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Brownfield/Superfund Case Law Updates 2018

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Background

- Brown Duke & Fogel, P.C. is a law firm with offices in Syracuse, New York City and Monticello, dedicated to providing focused and practical legal advice to clients in the areas of environmental law, land use, zoning and development, mining and litigation
- A large part of our practice focuses on environmentally impaired and contaminated areas

New York v. General Electric Company

- Northern District of New York March 31st, 2017
- State commenced a CERCLA recovery action for PCB contamination at 53and 51 Luzerne Road. The State contended that, from 1952 to 1965, GE arranged for the disposal of scrap capacitors with the former owner of 53 Luzerne Road, who owned a scrap yard on the rear portion of the property.
- In October 1979, following approval by the EPA the State, pursuant to an agreement with the DOH, City of Glens Falls, Warren County, and the Town of Queensbury, removed 13,000 cubic yards of waste from the rear portion of 53 Luzerne Road. The State constructed a containment cell, on 51 Luzerne Road, a nearby land parcel, and deposited capacitors.
- In the action the State sought to treat 51 Luzerne Road and 53 Luzerne Road – as a single "facility" under CERCLA and to hold GE liable as a potentially responsible party under CERCLA for the "single facility" even though GE had no connection whatsoever to at least one of the two sites.
- The Court found that two locations are not a "single facility" for purposes of CERCLA liability, despite a common source of contamination, the common source is neither (1) due to the direct actions of the defendant, or (2) due to the natural spreading of the contamination. Instead, the two parcels have a common source of contamination due to the State's actions in excavating and moving contaminated waste from 53 Luzerne to 51 Luzerne, rather than from GE's direct conduct.
- Further, the properties were not operated as a single unit together and did not have a common owner at the time of contamination.

In re Midland Ins. Co

- Appellate Division, First Department June 22nd 2017
- Insured mining, smelting company (ASARCO) sought indemnification from insurer under excess insurance policies of amounts paid pursuant to settlement Agreement with EPA in connection with EPA's cleanup of lead contaminated soil in residential areas.
- The Policies contained pollution exclusion, i.e. excluded coverage for "property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land" unless the "discharge, dispersal, release or escape is sudden and accidental."
- Agree that pollution exclusion bars indemnification claims related to cleanup of soils associated with lead emissions.
- However, mining company contended that indemnification for clean-up costs related solely to chipping and flaking of lead paint from houses was warranted.

In re Midland Ins. Co

- The Court ruled in favor of the Insurance Company, holding that while other cases have held that damage resulting solely from lead paint is not excluded from coverage under similar pollution exclusions, those cases did not address damage caused by lead paint in conjunction with an acknowledged pollutant, nor the liabilities under CERCLA.
- Due to CERCLA's imposition of strict joint and several liability and the fact that some of the damage was caused by a party other than the insured does not affect the applicability of a coverage exclusion.
- The damage in this case was caused by both plaintiff's lead emissions and lead paint, and the damage from either source is not readily divisible. To the extent a particular area was contaminated solely by lead paint, it was not (and could not have been) included in the EPA's remediation efforts.
- Thus, entire claim barred by the pollution exclusions.

New York v. Pride Solvents & Chem. Co.

- Eastern District of New York December 15th, 2017
- In a CERCLA action regarding a Landfill, Plaintiffs seek recovery from Pride Solvents (Pride), identifying them as a source of hazardous waste contamination at the landfill.
- Pride challenges a Report and Recommendation partially granting leave to file a third-party complaint, which was granted as to 10 John Doe defendants, and denied as to fifty-eight other proposed third party defendants (settling defendants).
- The settling defendants had previously entered into a consent decree with the subject landfill.

New York v. Pride Solvents & Chem. Co.

- The issue at hand was whether the consent decree shielded the settling defendants from the present litigation.
- The court found that the plain language of the consent decree established that any migration of the hazardous sites would be a matter addressed by the decree, and the clause guaranteeing contribution protection foreclosed Pride Solvents from bringing into this action.
- Pride Solvent's contentions that the Pride site was a different site and therefore a different matter was unpersuasive, since migration onto other (including adjacent) properties was within the scope of the decree and its protections.

Cooper Crouse-Hinds, LLC v. City of Syracuse

- Northern District of New York February 12th, 2018
- CERCLA §107, and alternatively §113 actions against City of Syracuse and Onondaga County arising from disposal of hazardous waste at Plaintiffs' landfill for recovery of costs not included in settlement or contributions for costs incurred.
- In 2004 One plaintiff entered into a consent order with DEC in which plaintiffs undertook sampling investigations and studies, as well as interim response measures.
- In 2011 other plaintiff entered into a consent order to implement a new remedial action plan.

Cooper Crouse-Hinds, LLC v. City of Syracuse

- Defendants moved to dismiss claiming that can't bring a §107 claim and that plaintiff can only proceed under §113(f)(3)(B).
- First Order did not resolve liability so Plaintiff CI can proceed under 107
- Second Order releases liability upon issuance of a COC. Parties did not brief issue so Court withheld determination as to whether CCH is required to proceed under 113(f)(3)(B).
- Due to a split in the Circuits, the Court declined to address the issue of whether the 2011 order's conditional release of liability settled the issue of plaintiff's liability.
- Defendants attempted to dismiss the § 107 claim on grounds that plaintiffs failed to identify with certainty or specificity any costs incurred under the 2004 Order. But CCH does not need to specifically identify costs related to the 2004 Order at this stage.

TDY Holdings v. United States

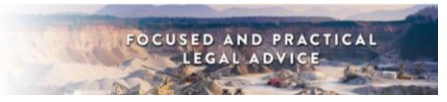
- Ninth Circuit Court of Appeals March 20th, 2018
- TDY was a military contractor for the United States.
- Appeal from district court decision allocating 100% of past and future CERCLA costs to TDY.
- On Appeal, circuit court found that the district court had deviated from existing case law decisions of *United States v. Shell Oil Co*., and *Cadillac Fairview/California, Inc. v. Dow Chem.,* which have previously allocated clean-up costs to the government as the contractors actions were seen as part of the war effort.

TDY Holdings v. United States

- The circuit court found that the government's control over TDY was less than in the prior two cases, but the district court still erred in its analysis of cost allocation.
- The district court should have considered that the government had instructed TDY to use 2 of the 3 chemicals at issue; that the government had previously paid 90-100% of cleanup costs on the site for prior contamination; and that TDY had stayed current on the evolving standards and practices to reduce the risk of discharge of the chemicals at issue.

FMC v. NYSDEC

- New York Court of Appeals May 1st, 2018
- Circumstances where DEC may undertake a corrective action unilaterally under Titles 9 and 13 without opportunity for a hearing.
- FMC owns and operates a 103-acre pesticide production facility in Niagara County. Over its lifetime, nearly 100 years, the facility released significant quantities of hazardous wastes, which have migrated onto adjacent properties.
- Since 1980, a portion of the facility has been operating under RCRA interim status since applying for an operating permit in 1980. ECL Title 9
- Also since 1980, portion of the facility an inactive haz waste site. ECL Title 13
- DEC expanded the boundaries of inactive haz waste site and classified as Sig. Threat Site
- Lower courts initially held that DECs unilateral decision to remediate without affording a hearing was improper.



FMC v. NYSDEC

- Art 78 challenging DEC's decision to remediate three adjacent properties without providing FMC with a hearing.
- Interim status does not preclude DEC from unilaterally cleaning up sites
- Attempted negotiations at a consent order for a year constitutes sufficient opportunity to be heard and also satisfied the first condition of Title 13, i.e. secure a voluntary agreement
- The second condition of Title 13 requires DEC to later recover funds. DEC can satisfy this requirement under a subsequent CERCLA action.

Sweener v. Saint-Gobain Performance Plastics Corporation

- Northern District of New York May 16th, 2018
- Plaintiff alleges that contaminated the Village's groundwater by discharging PFOA from one or more manufacturing facilities they operated within the Village and that this contamination caused her to suffer personal injuries, including uterine cancer.
- Defendants argued that Plaintiff's claims were untimely under New York CPLR § 214-c and 42 U.S.C. § 9658, a provision of CERCLA that preempts state statutes of limitations for certain claims based on exposure to harmful substances.

Sweener v. Saint-Gobain Performance Plastics Corporation

- The Court then turned to § 214-f, which allows personal injury actions related to the exposure to hazardous substances to be commenced by the plaintiff within the period allowed pursuant to [§ 214-c] or within three years of such designation of such an area as a superfund site, whichever is latest.'"
- The Court found that Plaintiff's claims were timely under § 214-f because she commenced this action "less than a year and a half after New York designated the Superfund site in Hoosick Falls.
- Defendants moved to certify an interlocutory appeal reviewing this decision. The Court declined to certify because it found no substantial ground for difference of opinion regarding the constitutionality of § 214-f as it satisfies due process "as a reasonable response in order to remedy an injustice."

Bartlett v. Honeywell International Inc.

- Second Circuit Court of Appeals May 25th, 2018
- Case involving preemption of state tort law claims under CERCLA.
- Honeywell had been required to cleanup and dredge that part of the Onondaga Lake Superfund Site known as "Wastebed 13" pursuant to a federal consent decree, in which it agreed to carry out a CERCLA cleanup plan established by EPA and DEC. As part of the cleanup plan, Honeywell dredged sediment from portions of Onondaga Lake and transported that waste sediment via pipeline to Wastebed 13.
- Plaintiffs brought a tort action alleging alleged that Honeywell had been negligently dumping hazardous waste generated from their dredging of contaminated sediment from the lake.

Bartlett v. Honeywell International Inc.

- The Second Circuit Court of Appeals found these allegations to be "implausible" because both EPA & DEC were supervising Honeywell's activities, with a federal district court supervising Honeywell's conduct in compliance with the consent decree.
- The court ultimately held that these state tort law claims were preempted by CERCLA, as the allegations in essence challenged consent decree itself, and not its implementation.

Brooklyn Union Gas Company v. Exxon Mobile

- Report and Recommendations - Eastern District of New York September 10th, 2018
- Plaintiff seeks cost recovery, and alternatively, contribution pursuant to CERCLA
- In 2007, plaintiff entered into a consent agreement with DEC for the investigation and possible remediation of numerous manufactured gas plants (MGPs).
- The consent agreement provided for a conditional release of liability.

Brooklyn Union Gas Company v. Exxon Mobile

- Due to the existing split in the Circuit courts, the court examined the language of the consent order to determine the intent of the parties at the time of execution.
- The court determined that the intent was to resolve the issue of liability at the time of execution, thus barring the §113 claim.
- The court also found that the §107 was insufficiently pled, as plaintiffs failed to prove that the recovery sought for sites not included in the AOC were considered a "facility" under CERCLA.
- The court looked to the fact that the other MGPs were neither owned, nor operated by the same party and involved different contaminants.

Pakootas v. Teck Cominco Metals, Ltd

- Ninth Circuit Court of Appeals September 14th, 2018
- This appeal was the latest of a multi-decade dispute centered on Teck Metals' liability for dumping several million tons of industrial waste into the Columbia River over a time span of almost 100 years.
- Litigation was ultimately trifurcated into three phases to sequentially determine: (1) whether Teck is liable as a PRP; (2) Teck's liability for response costs; and (3) Teck's liability for natural resource damages.

Pakootas v. Teck Cominco Metals, Ltd

- This appeal examined whether;

1. the district court had to wait for the resolution of the entire case before entering judgment on the Tribes' response costs claim;
2. did the district court have personal jurisdiction over the defendant;
3. Did the district court properly award Colville Tribes' investigation costs?
4. Did the district court properly award attorneys fees?
5. Did the district court properly deny Teck's divisibility defense?

Pakootas v. Teck Cominco Metals, Ltd

- The court found that;
- Entering the response cost claim was proper because entry of partial judgment against company would help ensure that a responsible party promptly paid for contamination of river, advancing CERCLA's goals and easing tribes' burden of financing litigation effort.
- Defendants "expressly aimed" several million tons of industrial waste it dumped into Columbia River, 10 miles upstream of United States' border with Canada, at State of Washington, thereby establishing requisite effects in Washington for exercise of specific personal jurisdiction

Pakootas v. Teck Cominco Metals, Ltd

- Defendants were entitled to recover investigation costs, as recoverable costs of "removal," in CERCLA action brought against Canadian company, seeking to hold it liable for dumping several million tons of industrial waste into Columbia River
- Defendants were entitled to recover reasonable attorneys fees.
- Defendants failed to establish that harm caused to Upper Columbia River by the dumping of several million tons of industrial waste was theoretically capable of apportionment and, thus, company was not entitled to divisibility defense in CERCLA
- Good analysis of what constitutes a divisibility defense under CERCLA

DMJ Associates, LLC v. Capasso v. Ace Waste Oil, Inc.

- Eastern District of New York September 19th, 2018
- Case about validity of assignment of rights to recover response costs and to seek contribution under CERCLA.
- Objections to two R&Rs involving motions challenging third-party complaints of Exxon and Quanta (the TPPs) against various Fed FTPD's (Air Force, Army, Navy, DOD, Coast Guard) and Revere.
- First R&R recommends granting FTPDs motion to dismiss because the claims are premised on claims that violate the Assignment of Claims Act.
- Second R&R recommends denying Revere's motion because rights were properly assigned to TPPs.

DMJ Associates, LLC v. Capasso v. Ace Waste Oil, Inc.

- District Court adopted the R&Rs with one modification to clear that any purported claims of Daimler Chrysler Corporation, Dana Corporation, and General Motors Corporation are dismissed from the third-party action.
- The court agreed with the magistrate and denied objection to the first R&R because such assignments would deprive the U.S. from defending each claim directly and individually. In upholding the R&R the court looked to the purpose of the ACA was "enabl[e] the United States to deal exclusively with the original claimant instead of with several parties."
- The court also upheld the second R&R finding that the clear and unambiguous language of the assignment of rights documents effected a proper assignment.

United States v. Raytheon Company

- District Court of Massachusetts September 25th, 2018
- Government brought claim against contractor (Raytheon) under CERCLA to recover costs incurred by the United States Navy in response to the release hazardous substances from Naval Weapons Industrial Reserve Plant. Contractor moved to dismiss on ground of Res Judicata.
- Prior to this case, the Town of Bedford had brought an action against the Navy, who in turn brought cross claims against Raytheon.
- In March, 1993, the district court entered a judgment dismissing with prejudice the Bedford Litigation, including the Navy's cross claims against then co-defendant Raytheon. That dismissal was based upon six separate settlement agreements, including one overarching settlement agreement.

United States v. Raytheon Company

- In 1999, Navy negotiated an additional Federal Facility Agreement with the EPA. Ten years later, in 2010, the Navy issued a record of decision ("ROD") for the site which established a remedial action. In 2010, the Navy issued a record of decision ("ROD") for NWIRP, which selected a final remedial action. The Navy sought recovery under §9613(g) and §9607(a)
- The court held that the elements of Res Judicata were met. While the Navy contended that the allegations in its 2017 complaint differ from the claims made in the Bedford Litigation, knowledge of potential CERCLA claims was sufficient to make a claim ripe for res judicata purposes. The court continued to discuss the other mooted issues.

United States v. Raytheon Company

- The court found that the Federal Facility Agreement did not bar §9607 recovery costs since the court found that it was an inter-agency agreement pursuant to §9620(e)(2), for the purposes of facilitating necessary remediation at a contaminated government facility, not for purposes of resolving an issue of liability. The court came to this conclusion by looking to the reference of §9620 and the absence of admissions of liability in the agreement.
- The court finally found that defendants had sufficiently alleged enough facts that the Navy's actions on the site were remedial in nature, thus making the Navy's §9607 claims time barred under six-year statute of limitations.

Refined Metals Corporation v. NL Industries, Inc.

- Seventh Circuit Court of Appeals September 25th, 2018
- The lawsuit involved contamination at a former secondary lead smelter owned by Refined Metals, and previously owned by defendant NL Industries, Inc. in Beech Grove, Indiana.
- In 1998 Refined Metals signed a consent decree with the United States and the state of Indiana to remediate the site under RCRA and the CAA. One of the purposes of the decree was for Refined Metals to obtain a covenant not to sue, pay a penalty, and recommend a final corrective measure for the site and to perform the final corrective measures as required by EPA. Refined Metals was not required to, and did not admit, liability. Refined Metals was required to close the site and investigate, propose, and implement a plan of remediation for the site. The consent decree made no mention of CERCLA liability. NL was not a party to the 1998 consent decree or the litigation with the United States and Indiana.

Refined Metals Corporation v. NL Industries, Inc.

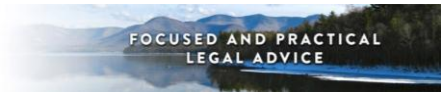
- The complaint was filed against NL Industries almost 19 years after the 1998 consent decree was entered, but less than three years from the date that Refined Metals alleged the on-site remedy implementation had begun.
- The district court dismissed Refined Metals §107 claims holding that a §113 claim was available to Refined Metals. The court then found that the 3 year statute of limitations had run for the §113 claim, holding that;
- Specific resolution of CERCLA liability is not required to trigger contribution rights under CERCLA section 113(f)(3)(B).
- Refined Metals resolved the issue of liability because the unconditional assumption of a legal obligation to remediate the property through the consent decree in exchange for a legal benefit was a *conclusive determination* that amounts to a resolution of CERCLA liability.

Wisconsin Cent. Ltd. v. Soo Line R.R. Co

- Northern District of Illinois September 30th, 2018
- Breach of contract case regarding indemnification for response costs paid to EPA as part of Ashland/NSP Superfund site cleanup.
- Parties finalized an asset purchase agreement ("APA"). Among the railroad assets purchased by WCL in the transaction was a right-of-way located in Ashland, Wisconsin which was later designated as a Superfund Site. Both WCL and Soo Line later contributed to the settlement of claims related to the Superfund site.
- Pursuant to the APA, each party looked to the other to indemnify it for the amounts contributed to the settlement. Both refused and WCL filed a breach of contract action. Along with its answer, Soo Line set forth its own breach of contract counterclaim against WCL.

Wisconsin Cent. Ltd. v. Soo Line R.R. Co

- According to the APA, WCL assumed liability for "all claims for environmental matters relating to the ownership of the Assets or the operation of the that are asserted after the tenth anniversary of the Closing Date," And did not assume liability for any "claims for environmental matters relating to the ownership or operation prior to the Closing Date of the Operating Rail Property ... asserted on or prior to the tenth anniversary of the Closing Date."
- Both entered consent decree with EPA and paid 5.25MM each. WDNR agreed not go raise claims against either Soo Line of WCL.
- Applying state contract law to clear up ambiguities as to what is considered a "claim" under the contract, the court found that the prior CERCLA claims occurred during the period in which WCL was required to indemnify Soo Line. The court ruled accordingly.



New York State Department of Taxation and Finance – Advisory Opinion – March 7, 2018

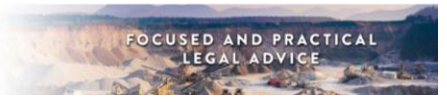
- Petitioner asks when tangible property is considered "placed in service" given that the project site involves the redevelopment of an approximately 140,000 sq. ft. building that will be remediated and occupied in phases.
- The Site will be considered placed in service when renovations to the first of the separately occupied and used portions of the building are substantially complete and that separately occupied portion of the building is ready for its specifically assigned function.
- If Site placed in service prior to the issuance of the CoC, the CoC must be issued in the same taxable year that the Site is placed in service for the Petitioner to be eligible for the tangible property component for the costs incurred prior to issuance of the CoC. Ten years thereafter.

New York State Department of Taxation and Finance – Advisory Opinion

- Petitioner also asks whether costs incurred for certain activities will qualify for the site preparation component, i.e. (1) excavation and removal of contaminated soil; (2) placement of one foot or more of site cover; (3) ongoing soil vapor intrusion investigation; (4) placement of an environmental easement on the property; (5) development of a site management plan; (6) submission of periodic review reports; (7) installation of a sub-slab depressurization system; (8) asbestos removal; (9) demolition and removal of dilapidated buildings on the site; (10) conversion of building space from warehouse to office space; and (11) the modification and renovation of existing fire suppression, plumbing, HVAC and electrical system
- Yes, EXCEPT as to 10 and 11. These may be eligible as costs included the tangible property component as long as: (A) they are not treated as site preparation costs; and (B) the property to which these costs relate meets the requirements as tangible property pursuant to Tax Law § 21(b)(3).

Cases

- *The Brooklyn Union Gas Company v. Exxon Mobile Co.,* 17-CV-0045 (MKB)(ST) [EDNY September 10th, 2018]
- *Bartlett v Honeywell Intl. Inc.,* 737 Fed Appx 543 [2d Cir 2018]
- *Cooper Crouse-Hinds, LLC v City of Syracuse, New York*, 16-CV-1201 (MAD/ATB), 2018 WL 840056 [NDNY Feb. 12, 2018]
- *DMJ Assoc., L.L.C. v Capasso,* 181 F Supp 3d 162 [EDNY 2016]
- *FMC Corp. v New York State Dept. of Envtl. Conservation*, 31 NY3d 332 [2018]
- *In re Midland Ins. Co.,* 151 AD3d 624 [1st Dept 2017]
- *New York v. Gen. Elec. Co.*, No. 1:14-CV-747 (CFH), 2017 WL 1239638 (N.D.N.Y. Mar. 31, 2017)
- *New York v. Pride Solvents & Chem. Co*., No. 15-CV-6569(DRH)(ARL), 2017 WL 6403515, [E.D.N.Y. Dec. 15, 2017]



Cases

- *New York State Department of Taxation and Finance Advisory Opinion* TSB-A-18(1)I [March 7, 2018]
- *Olin Corp. v Lamorak Ins. Co.*, 84-CV-1968 (JSR), 2018 WL 3442955 [SDNY July 17, 2018]
- *Pakootas v Teck Cominco Metals, Ltd.*, 905 F3d 565 [9th Cir 2018]
- *Refined Metals Corp. v NL Indus., Inc*., 117CV02565SEBTAB, 2018 WL 4592110 [SD Ind Sept. 25, 2018]
- *Sweener v St.-Gobain Performance Plastics Corp.,* 117CV532LEKDJS, 2018 WL 2229133, [NDNY May 16, 2018]
- *TDY Holdings, LLC v United States*, 885 F3d 1142 [9th Cir 2018]
- *United States v Raytheon Co.,* CV 17-11816-NMG, 2018 WL 4623060 [D Mass Sept. 25, 2018]
- *Wisconsin Cent. Ltd. v Soo Line R.R. Co.,* 16-CV-04271, 2018 WL 4699840 [ND Ill Sept. 30, 2018]

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