

## Seventh Circuit Case Examines the Ambiguities of CERCLA

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When Congress enacted the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) in 1980, the objective seemed simple: requiring polluters to clean up the contamination they had caused. In practice, however, the hastily considered statutory language has spawned numerous controversies and lawsuits and heightened the costs of completing cleanups. In two companion decisions issued Sept. 25—*NCR v. George A. Whiting Paper*, No. 13-2447, and *United States v. P.H. Glatfelter*, No. 13-2436—the U.S. Court of Appeals for the Seventh Circuit attempted to make sense of the confusing provisions of CERCLA. The two cases are collectively known as the Fox River Litigation.

The Fox River Litigation involves the cleanup of the Lower Fox River and Green Bay Superfund Site in Wisconsin. The Lower Fox River flows northeasterly into Green Bay, a waterbody connected to Lake Michigan. Various paper mills and paper recycling companies historically operated on the banks of the Lower Fox River. From the mid-1950s to the 1970s, NCR Corp. manufactured an emulsion for coating paper to produce copies without use of carbon paper. The emulsion contained polychlorinated biphenyls (PCBs), which are now known to cause cancer. The paper mills that applied this emulsion and recyclers that obtained scrap paper coated with NCR's emulsion discharged effluent containing PCBs into the Lower Fox River. These discharges contaminated sediments in the river.

The U.S. Environmental Protection Agency placed the site on its Superfund list and selected a remedy requiring dredging contaminated sediments in portions of the river and capping the sediments in other river segments. NCR as successor to a paper company initially performed some of the remediation and sought to recover all or some of its response costs from the mill operators and paper recyclers. They in turn filed counterclaims against NCR. In light of the high cost of performing the remedy, estimated by the EPA in 2010 at \$701 million, the government, NCR and the defendants waged a fierce battle to establish responsibility for the cleanup.

### **The Section 107 vs. Section 113(f) Debate**

In its suit against the other potentially responsible parties (PRPs), NCR asserted a cost recovery claim under Section 107 of CERCLA. The PRPs contended that NCR could at most bring a contribution claim under Section 113(f) of CERCLA. Because defendants may bring counterclaims, in many instances the choice of claims is not critical. Nevertheless, plaintiffs usually prefer a Section 107 claim. Section 107 may impose joint and several liability on defendants, a valuable tool when it is difficult to prove each party's share or when some defendants are insolvent (the so-called orphan share problem). The two sections are also subject to different statutes of limitations and other defenses.

A PRP may bring an action under Section 113(f) if it has first been sued under Section 107 or 106 of CERCLA or has resolved its liability to the United States or a state. Most circuit courts will allow a PRP to proceed under Section 107 only if it cannot satisfy the prerequisites for

asserting a contribution claim under Section 113(f). The odd result, allowing some PRPs but not others to bring a Section 107 claim, is difficult to support by reference to CERCLA's goals.

The distinction is also hard to apply in practice. NCR incurred costs in performing work under a 2001 consent decree, a 2007 EPA unilateral administrative order and a 2004 administrative order on consent (AOC). The work it performed under its 2001 consent decree resulted from a government suit against it and therefore readily satisfied the predicates for a Section 113 claim. Similarly, at least a portion of NCR's claim to recover costs to comply with the 2007 unilateral order sounded in contribution as a result of the EPA's action to enforce its administrative order. But NCR contended that the costs it incurred before the EPA commenced its enforcement action should be recoverable under Section 107. The Seventh Circuit rejected that argument: "Slicing and dicing of costs incurred under the same administrative order makes little sense when a party's liability for all of those costs will ultimately be determined in the enforcement action."

Likewise, the Seventh Circuit held that NCR could bring only a contribution action to recover costs expended to satisfy the 2004 AOC because the AOC resolved NCR's liability to the government. The Seventh Circuit rejected NCR's argument that it remained liable under the AOC because the government's covenant not to sue NCR was dependent on NCR's satisfactory performance of the work under the AOC.

In contrast to its ruling on NCR's claim, the Seventh Circuit determined that Appvion, an alleged successor to one of the paper mills, did have a cognizable Section 107 claim. Appvion was named as a PRP in the EPA's 2007 unilateral order and initially expended response costs. Subsequently, it was determined that Appvion was not a PRP because it had not succeeded to any liability of the paper mills. The Seventh Circuit determined that "a party such as Appvion that is no longer a PRP logically cannot be a joint tortfeasor for CERCLA purposes," and therefore was not a proper contribution plaintiff. In the court's view, a Section 107 action would lie because Appvion's payments were "constructively voluntary," i.e., they would have been voluntary had Appvion not been mistakenly named in the 2007 order. Appvion's separate indemnity claim did not preclude its Section 107 claim.

The court's characterization of work performed under an EPA order as voluntary seems strained; a party refusing to comply with the order risks substantial penalties. Nevertheless, allowing an innocent party to bring a Section 107 claim furthers CERCLA's goal to facilitate prompt cleanups. If a party that believes it is not liable has the opportunity to recover all of its costs from other PRPs through a subsequent Section 107 action, it will be less likely to delay the cleanup until litigation resolving its liability is concluded. CERCLA's policies may help explain the Seventh Circuit's ruling.

### **Limiting Liability**

Those PRPs unable to demonstrate that they had no liability for costs at the site looked for ways to limit their liability to only portions of the site. In light of the large size of the site, the EPA divided the site into five operable (geographic) units. Based upon this division, defendant P.H. Glatfelter Co. contended that the government must establish separately for each operable unit that a release of PCBs for which Glatfelter is responsible caused the incurrence of response costs.

The Seventh Circuit acknowledged that CERCLA is ambiguous regarding whether causation is an element of a Section 107 claim, but found no need to decide the issue. The Seventh Circuit emphasized that operable units are discrete geographic areas that can be separately analyzed for cleanup purposes, but are not separate Superfund sites. Because PCBs released by Glatfelter's predecessor caused the incurrence of some response costs at the site, Glatfelter may be held responsible to the government for all response costs at the site.

As Glatfelter recognized, the concept of a PRP's joint and several liability to the government for all costs at a Superfund site has its limits. Even PRPs shown to have liability at a site may avoid joint and several liability by proving that the harm at the site is divisible. To prove this defense, Glatfelter could have attempted to quantify the contamination for which it was responsible. Indeed, NCR quantified its own share for operable unit 4, and the Seventh Circuit remanded the case for consideration of NCR's divisibility defense.

Unlike NCR, Glatfelter took what the Seventh Circuit termed an "all-or-nothing" approach. Glatfelter proffered an expert who opined that Glatfelter was neither a sufficient nor necessary cause of the contamination. In essence, the expert opined that the mass of PCBs from Glatfelter's predecessor were not deposited in concentrations exceeding cleanup levels and therefore Glatfelter's discharge alone would not have required site cleanup. In the expert's view, Glatfelter's discharges had also not contributed to the need for a cleanup because when solids with low concentrations of PCBs in Glatfelter's discharge mixed with solids containing high concentrations of PCBs from other parties, Glatfelter's contribution reduced the average concentration of PCBs in the sediments.

The district court found flaws in the expert's analyses regarding both the mass and deposition rate of PCBs, thereby calling into question the expert's opinion that Glatfelter had not caused PCB concentrations in excess of cleanup standards. But alternatively, the Seventh Circuit found that Glatfelter's discharges, even at lower PCB concentrations than discharges from its fellow PRPs, would have contributed to, not diminished, the total concentrations of PCBs in the sediments. The court reasoned that if the solids discharged by Glatfelter had no PCBs attached to them, PCBs from other discharges would have attached to those solids, thereby reducing the overall concentration of PCBs in the sediment.

The Seventh Circuit focused on PCB-free discharges without discussing whether the recycler could operate profitably if it had to remove the PCBs or whether solids with low or no concentrations of PCBs would contribute to the cost of the remedy (e.g., after exposure to PCBs in the river they would have to be dredged or capped). Resolution of those issues may be important to a determination of Glatfelter's contribution to the cleanup costs.

### **Equitable Allocation**

In a contribution action brought under Section 113(f), the district court must equitably allocate response costs among PRPs. In many CERCLA cases, the volume and toxicity of each PRP's hazardous substances are often the key allocation factors, with other factors such as a PRP's cooperation with the government, culpability and knowledge tilting the outcome more or less in a party's favor. In this case, however, the defendants seized on the alleged knowledge of NCR

regarding the environmental harm that would be caused by the discharge of PCBs as a reason to allocate all of the costs to NCR. On motions for summary judgment, the district court found that only NCR was aware of warning signs that PCBs could cause harm. The district court concluded that this factor alone justified allocating all of the response costs for the Lower Fox River to NCR.

On appeal to the Seventh Circuit, NCR contended that the district court's findings as to its knowledge were improperly made on the summary judgment record. NCR had presented evidence of its lack of full knowledge of the dangers of PCBs. In its view, this evidence created a genuine issue of fact regarding its knowledge. NCR further contended that the district court could not properly select knowledge as the sole equitable factor without first allowing NCR to present evidence of other equitable factors that it wished the court to consider.

On review, the Seventh Circuit concluded that the district court's finding that NCR was aware of some warnings was undisputed. The Seventh Circuit nonetheless emphasized that NCR's awareness of warnings (which fell short of full knowledge) did not necessarily mean that NCR should bear all response costs. That decision would require the district court to consider all equitable factors and then, in light of all of the circumstances, identify the factor or factors that it would use for allocation. The Seventh Circuit concluded that the district court had not made this evaluation on a full record. Accordingly, the Seventh Circuit vacated the decision denying NCR contribution, and remanded the action to the district court to establish a more complete record that considers factors such as relative volumes of PCB discharges, other sources of PCBs unrelated to NCR's emulsion, and the parties' levels of voluntary cooperation with the cleanup. The district court must explain why these should or should not be among the factors used to allocate response costs under the circumstances of this case.

The Seventh Circuit's rulings on these and other issues establish important precedents. Nevertheless, even 34 years after CERCLA's enactment, courts are still struggling to resolve the ambiguities existing throughout the statute.

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