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WHAT'S INSIDE

COMMENTARY

Supreme Court poised to limit tort claims for historic pollution

Nancy J. Rich and James P. Rizk of Katten Muchin Rosenman LLP discuss an environmental case recently accepted for review by the U.S. Supreme Court and the potential implications of reversing the lower court decision in the case.

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MTBE

N.Y.C. asks Supreme Court not to review $105 million verdict against Exxon

The city of New York is urging the U.S. Supreme Court to deny Exxon Mobil Corp.'s petition to overturn a $105 million jury award for contaminating the city's water supply with the gasoline additive MTBE.

Exxon Mobil Corp. et al. v. City of New York et al., No. 13-842, opposition brief filed (U.S. Mar. 17, 2014).

In its opposition brief, the city says Exxon's petition offers no persuasive argument for further review of the jury award. The city also rejects the company's claim that the Clean Air Act, 42 U.S.C. § 7401, required the use of MTBE.

The city argues that the 2nd U.S. Circuit Court of Appeals was correct in upholding the $105 million award. The city says federal law did not explicitly mandate the use of MTBE. The additive was an option, but Exxon could have used ethanol, which lacked MTBE's dangerous properties, the city says.

Additionally, the jury found Exxon liable for negligent handling of MTBE and failure to warn of the gasoline additive's dangers, the brief says.

MTBE is a gasoline additive first used in the 1970s to increase the oxygen content in fuel. Its

REUTERS/Jason Reed

use became more widespread after government regulations required oil companies to produce fuel with a higher oxygen content to reduce smog. The Environmental Protection Agency approved both MTBE and ethanol for use as oxygenates, but MTBE was more widely used.

In 2000 New York banned MTBE in gasoline but gave manufacturers until 2004 to fully modify their supply systems. In 2005 Congress repealed the oxygenate requirement.

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Supreme Court poised to limit tort claims for historic pollution

By Nancy J. Rich, Esq., and James P. Rizk, Esq.
Katten Muchin Rosenman LLP

The U.S. Supreme Court agreed this January to review a decision of the 4th U.S. Circuit Court of Appeals finding the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9601, or CERCLA, preempts state statutes of repose as well as limitations. In general, a statute of limitations bars claims after a certain period of time since an injury, whereas a statute of repose bars claims after some action by the defendant, even if it takes place before the plaintiff is injured. A statute of repose is thus more favorable to defendants, because it bars more claims.

4TH CIRCUIT DECISION

On July 10, 2013, in a 2-1 decision, the 4th Circuit reversed a lower court ruling that barred a common law nuisance claim by owners of contaminated property. The 4th Circuit's ruling was based on a statute of repose and allowed the nuisance claim to proceed, notwithstanding the contamination occurring earlier than 1987. Otherwise, a 10-year statute of repose would have applied.[1]

The case involved nuisance claims brought by 25 landowners in North Carolina, following the 2009 discovery that their well water contained concentrated levels of trichloroethylene, or TCE, and cis-1,2-dichloroethane, or DCE, allegedly caused by a former CTS Corp. plant nearby.

At issue was Section 9658 of CERCLA, which governs actions under state law for damages from exposure to hazardous substances. Section 9658 says, "the statute of limitations established under state law shall apply,"[2] except where the applicable limitations period (as specified in the state statute of limitations or under common law) would begin earlier than the "federally required commencement date." This may occur when the plaintiff knows or reasonably should have known that the personal injury claimed was caused by the hazardous substance concerned.[3]

> Section 9658 says "the statute of limitations established under state law shall apply" except where the applicable limitations period would begin earlier than the "federally required commencement date."

The issue for resolution by the 4th Circuit was whether CERCLA's language preventing application of statutes of limitation prior to the CERCLA-established date is broad enough to encompass "statutes of repose."

The majority first determined that the term "statute of limitations" is ambiguous as to whether it includes statutes of repose and then looked to other indicia of congressional intent to interpret the term. Relying on statements in a report issued in 1982 by a CERCLA study group appointed by Congress, the majority found that the term "statute of limitations" was intended to apply to both statutes of limitation and statutes of repose. As to the implications of its decision, the majority stated:

> Our decision here will likely raise the ire of corporations and other entities wishing to rest in the security of statutes of repose, free from the threat of being called to account for their contaminating acts. They likely will cite the well-known policies underlying such statutes and asseverate that we have ignored them. But we are not ignorant of these policies, nor have we turned a blind eye to their importance.
>
> Accordingly, we reaffirm our conclusion that North Carolina's 10-year limitation on the accrual of actions is preempted by Section 9658 of CERCLA. In so holding, we simply further Congress's intent that victims of toxic waste not be hindered in their attempts to hold accountable those who have strewn such waste on their land.[4]

The decision notes that it is consistent with the 9th U.S. Circuit Court of Appeals' holding in *McDonald v. Sun,* 548 F.3d at 774 (9th Cir. 2008). It also distinguishes the 5th Circuit's opposing view in *Burlington Northern & Santa Fe Railway Co. v. Poole Chemical Co.,* 419 F.3d 355 (5th Cir. 2005), in that plaintiffs there had knowledge of their claim before the expiration of the statute of repose.

The dissent relied on the plain language of CERCLA, saying it is limited to preempting statutes of limitation and, on its face, does

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not apply to statutes of repose. The dissent further said,

> Even if the preemptive effect of Section 9658 were susceptible to two interpretations, a presumption against preemption would counsel that we should limit Section 9658's preemptive reach to statutes of limitations without also extending it to statutes of repose.[5]

POTENTIAL IMPLICATIONS OF REVERSING THE 4TH CIRCUIT'S DECISION

The case before the Supreme Court is titled *CTS Corp. v. Waldburger*.[6] Under Supreme Court rules, the briefing schedule will be completed in late April, although the court rules allow modification of the schedule. Oral argument will occur during the court's October 2014 term, as the court does not hear oral arguments from May through September.

In the meantime, corporations and others with potential liability for historic contamination are evaluating the likelihood that the Supreme Court will reverse the 4th Circuit's decision, and the extent to which reversal of the decision would discourage environmental tort suits for such contamination.

The judicial history of the current, usually conservative-leaning Supreme Court suggests a significant likelihood of reversal. CERCLA plainly refers to statutes of limitations but not statutes of repose. Further, even if the Supreme Court agrees that the language of Section 9658 is ambiguous, Judge Stephanie Thacker noted persuasively in the 4th Circuit dissent that courts usually apply a presumption against preemption in such cases.

If the Supreme Court reverses the 4th Circuit's decision, entities and individuals with potential environmental tort liabilities will need to re-evaluate their risk profile. They will need to know the law of each of the jurisdictions in which future plaintiffs may allege injury, and the specific facts of each potential liability.

Many statutes of repose are not as broad as the North Carolina statute at issue in *Waldburger*. For example, these statutes are frequently directed specifically at product liability or construction liability. Thus, the law of states with focused statutes of repose not reaching environmental torts would remain unaffected by reversal of *Waldburger*.

In addition, it is likely courts will seek to narrowly interpret the applicability of statutes of repose under case-specific facts to provide plaintiffs with the opportunity to recover damages for their alleged injuries. For example, under certain facts, defendants who are allegedly responsible for contamination of soil, groundwater, water or air might be presumed to have reasonably known and investigated injurious releases of contamination into the environment from historic operational locations.

Plaintiffs' lawyers could allege that this is a critical distinction between tort actions for environmental contamination and, for example, asbestos product liability actions. In this scenario, plaintiffs would argue that owners of companies having potential historic releases of hazardous substances may usually be expected to know the physical locations of most or all of the company's former facilities.

If the Supreme Court reverses the 4th Circuit's decision, entities and individuals with potential environmental tort liabilities will need to re-evaluate their risk profile.

In contrast, they could argue, asbestos product liability defendants usually distributed their products into a broad stream of commerce many decades ago, making it less likely that they could address exposures to the products with the passage of time. Former owners or operators of industrial facilities, however, arguably could have contacted current owners of the facilities and sought to investigate the presence and migration of historical releases.

Thus, courts applying the law of jurisdictions in which the "last act or omission" of the defendant begins the statute of repose might say this statute cannot begin while the defendant continues to expose persons or property to its waste. This argument might be less persuasive in the case of releases from off-site disposal facilities, unless the defendant would reasonably be expected to have disposal records from the time of disposal, or other knowledge of its connection to historic releases.

Courts may also be concerned that federal environmental statutes do not provide damages for personal injuries. As a result, a reversal of *Waldburger* is most likely to benefit environmental tort defendants in jurisdictions with statutes of repose like North Carolina's: broad in scope and applied strictly to limit plaintiffs' injury claims. Defendants in other jurisdictions will need to develop arguments based on the facts of their cases and the particular limits of the applicable statutes of repose.

HEIGHTENED CONSIDERATIONS FOR PROPERTY DEVELOPMENT

In spite of the potential for environmental tort claims to remain viable in certain situations such as those noted above, the Supreme Court's reversal of *Waldburger* might seem to promote development of potentially contaminated Brownfield-type properties. Historic owners and operators of such properties would be protected in jurisdictions with widely applicable statutes of repose.

It is reasonable to expect that the plaintiffs' bar would look for other viable defendants, in addition to joining with other interest groups to seek legislative solutions in jurisdictions with broad statutes of repose.

As a result, property developers and other purchasers would need to be wary of increased liability risks associated with land for which prior industrial owners or operators and their corporate successors might no longer be responsible for environmental tort claims. Current owners of historically contaminated properties might be targeted in environmental tort suits, too, depending on the plaintiffs' ability to demonstrate whether the owners acted responsibly regarding the contamination.

Although federal and state programs have actively promoted brownfields redevelopment for years, federal brownfields law does not purport to preempt state law tort actions against non-governmental acquirers of contaminated properties. The Small Business Liability Relief and Brownfields Revitalization Act,[7] which amended CERCLA in 2002, provides developers and other

purchasers of contaminated properties with important protection from CERCLA liability.

If a purchaser of real property performs a phase I environmental site assessment complying with the "all appropriate inquiry" rule promulgated by the Environmental Protection Agency, it will be protected from CERCLA liability. A number of states have enacted similar laws providing similar protections to bona fide prospective purchasers, or BFPPs. Redevelopment funds administered by various federal and state agencies are often available to developers of brownfields.[8]

> The law of states with focused statutes of repose not reaching environmental torts would remain unaffected by reversal of *Waldburger*.

One way plaintiffs' environmental tort lawyers might attempt to state a claim against a property developer or other subsequent property purchaser would be to assert that the developer or owner fails to satisfy the criteria required to maintain BFPP status. As a threshold matter in any BFPP analysis, it is necessary to determine whether the hazardous substance at issue is covered by CERCLA.

For example, petroleum is not regulated by CERCLA.[9] Unless an applicable state environmental statute provides BFPP protection for purchasers of properties that are contaminated solely by non-CERCLA substances, then the CERCLA BFPP defense will not apply to these properties.

Plaintiffs seeking contribution under CERCLA have successfully challenged defendants' assertion of the BFPP defense in certain cost recovery actions. CERCLA Section 9601(40) requires a person claiming to be a BFPP to establish by a preponderance of the evidence that the person meets a number of prerequisite conditions for the liability exemption. These conditions include a requirement that the person exercise "appropriate care" with respect to the hazardous substances found at the facility by taking "reasonable steps" to:

- Stop any continuing release.
- Prevent any threatened future release.
- Prevent or limit human, environmental or natural resource exposure to any previously released hazardous substance.[10]

The case law addressing the BFPP exemption provides a clear warning to developers and other purchasers of brownfields who fail to prepare and implement post-acquisition plans to address prior releases of hazardous substances.[11] Purchasers must also be aware of their responsibilities to comply with state laws regarding BFPPs.

For example, in a case in which the purchaser successfully prevailed on its BFPP defense regarding the manner in which it addressed leaking underground storage tanks, the court noted that California's requirements differed from those of CERCLA. The court then examined the purchaser's compliance with both sets of requirements.[12]

Ironically, the investigations purchasers undertake to satisfy the all appropriate inquiry rule to attain BFPP status might help plaintiffs demonstrate that the purchaser failed to prevent or limit exposure to previously released hazardous substances, as required by CERCLA Section 9601(40)(D). "Limit" is a broad term, and environmental reports for former industrial properties may identify conditions that, as viewed in hindsight by a court, the defendant did not adequately address, in spite of having knowledge of those conditions.

CONCLUSION

The likelihood that the Supreme Court will reverse *Waldburger* is significant enough that entities with potential environmental tort liabilities for historic contamination may wish to evaluate how those risks may change as a result of the court's impending decision. Parties should consider these risks on a case-by-case basis addressing the specific facts regarding each property and the jurisdiction in which it is located.

Former owners or operators, current owners, property developers and prospective property purchasers should investigate the potential for off-site migration issues and otherwise perform adequate due diligence to identify environmental tort risks. The results of these analyses should provide a foundation for post-*Waldburger* environmental risk decision-making, such as reducing or eliminating reserves for repurchasing certain former properties.

Current owners, potential purchasers and former owners or operators unable to rely on statutes of repose can use these analyses to target properties for proactively addressing conditions that might provide a basis for environmental tort claims. WJ

NOTES

1 *Waldburger v. CTS Corp.*, 723 F.3d 434 (4th Cir. 2013).

2 42 U.S.C. § 9658(a)(2).

3 *Id.* at § 9658(b)(4).

4 *Waldburger*, 723 F.3d at 444-45 (Floyd, J.).

5 *Id.* at 445 (Thacker, J. dissenting).

6 CTS Corp. v. Waldburger, No. 13-339, cert. granted (Jan. 10, 2014).

7 Pub. L. No. 107-118, 115 stat. 2356 (2002).

8 *See, e.g.*, U.S. Envtl. Prot. Agency, Brownfields and Land Revitalization - Grants & Funding, http://www.epa.gov/brownfields/grant_info/index.htm (last updated Aug. 15, 2012) (describing various brownfields grant and funding programs).

9 42 U.S.C. § 9601(14).

10 *Id.* at § 9601(40)(D).

11 *See e.g., PCS Nitrogen Inc. v. Ashley II of Charleston LLC*, 714 F.3d 161 (4th Cir. 2013) (lack of appropriate care evidenced by owner's failure to promptly clean and fill sumps and remediate debris pile); *Voggenthaler v. Md. Square LLC*, 724 F.3d 1050 (9th Cir. 2013) (property purchaser's affidavit from its environmental consultant in the state's suit to recover response costs allegedly resulting from the purchaser's building demolition was "woefully insufficient" to demonstrate the purchaser was a BFPP).

12 *3000 E. Imperial LLC v. Robertshaw Controls Co.*, No. CV 08-3985 PA, 2010 WL 5464296 (C.D. Cal. Dec. 29, 2010).

CLEAN WATER ACT

Supreme Court denies review in coal mining permit case

The U.S. Supreme Court will not hear the appeal of a West Virginia coal mine operator seeking to overturn an Environmental Protection Agency decision to revoke a dredge-and-fill permit issued by the U.S. Army Corps of Engineers.

Mingo Logan Coal Co. v. U.S. Environmental Protection Agency, No. 13-599, cert. denied (U.S. Mar. 24, 2014).

The District of Columbia U.S. Circuit Court of Appeals ruled in favor of the EPA in April 2013, which caused Mingo Logan Coal Co. to petition the high court for review.

In a March 24 statement, the environmental group Earthjustice said the Spruce No. 1 mine in Logan County, W.Va., is one of the most destructive mountaintop removal mines ever proposed in Appalachia.

"The Supreme Court refusal to hear [the coal] industry's baseless case confirms that the EPA has the clear legal authority to prevent the dumping of waste whenever it would cause unacceptable harm to communities and the environment," Earthjustice President Trip Van Noppen said in the statement.

In 2007 the Army Corps issued the permit that allowed Mingo Logan to dump rock and dirt from the Spruce No. 1 mine at sites that include streams.

The EPA revoked the permit in 2011 and said it would require the company to comply with the Clean Water Act, 33 U.S.C. § 404(c). The permitted activities likely would cause extensive harm to water quality and wildlife and, combined with the activities of other mines, would severely damage the Coal River, the agency said.

According to Earthjustice, the Army Corps permit would have allowed Mingo Logan to destroy 6 miles of mountain streams and more than 2,000 acres of land, releasing harmful pollutants into downstream waters that provide drinking water for humans and wildlife.

Although the EPA proposed a waste-disposal plan for Mingo Logan that complies with the Clean Water Act, the company said the plan is economically unfeasible.

Mingo Logan then sued the EPA in the U.S. District Court for the District of Columbia.

Although the company acknowledged that the Clean Water Act allows the EPA to veto a Corps-approved permit, it said this veto authority can be invoked only while a permit is being considered, not after it has been issued.

> The Army Corps permit would have allowed Mingo Logan Coal Co. to destroy 6 miles of mountain streams and more than 2,000 acres of land, according to Earthjustice.

Mingo Logan also said the agency's action would cause it severe economic harm.

The District Court found for the company, rejecting the EPA's effort to veto an already-issued Clean Water Act permit.

The D.C. Circuit reversed, finding that Section 404(c) of the Clean Water Act gives the EPA broad authority to deny, restrict or withdraw a permit at any time.

However, the appeals court remanded the case to the District Court for consideration of the claim that the EPA's revoking of the permit was arbitrary and capricious.

Mingo Logan then petitioned the Supreme Court for relief.

Because the high court denied the review, the case goes back to the District Court for further proceedings. WJ

Related Court Document:
Petition: 2013 WL 6057039

Court OKs environmental assessment for Fresh Direct's Bronx relocation

By Alex Horowitz, Senior Content Writer, Westlaw Daily Briefing

Online grocery vendor Fresh Direct Inc. doesn't need to conduct further environmental assessments before it can relocate its headquarters from Queens to the Bronx, a New York appellate judge has ruled.

REUTERS/Lucas Jackson

A Fresh Direct employee makes a grocery delivery at a residence in New York. A city agency gave the company roughly $84 million in subsidies to relocate from Queens to the Bronx. An advocacy group said the agency should have first required further environmental studies.

South Bronx Unite! et al. v. New York City Industrial Agency et al., No. 11459 260462/12, 115 A.D.3d 607 (N.Y. App. Div., 1st Dep't Mar. 27, 2014).

Affirming a Bronx judge's May 2013 ruling, a panel of the New York Supreme Court, Appellate Division, 1st Department, dismissed the claims lodged by parties including community group South Bronx Unite! against the New York Industrial Development Agency and others.

The suit alleged the New York City Industrial Development Agency should have required further environmental impact study before providing roughly $84 million in subsidies to Fresh Direct to relocate to the Harlem River Yards.

The appellants had argued that the decision was arbitrary and capricious, an abuse of discretion, and in violation of the State Environmental Quality Review Act, N.Y. Envtl. Conserv. Law § 8-0101, or SEQRA.

THE HARLEM RIVER YARDS

The litigation stems from Fresh Direct's Jan. 25, 2012, petition to the NYC Industrial Development Agency for financial incentives to move its facilities from Long Island City, Queens, to the Harlem River Yards in the Bronx.

Fresh Direct plans to use the new Bronx facility as its primary warehouse, distribution and vehicle maintenance center, and headquarters for its trucking division, UTF Trucking Inc., the opinion said.

Harlem River Yards is a warehousing and manufacturing industrial park developed in the 80s and 90s.

The New York State Department of Transportation acquired the site in 1982, then selected Harlem River Yards Ventures to develop it, according to the opinion.

In 1994 the DOT approved Harlem River Yards Ventures' land use plan based on a 1993 final environmental impact statement consultants carried out pursuant to SEQRA, the opinion said.

The FEIS looked at the plan's impacts on air quality, socioeconomic conditions, community resources, and traffic and transportation, among other things, the opinion notes.

FRESH DIRECT'S PROJECT

When Fresh Direct applied for subsidies, it submitted a state environmental assessment form that analyzed the impacts its facility would currently have compared to the effects of the Harlem River Yards plan approved in 1993, according to the opinion.

The EAF found the project to be materially similar to proposed uses in the 1993 plan and that it wouldn't generate new, additional or increased significant adverse impacts, the opinion said.

The project was also found to generate less traffic, according to the opinion.

The Industrial Development Agency approved the petition after a public hearing in February 2012, finding the project would not have a significant environmental impact under SEQRA and would not require further environmental review, the opinion said.

The petitioners filed suit in June 2012, arguing that the environmental review of the project didn't take a close enough look at traffic, air quality and noise impacts in and around the Harlem River Yards, the opinion said.

They appealed after the New York Supreme Court dismissed the case.

But the appeals court panel found that the Industrial Development Agency was not obligated to require a SEIS, and that its determination was not affected by an error of law and was not arbitrary and capricious or an abuse of discretion.

The agency took "the requisite 'hard look'" at the relevant areas of concern and "set forth a reasoned elaboration" on how it determined a SEIS was not required, the opinion said. WJ

Related Court Document:
Opinion: 115 A.D.3d 607

Nuisance claims dismissed against Halliburton

A group of Oklahoma homeowners who say Halliburton Co. diminished their property values by contaminating nearby groundwater with industrial chemicals has failed to make out a nuisance claim against the defense giant, a federal judge in the state has decided.

McCormick et al. v. Halliburton Co. et al., No. 5:11-cv-01272, 2014 WL 1328352 (W.D. Okla. Mar. 31, 2014).

U.S. District Judge Vicki Miles-LaGrange of the Western District of Oklahoma dismissed the suit March 31, finding that allegations about the effect of marketplace fear on home prices were insufficient as a matter of law to support a nuisance claim.

Barring appeal, the ruling disposes of the homeowners' suit, which concerned a Halliburton facility in Duncan, Okla., that cleaned missile casings for the U.S. Defense Department from 1962 until 1991.

According to court documents, the cleaning operations involved the disposal of ammonium perchlorate, a hazardous substance that Halliburton's own ongoing environmental monitoring has since detected in groundwater near the facility.

Halliburton entered into a consent order in August 2011 with the Oklahoma Department of Environmental Quality. The agreement required the company to investigate the potential harm to the environment and to clean up any contamination near the site.

Two months later, the homeowners group sued Halliburton, claiming the ammonium perchlorate had migrated from groundwater beneath the site into the adjacent neighborhood, where it has affected their properties.

One of the two subclasses of the residents proposed in their motion for class certification comprised property owners who have not yet experienced groundwater contamination but whose property values have allegedly dropped because of their proximity to the site.

> Halliburton entered into a consent order with the Oklahoma Department of Environmental Quality, agreeing to investigate potential harm to the environment and clean up any contamination.

REUTERS/Richard Carson

Under Oklahoma law, nuisance claims do not require a physical trespass, the plaintiffs argued.

Halliburton moved for judgment on the pleadings as to that subclass, saying an Oklahoma plaintiff cannot recover for future property damage.

Judge Miles-LaGrange agreed and granted the motion.

Although there is no Oklahoma authority exactly on point, the judge said, other jurisdictions have overwhelmingly declined to recognize a nuisance claim based solely on diminished property values. WJ

Related Court Document:
Order: 2014 WL 1328352

See Document Section B (P. 30) for the order.

Judge rejects preemption argument in landfill case, allows immediate appeal

A South Carolina landfill can immediately appeal a federal judge's decision to let the nuisance case against it proceed past summary judgment, the judge has decided.

Babb v. Lee County Landfill SC LLC, No. 10-01724, 2014 WL 1234474 (D.S.C. Mar. 25, 2014).

U.S. District Judge Joseph F. Anderson Jr. of the District of South Carolina on March 25 granted Lee County Landfill's motion for an interlocutory appeal, finding that the suit's unusual procedural posture justified departing from the general rule barring mid-case appeals of summary judgment decisions.

Judge Anderson stayed the suit, which involves "noxious odor" claims the dump's neighbors filed against it, while the landfill asks the 4th U.S. Circuit Court of Appeals to review his order barring it from asserting a federal preemption defense. The judge issued that ruling as part of the same March 25 opinion.

The landfill forfeited the right to argue Clean Air Act preemption, he held, by failing to do so during an earlier damages trial, which ended in March 2012 when a jury awarded the plaintiffs $2.3 million. The injunction litigation is occurring as a separate trial phase because it concerns questions of equity, which are a judge's province, rather than questions of law for a jury.

But because the order turned on "a controlling question of law as to which there is substantial ground for difference of opinion," Judge Anderson found, 28 U.S.C. § 1292(b) allows for an interlocutory appeal.

EARLIER PROCEEDINGS

The procedurally complex suit, which Perrin Babb and five of Babb's neighbors in Bishopville, S.C., originally filed in state court, claims that noxious odors emanating from the nearby landfill interfered with their quality of life. The complaint sought damages and an injunction shutting the dump down.

Lee County Landfill removed the case to federal court.

After initially deciding to try the plaintiffs' legal claims for money damages concurrently with their equitable case for an injunction, Judge Anderson changed his mind, agreeing to bifurcate the proceedings.

A federal jury awarded the plaintiffs $2.3 million in compensatory and punitive damages in March 2012 after finding that the landfill's conduct was "willful, wanton or reckless." *Babb et al. v. Lee County Landfill SC LLC*, No. 10-1724, *verdict returned* (D.S.C. Mar. 30, 2012).

The landfill then moved for judgment as a matter of law or a new trial. After determining that South Carolina precedent provided only vague guidance concerning various dispositive issues of state law, Judge Anderson certified several questions to the state Supreme Court.

The high court held in 2013 that South Carolina does not recognize a trespass claim for "invisible" land invasions, including those involving odors. That is what the law of nuisance exists for, the justices said.

The state Supreme Court also found the jury's damages determination excessive, saying South Carolina law limits damages arising from temporary trespass or temporary nuisance to the lost rental value of the property. Claims of permanent trespass and permanent nuisance can yield liability up a property's full market value, the court added. *Babb et al. v. Lee County Landfill SC LLC*, No. 27299, 2013 WL 4082356 (S.C. Aug. 14, 2013).

On remand, Judge Anderson said he would reduce the total award by nearly 75 percent, to about $625,000, in light of the ruling.

But before he could enter the judgment, the parties informed him they had settled the case. Under the settlement, the landfill agreed to pay the new damages total without admitting liability.

With the case's damages phase resolved, the judge scheduled a trial on the injunctive claim for March 5. The landfill moved for summary judgment, arguing that the Clean Air Act, 42 U.S.C. § 7401, preempts the injunction claim.

The plaintiffs countered that the landfill had waived the preemption defense by failing to assert it earlier. They also argued against the motion on the merits.

Judge Anderson agreed with the waiver argument, finding that allowing the preemption defense after years of litigation would cause the plaintiffs unfair prejudice and surprise.

> The judge said that given the lack of clarity about the controlling legal principles, the landfill had a good-faith basis for appealing his decision and could therefore do so immediately.

But the judge took the rare step of giving the landfill permission to appeal that ruling immediately to the 4th Circuit.

Given the lack of clarity about the controlling legal principles, the defendant had a good-faith basis for disagreeing with his interpretation, Judge Anderson said. WJ

Attorneys:
Plaintiffs: Gary W. Poliakoff, Poliakoff & Associates, Raymond P. Mullman Jr., Spears Poliakoff & Poole, Spartanburg, S.C.

Defendant: Kevin A. Dunlap, Parker Poe Adams & Bernstein, Spartanburg, S.C., Pamela A. Baker, Parker Poe Adams & Bernstein, Columbia, S.C.; Steven D. Weber, Parker Poe Adams & Bernstein, Charlotte, N.C.

Related Court Document:
Order: 2014 WL 1234474

See Document Section C (P. 35) for the order.

Judge excludes expert's opinion on property devaluation from toxic 'white rain'

A federal judge in Pittsburgh has blocked a real estate valuation expert from testifying that a power plant's discharges of toxic "white rain" reduced property values in the area.

Hartle v. FirstEnergy Generation Corp., No. 08-CV-1019, 2014 WL 1317702 (W.D. Pa. Mar. 31, 2014).

Patrick et al. v. FirstEnergy Generation Corp., No. 08-CV-1025, 2014 WL 1317702 (W.D. Pa. Mar. 31, 2014).

Price et al. v. FirstEnergy Generation Corp., No. 08-CV-1030, 2014 WL 1317702 (W.D. Pa. Mar. 31, 2014).

U.S. District Judge Joy Flowers Conti of the Western District of Pennsylvania found John A. Kilpatrick used flawed surveys and improperly analyzed home sales data to reach his conclusion on white rain, but said he may testify on value diminution caused by releases of "black rain."

White rain is a corrosive material containing arsenic, and black rain is a sooty material containing lead, thallium, arsenic and radioactive uranium.

FirstEnergy Generation Corp. faces three lawsuits by area residents over chronic releases of white rain and two discharges of black rain from its Bruce Mansfield power plant in Shippingport, Pa.

Michael and Jessica Hartle claimed their young daughter was playing outside during the black rain discharge in 2006 and suffered thallium exposure that caused her to lose all her hair.

David and Rikki Patrick alleged in a proposed federal class action that the plant released black rain on two occasions in 2006 and 2007, respectively, damaging area crops and polluting the air and soil.

Robert and Carol Price asserted in another suit that they and 17 other area residents suffered health effects including respiratory problems, as well as property damage, from the plant's releases.

Judge Conti consolidated the three suits for discovery purposes in 2008. The parties conducted extensive discovery after unsuccessful attempts at mediation.

FirstEnergy moved to limit or preclude testimony by 12 of the plaintiffs' expert witnesses, including Kilpatrick, whose testimony is at issue only in the Patricks' and the Prices' suits.

Kilpatrick used a "mass appraisal model" to determine the impact of black and white rain discharges on property values in the affected areas.

He applied the model using actual survey data, information from previously published case studies, academic research on similar pollution events and the results of a "hedonic regression analysis" of property values in the affected area.

Hedonic regression is a type of analysis that attempts to determine mathematically the value or price of the various components or characteristics that add up to the total value or utility, according to the opinion.

Kilpatrick ran a hedonic regression analysis using home sales data for residential properties within a 23-mile radius of the Bruce Mansfield plant both before and after the initial black rain incident in 2006.

He concluded that the value of homes in the area affected by the black rain discharges fell 45 percent and that the homes affected by white rain dropped 12 percent, the opinion says.

FirstEnergy argued that Kilpatrick's opinion is scientifically unreliable because he used inappropriate survey questions and inaccurate data in his hedonic regression analysis.

The plaintiffs sought to limit rebuttal testimony on property valuation by defense experts Jerry M. Dent and Charles E. Finch, who criticized Kilpatrick's use of mass appraisal instead of individual appraisals.

Judge Conti said Kilpatrick's survey on the effect of white rain on property values was inadmissible because he misinformed participants that white rain contains radioactive elements.

Kilpatrick also improperly applied tax assessment data in his hedonic regression analysis on white rain, so his opinion on white rain must be entirely excluded, she said.

Judge Conti found Kilpatrick's survey on black rain admissible and said he could use case studies and academic literature to demonstrate the effectiveness of a mass appraisal model at this stage in the proceedings.

While she declined to exclude Kilpatrick's entire hedonic regression analysis with respect to black rain, she took issue with the minimal weight he gave to actual home prices in the area based on his theory that sellers have failed to disclose the pollution, according to the opinion.

Kilpatrick's prediction that home prices in the area will eventually stagnate because of widespread knowledge of black rain is pure speculation, especially since the black rain events occurred more than six years ago, Judge Conti said.

She allowed Kilpatrick to testify on actual property value diminution due to black rain but precluded his opinion on hypothetical market value loss.

Judge Conti rejected the plaintiffs' argument that Dent and Finch are unqualified to offer an opinion because they are not certified real estate appraisers, but she precluded the defense experts from testifying that the plaintiffs cannot adequately represent the proposed class. WJ

Attorneys:
Plaintiffs: Deanna K. Tanner, Paul D. Brandes and Peter M. Villari, Villari Brandes & Kline, Conshohocken, Pa.

Defendant: Kathy K. Condo, Alana E. Fortna, Christopher M. Helms and Mark D. Shepard, Babst, Calland, Clements & Zomnir, Pittsburgh

Related Court Document:
Opinion: 2014 WL 1317702

New Jersey appeals court says heating oil spill not a nuisance

By Gregory Gethard, Senior Content Writer, Westlaw Daily Briefing

Two homeowners could not be held liable for the leakage of fuel oil from an underground storage tank on their property onto a neighboring property, a New Jersey state appeals court has ruled.

Ross et al. v. Lowitz et al., No. L-5002-07, 2014 WL 1010885 (N.J. Super. Ct. App. Div. Mar. 18, 2014).

The defendants were properly granted summary judgment on the plaintiffs' claims of nuisance and trespass because the oil's migration was not caused by an intentional act by either defendant, the Superior Court of New Jersey, Appellate Division, said.

Defendant Susan Ellman owned a residential property in Red Bank, N.J. from 1988 until 1999, when she sold it to defendant Karen Lowitz.

> New Jersey precedent defines a private nuisance as unreasonable interference with use and enjoyment of land.

In 2003 testing of the property's underground storage tank revealed a leak. Lowitz's insurer, State Farm Fire & Casualty Co., expended money to clean up and remediate the contamination, the opinion says.

Plaintiffs John and Pamela Ross purchased a house a few doors down from the defendants' property in July 2004, the opinion says. At the time, the plaintiffs were aware of oil contamination at Lowitz's property and the adjacent property but were unaware that the oil had migrated to their property.

The Rosses entered an agreement of sale for their property in May 2007. However, the contract was cancelled after an environmental company discovered their property was contaminated, according to the opinion.

The Rosses brought suit against Ellman and Lowitz in New Jersey's Monmouth County Superior Court, seeking damages due to their loss of use and the decline in value of their property, asserting claims for nuisance and trespass, among others.

State Farm and another insurer paid the full cost of remediating the Rosses' property and paid for their restoration and relocation costs, the opinion says.

The Law Division granted the defendants' motions for summary judgment on plaintiffs' nuisance and trespass claims, and the plaintiffs appealed.

NUISANCE OR NOT

New Jersey precedent defines a private nuisance as unreasonable interference with use and enjoyment of land.

Citing the Restatement (Second) of Torts § 822, the appellate court said that a party is liable for the invasion of another's interest in the private use and enjoyment of land if the party's conduct is intentional and unreasonable, or if it is unintentional but otherwise actionable.

"Thus, liability for private nuisance is not imposed without proof of some fault, unless ... there is intentional or hazardous activity requiring a higher standard of care," the appellate panel said, noting the same limitations apply to the tort of trespass.

The panel agreed with defendants and the judge below that a homeowner's use of an underground tank to store home heating oil is not an abnormally dangerous activity to which strict liability may attach.

It also found no reason to disturb the trial judge's determination that there was no evidentiary basis for finding that migration of oil to the plaintiffs' property was caused by an intentional or negligent act by either defendant.

Consequently, it affirmed the granted of summary judgment in the defendants' favor on the plaintiffs' nuisance and trespass claims. WJ

Related Court Document:
Opinion: 2014 WL 1010885

EPA chief says power plant rule will be tough, enforceable

(Reuters) – The U.S. Environmental Protection Agency's chief said April 7 that new carbon pollution standards due in June will be flexible enough for all states to meet but will be environmentally stringent and federally enforceable.

EPA Administrator Gina McCarthy gave her first remarks since the agency sent its proposed rule, which aims to curb carbon emissions from more than 1,000 existing power plants in the United States, to the White House's Office of Management and Budget for review.

The rule, a centerpiece of President Barack Obama's second-term climate change strategy, is on track to be released in June, kicking off a months-long public comment process.

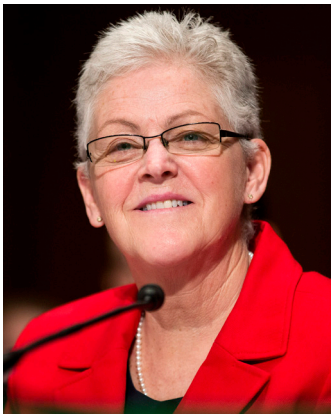
Without providing details on the highly anticipated rule, McCarthy said the proposal targeting the largest source of domestic carbon emissions would have regulatory teeth.

"It is not going to be an aspirational goal," McCarthy said at a conference held by the Bipartisan Policy Center and the National Association of Regulator Utility Commissioners.

Opponents of EPA curbs on carbon pollution, including Republican lawmakers and Democrats representing states that rely on coal, have for months accused the EPA of a "war on coal" as they anticipate release of the power plant rule.

McCarthy said the regulations will give states the flexibility to meet federal guidance in various ways, so long as the result is significant cuts to emissions, and that the standard will recognize the different economic and regional differences between states

"That doesn't mean it is going to be so flexible that I won't be able to rely on this as a federally enforceable rule to deliver carbon pollution reductions at the level that our guidance indicates," she added.



REUTERS/Joshua Roberts

"The EPA is not issuing its own vision of what the energy world looks like. We are looking at what the energy world is," EPA Administrator Gina McCarthy said.

Utility commissioner association President Colette Honorable, who spoke on the same panel as McCarthy, urged the agency to recognize the work many states have already done to reduce carbon emissions.

Last November, the association unanimously approved a resolution that urged the EPA to give states enough flexibility to meet the future regulations in their own ways.

"We aren't saying let everything count. We are saying, 'EPA, let's not reinvent the wheel here,'" Honorable said, adding there are many initiatives being carried out on the state level that should be recognized by the agency.

McCarthy said the challenge for the agency is trying to account for the fact that some states do not have access to easy emission reductions and may need more time while adhering to the parameters of the Clean Air Act, which does not give "unbridled flexibility."

"The EPA is not issuing its own vision of what the energy world looks like. We are looking at what the energy world is," she said. WJ

(Reporting by Valerie Volcovici; editing by Jonathan Oatis)

Clean-air suit targets the only operational U.S. uranium mill

(Reuters) – Environmentalists are suing the only operational uranium mill in the United States, part of a long-running battle weighing the creation of mining jobs against fears of contamination near the Grand Canyon.

Grand Canyon Trust v. Energy Fuels Resources, No. 14-00243, complaint filed (D. Utah Apr. 2, 2014).

In the suit, filed April 2 in federal court in Utah, the Grand Canyon Trust claims the White Mesa mill run by Colorado-based Energy Fuels is releasing cancer-causing radon gas, in violation of Clean Air Act standards.

The trust says it has 4,000 members who live in Utah and Colorado and wants the court to issue civil penalties, along with an injunction against the milling operations, until it can come under code and to issue civil penalties.

The complaint did not specify an amount for the penalties but the maximum allowed by the Clean Air Act is $37,500 per violation per day. Energy Fuels denied the claims in the suit.

"All of the alleged issues raised in the suit are well known by the regulators, and none have resulted in violations," said Curtis Moore, director of investor relations at Energy Fuels.

> The environmental group says more radon is escaping from one of the mill's tailings piles than is allowed by federal standards.

The mill, situated near the Utah-Arizona border more than 200 miles from the Grand Canyon National Monument, has the capacity to produce up to 8 million pounds of uranium per year.

The mining and milling process produces a sandy, radioactive byproduct called "tailings." The environmental group says more radon is escaping from one of the mill's tailings piles than is allowed by federal standards.

"Our goal isn't to shut down the mill," said Anne Mariah Tapp, an attorney at the Grand Canyon Trust. "This is about holding operators of inherently dangerous operations to federal standards."

REUTERS/Charles Platiau

The mill at the center of the suit, situated near the Utah-Arizona border more than 200 miles from the Grand Canyon National Monument, has the capacity to produce up to 8 million pounds of uranium per year. A view from the south rim of the Grand Canyon is shown here.

She said that the company's tailings piles have been in compliance before and that Energy Fuels has the capacity to install modifications that can reduce the emissions.

COLD WAR LEGACY

The fight over uranium mining in the region has been simmering at a time when prices for the radioactive material — used to power nuclear power plants — are expected to recover after a collapse following the 2011 Fukushima disaster in Japan.

It would revive an activity common in the area during the Cold War when uranium mining was widespread — often on Native American lands — to fuel the nuclear arms race.

The issue has become especially contentious around the Grand Canyon, where in 2012 the U.S. government under President Barack Obama withdrew mining permits from more than 1 million acres of public lands in the canyon's watershed.

National mining groups have sued the government to try to overturn the government action. That case is ongoing. Industry backers say mining and milling activities would bring much needed jobs to economically depressed rural areas.

On the other side of the debate, the Navajo Nation and other tribes have filed lawsuits seeking the removal of uranium waste from their lands left for decades by long-shuttered mining operations.

On April 4 the U.S. Court of Appeals for the District of Columbia Circuit dismissed arguments by the Navajo Nation that the cleanup of uranium tailings from a 1950s-era mine — now owned by the El Paso Natural Gas Co. — was ineffective. A three-judge panel threw out most of the tribe's claims. *El Paso Natural Gas Co. v. United States*, 2014 WL 1328164 (D.C. Cir. Apr. 4, 2014). WJ

(Reporting by Mica Rosenberg)

Related Court Document:
Complaint: 2014 WL 1383562

Exxon Mobil

CONTINUED FROM PAGE 1

The city sued Exxon Mobil in state court in 2003, alleging the company's use of MTBE contaminated a groundwater well system in Queens known as Station Six. The city sought to recover the costs of removing the gasoline additive from its wells. The case was transferred to the U.S. District Court for the Southern District of New York.

The Station Six facility is incomplete and will not be used to distribute water to residents for about 15 to 20 years.

According to the suit, ExxonMobil added MTBE to gasoline even though it knew it would contaminate groundwater when the gasoline leaked. The oil company ignored warnings from its own scientists and engineers not to use the additive in areas of the country that use groundwater for drinking water, the suit claimed.

In 2009 the city's Station Six claims against Exxon Mobil became the first of consolidated multidistrict MTBE actions in the county to proceed to trial.

> ExxonMobil ignored warnings from its own scientists and engineers not to use MTBE in areas of the country that use groundwater for drinking water, the suit says.

A federal jury found the oil company liable for trespass, public nuisance, negligence and failure to warn about the dangerous nature of its product and awarded the city $104.9 million.

The 2nd Circuit upheld the verdict, rejecting Exxon's argument that the city's state law claims were preempted by federal law.

Exxon petitioned the Supreme Court to overturn the verdict.

In it petition, Exxon asks the high court to determine whether the "federal oxygenate mandate in the Clean Air Act Amendments of 1990 ... preempts a state law tort award that imposes retroactive liability on a manufacturer for using the safest, feasible means available at the time for complying with that mandate." WJ

Attorneys:
Respondents: Paul M. Smith, Joshua M. Segal and Matthew S. McKenzie, Jenner & Block, New York

Related Court Document:
Opposition brief: 2014 WL 1048628

See Document Section A (P. 17) for the opposition brief.

NEWS IN BRIEF

VEHICLE COMPANY TO PAY $630,000 IN CLEAN AIR ACT SETTLEMENT

American Lifan Industry Inc., a California vehicle and engine importer, will pay $630,000 in civil penalties and post a $300,000 to $500,000 bond for violating the Clean Air Act in a settlement approved by the Environmental Protection Agency, an EPA March 27 statement said. Under the settlement, the company agreed to ensure future imports will meet federal emissions standards. The bond will cover the cost of any future violations by the company, the EPA said. The EPA charged that the company, which imports vehicles from the Chinese manufacturer Lifan, imported and sold nearly 28,000 highway motorcycles, recreational vehicles and engines that did not comply with CAA standards. The agency said the company obtained certificates of conformity to federal standards for the vehicles without conducting required emissions testing.

3 CONSENT DECREES FILED FOR SUPERFUND CLEANUP

Three consent decrees have been filed in federal court under the Comprehensive Environmental Response, Compensation and Liability Act by the federal government, the state of Wisconsin and two Native American tribes to settle claims involving PCB contamination of the Lower Fox River and Green Bay Superfund site. The first decree requires CBC Coating Inc. and others to pay $54 million for cleanup and natural resource damage. Under the second consent decree, defendant Kimberly-Clark Corp. will pay the federal government and Wisconsin $1.3 million to settle Superfund claims. Under the third consent decree, NewPage Wisconsin System Inc., which filed a Chapter 11 Bankruptcy petition, will grant the federal government and Wisconsin a total of $1.1 million in general unsecured claims. According to the consent decree, the actual distributions to be received by the federal government and the state may be as little as $50,000. The decrees are subject to public hearings and final approval.

United States et al. v. NCR Corp., No. 10-C-910, consent decree filed (E.D. Wis. Mar. 26, 2014).

COMPANIES TO REIMBURSE EPA FOR N.J. SITE CLEANUP

Three companies will reimburse the Environmental Protection Agency $2.1 million for cleaning up contamination at a former bulk chemical packaging site in Clifton, N.J., according to a March 31 EPA statement. The companies involved in the settlement related to the Abrachem Chemical site are Clifton 2003 LLC, Hampshire Generational Fund LLC and WEA Enterprises Co. The EPA said the site contained over 1,600 drums, some of which were leaking toxic chemicals such as PCBs, benzene and volatile organic compounds. Several times over the seven-month cleanup, areas of the surrounding community were evacuated when unknown and potentially explosive chemicals were discovered, the EPA said. Hundreds of containers found at the site were returned to their owners, while others were disposed of at licensed hazardous waste disposal sites, the EPA said.

CASE AND DOCUMENT INDEX