granted Montrose's motion for summary judgment, ruling that the governments' actions were not barred by CERCLA's three-year statute of limitations provision.

The Ninth Circuit Court of Appeals reversed, ruling that the plain language of the statute required that both sets of rules must be promulgated before CERCLA's statute of limitations begins to run. The Court explained that when the statutory language is not ambiguous, it will not look to extrinsic information or legislative history to interpret its meaning, as Montrose requested. Since the statute, in its delegation of rulemaking authority, spoke of both sets of regulations together, and since the statute of limitations did not provide that only one set of rules may trigger it, the only reasonable interpretation of the provision, the Court concluded, was that the statute of limitations does not begin to run until both sets of regulations are promulgated. In support of its interpretation of the specific language, the Court emphasized that statutes of limitation are strictly construed to favor the government.

Montrose, losing on grounds of statutory interpretation, argued in the alternative that the statute's plain meaning may not be what Congress intended it to mean. Although a clear legislative intent may overrule the plain meaning of a statute, the Court admitted, Congress did not express a contrary intent in this instance. Montrose contended that when Congress amended CERCLA's statute of limitations in the Superfund Amendments and Reauthorization Act ("SARA"), it expressed an opinion that coastal zone Type A procedures were not significant, and thus, the statute should have been triggered by the Type B rules promulgated earlier. The Court dismissed this argument, stating that the SARA conference report made no distinction between Type A and B rules and did not indicate that only one set could trigger the statute of limitations. Therefore, the Court of Appeals found no legislative intent to contravene the plain meaning of the statute and held that the governments' actions were not barred by CERCLA's three-year statute of limitations provision.

The District Court also approved Montrose's motion in limine, capping its total liability for any possible environmental harm to $50 million plus response costs. Here again, the interpretation of statutory language was the key issue. Section 9607(c) limits the amount of damages of a party responsible for environmental harm to $50 million per "incident involving release" of a hazardous substance. The District Court accepted Montrose's interpretation of "incident involving release," which is not defined within the statute, as a term of art that within the legislative history means a release at each contaminated site. Thus, the statute would read that damages at each contaminated site, one in this case, are capped at $50 million plus response costs.

The Court of Appeals reversed the District Court on this issue as well. It ruled that because
the term was undefined in the statute, it should be given its common, ordinary meaning. It should therefore be interpreted to mean “each occurrence or happening,” or “a series of events of relatively short duration” that can be linked together, as according to its ordinary dictionary definition. The Court found that it naturally followed that the phrase was not a term of art, as Montrose suggested, and even the legislative history did not persuasively demonstrate that it was. If it were, the Court explained, Congress would have defined the term within the statute as it did with other terms, such as owner, operator, and release. The Court also noted that one of CERCLA’s predecessor bills provided a definition of “incident” consistent with its dictionary definition. Therefore, the Court rejected Montrose’s assertion that comports “incident” with “contamination site” and instead adopted the plain, ordinary meaning of the term as an “occurrence” or “event” involving release. It stopped short of ruling on any amount of damages to impose on Montrose, because of the insufficiency of the trial record, and remanded the issue for further proceedings.

In the course of its appeal, the government requested that upon remand, the Court of Appeals reassign the case to a different trial judge in order to ensure an appropriate appearance of fairness or justice. The government asserted that various comments made by the district judge within the course of a hearing, including references to the government’s environmental scientists as “pointy heads” and “so-called experts,” suggested that the judge was not fair in his deliberations. The Court of Appeals, while acknowledging that the district judge’s comments were “not as restrained as we would wish them to be,” refused to reassign the case, concluding that despite his remarks, there was no indication in the record that his ruling was based upon his negative opinion of environmental science or the government.

In conclusion, the Court held that CERCLA’s statute of limitations in section 9613(g)(1) is not triggered until both sets of regulations under CERCLA rulemaking authority in section 9651(c) have been promulgated. In addition, the Court assigned the term “incident involving release” its plain, dictionary meaning of “occurrence,” “event,” or “series of events” relating to a release of hazardous substances. Thus, a responsible party could be held liable for up to $50 million plus response costs for each occurrence of release regardless of the number of contamination sites. Finally, in refusing to reassign the case to a different trial judge upon remand, the Court noted that reassignment based upon an appearance of justice required more than was present here. Comments suggesting a negative opinion or attitude toward a party are not enough to warrant reassignment if there is no evidence in the record that the judge’s ruling was based upon that opinion.

-by Stephen Davis

Sun Company, Inc. v. Browning-Ferris, Inc., et al., 124 F.3d 1187 (10th Cir. 1997).

Sun Company, Inc., (“Sun”) brought an action for cost recovery and contribution under the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”) against Browning-Ferris, Inc., and other entities (collectively “BFI”) for costs expended in remediation of a hazardous waste site in compliance with an Environmental Protection Agency (“EPA”) unilateral administrative order.

Sun was identified by the EPA as one of the Potentially Responsible Parties (“PRP”)s who had transported hazardous waste to an abandoned limestone quarry on the bank of the Arkansas River in Tulsa County, Oklahoma. The quarry was operated as a landfill from 1972 to 1976. During those years, hazardous waste had contaminated the soil, surface water, and ground water near the quarry.

In an effort to cleanup the site and alleviate further possible pollution problems, the EPA selected a remediation plan for the landfill site. After attempts to negotiate a consent decree failed, the EPA issued a Unilateral Administrative Order under Section 106 of CERCLA requiring Sun to pay for remediation costs. Appellants complied with the order and performed the remediation, which was completed by August 29, 1991. Sun’s cleanup costs totaled 6.2 million dollars. Sun identified other parties that it believed were responsible for contributing hazardous waste to the site and brought a cost recovery action against BFI under Section 107 of CERCLA and a contribution action under Section 113 of CERCLA to recover cleanup costs.

The District Court for the Northern District of Oklahoma granted partial summary judgment in favor of the Respondents, BFI. The Court ruled that Appellant, as a PRP, had no cause of action under Section 107 and that the limitation period for Section 113 claims began running on the date Sun paid more than its fair share of remediation costs. This decision effectively barred Appellant’s claims under Section 113, as most of its claims fell outside of the three-year limitation period.
Sun argued on appeal that it was entitled to cost recovery under Section 107 since it did not incur clean up costs in connection with any civil action under either Sections 106 or 107 of CERCLA. Respondents contended, however, that Sun's claim should be denied, as a unilateral administrative order issued by the EPA did not change the party's status as a PRP.

The Court of Appeals for the Tenth District determined that Sun had no right to a cost recovery action under Section 107 of CERCLA. The fact that the government did not bring a civil action against Sun, but instead issued a unilateral order did not change Sun's status as a jointly and severally liable party. The Court concluded that Sun's claim could only be brought as a contribution claim under Section 113. The Court held that cost recovery under Section 107 applied only to a government entity or a party who did not contribute to the waste.

Sun next contended that its contribution claim under Section 113 of CERCLA should not be barred under the three-year statute of limitations. Appellant argued that the statute of limitations under Section 113(g)(3) applied to triggering events, such as judgments or judicially approved settlements, which could occur only as a result of a civil action under Section 106 or 107. An EPA unilateral administrative order, therefore, was not subject to the three-year statute of limitations, but to the six-year statute of limitations under Section 113(g)(2), which covers a PRP's initial claim for the recovery of costs for a remedial action. Respondents argued that the language of 113(g)(3) made it clear that Congress desired Section 113(g)(3) to apply to all contribution claims, including Appellant's initial claim for relief.

The Court of Appeals found that Sun's contribution claim fell within Section 113(g)(2), thus having a six-year statute of limitations. The Court determined that in effect there are two different types of contribution actions under CERCLA; both seeking to equitably apportion costs under Section 107, but governed by different statutes of limitations. A PRP who does not incur his or her costs as a result of a judgment or CERCLA settlement brings a contribution claim that is an initial action for relief, which is governed by the principles of Section 113(f). The PRP has six years from the start of remediation to file a claim under CERCLA Section 113(g)(2). A PRP who incurs cleanup costs pursuant to a civil action under Section 106 or 107 has three years to file such a claim.

The Court of Appeals ruling ensures that PRPs who have contributed to waste at a site can recover from other PRPs when their portion of the cleanup costs exceeds their pro rata share. The Court explained that such PRPs may invoke the contribution defense embodied in Section 113(f) of CERCLA regardless of how their claims evolved, and those individuals who are not PRPs may bring their traditional cost recovery claims under Section 107.

-by Stacy Nagel

Farmland Industries, Inc. v. Republic Insurance Co., 941 S.W.2d 505, (Mo. 1997).

Farmland Industries, Farmer's Chemical Company, and Union Equity Cooperative ("Farmland") brought a declaratory judgment action against Republic Insurance Company, Millers' Mutual Insurance Association of Illinois, the Home Insurance Company, the House Indemnity Company, First State Insurance Company, and Hartford Accident and Indemnity Company ("Defendants"/"Respondents"). Farmland asserted that its environmental liability insurance policies, umbrella policies, and other excess policies purchased from Defendants obligated Defendants to defend and/or indemnify Farmland's environmental liabilities which might arise from governmental actions under the Comprehensive Environmental Response Compensation Liability Act of 1980 ("CERCLA"), as amended, 42 U.S.C.A. §§ 9601-9675, and similar state environmental statutes.

CERCLA provides for removal and remedial actions against a party the Environmental Protection Agency (EPA) determines to be participating or has in the past participated in releasing hazardous substance into the environment. After determining a party's responsibility, the EPA, pursuant to 42 U.S.C. §§ 9604(a)(1), 9606(a), & 9622(a), may either clean up the hazardous substances itself and sue the responsible party for the cost it incurred, obtain an injunction requiring the responsible party to decrease its production or its release of the hazardous substance, or make an agreement with the individual entity to decrease such entity's production or release of the government pursued actions under CERCLA and similar state environmental statutes, which imposed a legal obligation on Farmland to compensate or satisfy cost incurred because of an abuse or damage. The Court refused to follow the Respondents' cited precedent, stating that the cited holding was incorrect in limiting the term "damages" to only monetary damages and that the facts of the cited case were distinguishable.
Contending that the intent of the parties was to use the term as it is used in the insurance context, Respondents next argued that the ordinary meaning of the term “damages” in an insurance context did not include response costs. The Respondents again cited precedent that stated that the term “damages” should be defined in an insurance context. In refusing to adopt this argument, the Court declared that the case upon which Respondents relied wrongly applied Missouri law, and that the term “damages” should only be defined in an insurance context when the parties plainly intended to use the technical meaning. The Court found that there was no evidence to support a claim that the parties to the instant case had such an intent. It further stated that even in an insurance context, the term would still include cost occurring from equitable relief.

The Respondents also argued that it would be repetitious to define “damages” to include both legal and equitable relief when read in the context of the insurance policies. Not persuaded by this argument, the Court stated that the term made it clear that the Respondents were liable to cover both direct and consequential losses of property damage for which Farmland might be obligated, even though Farmland did not sustain property damages. The Court further noted that including both legal and equitable relief in the term “damages” was not repetitious when read in the context of the policies in question.

Declining to follow the Respondents’ argument that it should not be liable for the environmental response costs because it was not specifically provided for in the policies, the Court stated that CERCLA permits parties to insure against the cost, and that the ordinary meaning of the term “damages” included relief that was present and not present under the law when the policy was written—including environmental response cost.

The Respondents also argued that Farmland assumed the liability for response cost because CERCLA has two different definitions under 42 U.S.C. §§ 9607(a)(4)(A) & (a)(4)(C). While the former places liability on the party for all cost in remedial and removal action, the latter places liability on the party to the extent of harm it caused to the environment. In rejecting this argument, the Court stated that the policies involved did not refer to the difference between the two definitions in CERCLA, thus the ordinary meaning of the term “damages” should be used.

Lastly, the Respondents argued that since it had previously been held that parties in an action for response costs under CERCLA are not entitled to jury trials, these actions should not be classified as actions for damages. The Court rejected this argument by stating that defining CERCLA claims as either equitable or legal had no influence in the Court’s determination of the ordinary meaning of the term “damages.”

In conclusion, the Court held that under Missouri law, the term “damages,” as used in the Respondents’ insurance policies, made the Respondents liable to indemnify and/or defend any environmental response costs “in without the fault of the DOE.”

In response to DOE’s attempt to recycle its argument from Maine, the Court reaffirmed its decision that the DOE’s obligation was unconditional. As a result, the Court issued a partial writ of mandamus precluding the DOE from excusing its own delay by arguing that it had not yet developed a permanent repository or interim storage facility. The Court also precluded the DOE from characterizing the delay as unavoidable because of the lack of such facilities.

Finally, the Court rejected the DOE’s interpretation of the Standard Contract, which DOE argued excused it from performance because of certain governmental acts. The Court reasoned that Congress created an unconditional duty to take the SNF by the statutory deadline and that DOE’s interpretation would violate the directives of Congress. The Court held that the language the DOE referred to in its interpretation of the Standard Contract was inconsistent with DOE’s statutory obligation and thus unenforceable.

—by Douglas L. McHoney

MISCELLANEOUS

Reese v. Travelers Insurance Co., No. 96-16507, 1997 WL 700936 (9th Cir. 1997).

Defendant Travelers Insurance Company (“Travelers”) insured plaintiff Reese’s metals reclamation business for comprehensive general liability between 1981 and 1985. Reese sued the insurer for indemnity, declaration of the duty to indemnify and breach of the implied covenant of good faith and fair dealing. Travelers denied that the policy’s coverage required the insurance company to defend an action against the insured for cleanup of environmental contamination because of a policy exclusion for property that the insured owned, rented or used.

Reese, as a director of the Keystone Metal Company (“Keystone”), rented a Bakersfield, California, business site from John Chrisman. Keystone reclaimed met-
als from scrap material, creating waste materials that contaminated the soil at the business site. Chrisman sued Keystone and its management for $1.9 million, which represented the costs of site cleanup and other damages. In Chrisman’s action, Reese brought a third-party complaint against Keystone’s insurer, Travelers. After originally agreeing to defend Reese, the insurance company withdrew coverage, concluding that the policy terms did not include liability for damage to property that the insured party owned, rented or used. Keystone rented the site from Chrisman, so the insurance company denied any obligation to indemnify Reese for damages that Chrisman’s action might impose on Keystone. Travelers countered Reese’s claim with a demand for declaration of its coverage obligations under the policy.

Upon Reese’s motion for summary judgment on his declaratory claim, the District Court granted summary judgment sua sponte for Travelers and denied Reese’s motion, citing the owned-property exclusion in the policy as justification for Travelers refusal to defend Chrisman’s claim. Reese appealed.

The Court first considered the insurer’s duty to defend. The policy language stated that coverage applied for property damage “even if any of the allegations of the suit are groundless, false or fraudulent.” The Court explained that to prevail through summary judgment, the insured must only establish the potential for coverage under the policy by comparing the policy language to the terms of the complaint, which Reese had done in the third-party complaint against Travelers. The Court cited precedent stating that the duty to defend is broader than the duty to indemnify, and moved on to consider Travelers’ argument that the owned-property exclusion precluded any obligation to defend.

Travelers argued that the contamination was limited to the property where Keystone conducted business and would not seep into the groundwater supply; therefore, the owned-property exclusion precluded coverage. Reese argued that the policy terms required Travelers to defend against Chrisman’s suit and that the exclusion did not apply.

The Court held that the owned-property exclusion did not excuse Travelers from defending Reese against Chrisman. The Court explained that Travelers’ evaluation of the validity of Chrisman’s claim against Reese on the merits was inappropriate and did not justify a refusal to defend the claim. The insurance company was obligated to defend because Chrisman’s complaint alleged property damage and groundwater contamination, which the policy explicitly covered. The allegation in the complaint of an act for which Reese had coverage, groundwater contamination, was enough to require the insurance policy to defend the action, whether or not the alleged provocation groundless. The Court cited A-H Plating, Inc. v. Am. Nat’l Fire Ins. Co. (57 Cal. App. 4th 427), stating that the insurer’s unilateral determination that the insured was not at fault did not justify a denial of the duty to defend under the policy.

In addition, the Court rejected Travelers’ argument that a policy exclusion for pollution that is “expected or intended” to result from the policyholder’s actions justified denial of coverage. Travelers claimed that the insured expected the metals reclamation business to produce pollution, therefore releasing Travelers from coverage on pollution claims. The Court found that although the metals reclamation business certainly produced pollution, the complaint against Keystone did not preclude the possibility that the damage was caused accidentally, which would be covered under the general liability policy.

In conclusion, the Court held that Travelers could not escape its duty to defend because the claim against Reese established the potential for liability under the policy. The Court also held that the owned-property exclusion did not apply because the complaint alleged groundwater contamination, which was a covered risk.

-by Becky Williams


A number of residential landowners commenced an action under Indiana’s Underground Storage Tank Act (“IUSTA”), IND. CODE ANN. § 13-23-1-1 to -15-4 (West 1997), to recover costs for past and future corrective actions necessary to abate contamination on property formerly operated as a gas station (“subject property”). In addition, the landowners sought to recover attorney fees and expenses pursuant to IUSTA. The trial court ordered the defendants to pay reasonable corrective action costs, totaling $2,743,660.21, and reasonable attorney fees and expenses, totaling $1,639,071.95. The plaintiffs and two defendants, Shell and Union, appealed.

In 1946, Fred Smith (“Smith”) purchased the subject property in West Point, Indiana, and
developed the land for use as a gas station. From 1946 to 1971, Smith leased the property to various parties who operated it as a “Shell” gas station. Smith, himself, transported gas from the Shell Oil Company (“Shell”) bulk plant in Lafayette, Indiana, to the subject property using his own tank truck. In 1971, the bulk plant began supplying Union Oil Company (“Union”) gas instead of Shell. As a result, the lessees ceased operating the property as a Shell station and began operating it as a “Union 76” gas station. Prior to his death in 1979, Smith continued transporting gas from the Union bulk plant to the subject property. From 1979 to 1981, the lessees continued operating the gas station on the subject property, and a Union gas distributor transported gas to the station. In 1981, the Union 76 station discontinued its operation on the subject property. Sometime thereafter, Robert Van Meter (“Van Meter”) acquired the subject property, removed the underground fuel tanks, and began operating Van’s Wholesale Auto Body Shop (“Van’s Body Shop”) on the property.

In 1989, Richard and Kim Meyer (the “Meyers”), who owned a residential lot near the subject property, noticed the odor of petroleum in their drinking water. The Meyers reported the odor to the county health department, which tested the Meyers’ water for contaminants. Lab tests revealed the presence of benzene in concentrations of 180 parts per billion. A few months later, the Indiana Department of Environmental Management (“IDEM”) tested residents’ water throughout the Meyers’ neighborhood and discovered that the water in the area contained concentrations of benzene; 1,2-dichloroethane; and other constituents of gasoline. Soon thereafter, the IDEM hired a private environmental consulting firm to conduct a study and identify the source of the contamination. In 1992, the consulting firm identified the subject property as the source, and subsequent testing on the property revealed high concentrations of petroleum hydrocarbons in and around the areas previously occupied by the underground fuel tanks.

In May 1993, the Meyers and several other residential landowners in the area filed a suit against Shell, Union, Van Meter, Van’s Body Shop, and Smith’s widow. The complaint alleged six counts: (I) liability under IUSTA; (II) liability under Indiana’s anti-dumping statute, IND. CODE ANN. § 13-7-11-6(c) (West 1997); (III) negligence; (IV) trespass; (V) nuisance; and (VI) strict liability for an abnormally dangerous activity. Originally, the plaintiffs named Shell and Union only under Counts III through VI but later amended the complaint to name both companies under Count I, as well. All parties agreed that Count I was an equitable claim and should be decided only after a jury trial on the plaintiffs’ common law counts. Following a trial on Counts III through VI, the jury returned a general verdict in favor of defendants. The trial court found in favor of the plaintiffs as to Count I, and ordered the defendant to pay reasonable corrective action expenses and attorney fees and expenses. The court apportioned these fees and expenses between Shell and Union based on the time the gas station operated under each name. Thus, the court ordered Shell to pay 70 percent of the award and ordered Union to pay 30 percent. The plaintiffs appealed, seeking a new trial. Shell and Union appealed on several grounds.

Shell’s and Union’s challenges to the trial court’s decision regarding Count I raised several issues on appeal. First, Shell and Union asserted that they were not “operators” within the meaning of IUSTA because the issue had been fully and fairly adjudicated before the jury, which had decided the issue adversely to the plaintiffs, and collateral estoppel barred subsequent reconsideration of the same issue under Count I. The appellate court recited the general rule that issue preclusion is not applicable where matters are not expressly adjudicated and cannot be inferred without argument. The court noted that, in fact, the parties had not adjudicated IUSTA’s definition of “operator” before the jury in this case. In addition, because the jury rendered only a general verdict, the court concluded that the jury may or may not have based its decision on a determination as to whether Shell and Union were operators of the gas station. Finally, the court invoked the doctrine of judicial estoppel to bar the oil companies’ assertion of collateral estoppel because such an argument was inconsistent with the companies’ previous arguments for removal to federal court. Consequently, the court held that the doctrine of collateral estoppel was inapplicable.

Second, Shell and Union contended they were not “operators” within the meaning of IUSTA because they had not exercised sufficient control over the operation of the gas station to be deemed operators. The plaintiffs argued that the facts sufficiently supported the trial court’s determination to the contrary. As an initial matter, the court noted that when a trial court’s decision is based on special findings and conclusions, an appellate court may reverse it only if clearly erroneous. Next, the court determined that the statutory definition of “operator” was ambiguous.
Consequently, the court employed rules of statutory construction to ascertain the term's meaning. The court found judicial interpretations of the term “operator” as defined and used in the Resource Conservation and Recovery Act (“RCRA”) and the Comprehensive Environmental Response, Compensation and Liability Act (“CERCLA”) particularly persuasive because of the consonant purposes of those acts and IUSTA and because the Indiana legislature had adapted many of RCRA’s and CERCLA’s provisions for its own use when it enacted IUSTA. Relying on several federal court opinions, the court determined that the term “operator” includes parties who possess the authority and/or ability to control underground storage tanks, whether or not they actually exercise that authority or ability. Because the oil companies had, in the past, demonstrated their ability to control the practices of independently owned gas stations in various ways, the court found that the evidence amply supported the trial court’s determination that Shell and Union were both operators within the meaning of IUSTA.

Third, the oil companies argued that the plaintiffs could not seek recovery for corrective action expenses because in this case because the plaintiffs were not themselves liable for corrective action expenses. Based on a plain reading of the IUSTA, the express purposes of Indiana’s environmental statutes, and precedent, the court concluded that anyone who incurs corrective action expenses otherwise compensable under the IUSTA may seek contribution. Fourth, Shell challenged the trial court’s apportionment of liability between Shell and Union because the trial court did not give Shell an opportunity to argue the issue or present evidence, the evidence of record did not support the trial court’s allocation, and the trial court improperly based its allocation on a market share liability theory. In response, the plaintiffs argued that Indiana’s statutes expressly authorize a trial court to consider any equitable factors it determines are appropriate when allocating corrective action expenses in a contribution action and that a trial court is entitled to greater deference where it exercises equitable discretion. Even so, the appellate court held that the trial court had abused its discretion by failing to notify the parties that it would be deciding the issue of allocation in its preliminary determination of liability. Consequently, the appellate court remanded the issue of allocation for briefing and an evidentiary hearing.

Fifth, Shell and Union asserted that the trial court should not have awarded contribution for corrective action costs yet to be incurred because such costs are speculative and not authorized by the IUSTA. In ruling that future corrective action expenses are presently recoverable, the court again relied on a plain reading of the IUSTA, as the IUSTA does not require that in a suit for contribution plaintiffs must already have incurred corrective action costs. In addition, the court noted that the oil companies’ interpretation of the statute was contrary to the purposes of Indiana’s environmental laws. As a result, the court concluded that future corrective action expenses are recoverable in actions for contribution under the IUSTA.

Sixth, the oil companies challenged the trial court’s inclusion of costs to monitor the future medical conditions of the plaintiffs as corrective action costs. Shell and Union contended that such costs are beyond the scope of corrective action expenses compensable under IUSTA. In opposition, the plaintiffs argued that the trial court’s award was appropriate and that the appellate court must affirm because of the deferential standard of review afforded a trial court’s findings and conclusions. After reviewing the IUSTA, the court concluded that medical monitoring is not a “corrective action” within the meaning of the IUSTA. Plaintiffs contended that medical monitoring should be considered an “exposure assessment,” which the IUSTA expressly provides is an appropriate corrective action. The appellate court disagreed with the plaintiffs and cited several sources supporting its conclusion, including the purposes for conducting exposure assessments under IUSTA, the purposes for taking corrective actions generally, the U.S. Environmental Protection Agency’s interpretation of the purpose for exposure assessments under RCRA, and the Conference Report on the Superfund Amendments and Reauthorization Act of 1986. Consequently, the appellate court ordered that the trial court exclude medical monitoring costs from its award of corrective action expenses.

Seventh, and finally, Shell and Union urged the court to construe the attorney’s fees and expense’s provision of the IUSTA narrowly, thereby disallowing an award of attorney’s fees for work unrelated to a successful claim for contribution. After considering the language of the IUSTA and factors commonly used to assess the reasonableness of attorney’s fees, the court concluded that courts should award attorney’s fees only insofar as related to a successful IUSTA contribution claim. As a result, fees incurred for work on non-IUSTA claims are not com-
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pensable, although the court indicated that fees incurred for work on successful IUSTA claims that overlap with non-IUSTA claims may be recovered under the statute. Because the plaintiffs’ suit had involved both IUSTA and non-IUSTA claims, the appellate court remanded the issue for an itemization of fees by claim.

Also related to the trial court’s award of attorney fees and expenses, the oil companies argued that paralegal and other miscellaneous fees are not compensable as “attorney’s fees and court costs” under the IUSTA. The appellate court noted that the IUSTA failed to define the phrase “attorney’s fees and court costs.” Thus, the court resorted to the purposes of Indiana’s environmental laws and precedent to uphold the trial court’s inclusion of paralegal and other miscellaneous fees in its award.

The plaintiffs raised only one issue on appeal. They contended that the trial court had erroneously instructed the jury regarding trademarks and requested that the appellate court grant a new trial. The appellate court held that the instruction was not erroneous and denied the plaintiffs’ request for a new trial.

In summary, the Indiana Court of Appeals addressed a number of issues related to the plaintiffs’ contribution action under the IUSTA. First, the oil companies were unable to assert collateral estoppel as to their status as “operators” under the IUSTA because they had the ability to control the operation of the gas station whether or not they actually did so. Third, the plaintiffs may recover corrective action expenses under the IUSTA even though they are not themselves liable for contribution. Fourth, the trial court abused its discretion when it failed to notify the parties that it would be allocating liability among the defendants in its preliminary determination of liability. Fifth, the trial court’s award of future corrective action expenses was proper under the IUSTA. Sixth, medical monitoring expenses do not constitute corrective action expenses within the meaning of the IUSTA and cannot be recovered in a contribution action thereunder. Seventh, courts will award attorney’s fees and court costs under the IUSTA only insofar as those fees and costs are incurred for work related to successful IUSTA claims. Also, paralegal and miscellaneous fees are properly includable in an award of attorney’s fees under the IUSTA. Eighth, the trial court’s jury instruction regarding trademarks was not erroneous, and, as a result, plaintiffs were not entitled to a new trial.

-by Craig A. Street

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