

CERCLA Case Law Update

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Cost Recovery vs. Contribution

- *Aviall*: PRPs cannot recover under § 113(f)(1) unless first sued by government
- *Atlantic Research*: PRPs may recoup cleanup costs through a § 107 cost recovery action
- Remaining Issues:
 - Is there overlap between § 107 and § 113(f)(1)?
 - What about § 113(f)(3)(B)?

Cost Recovery vs. Contribution

- *Solutia Inc. v. McWane Inc.*, 672 F.3d 1230 (11th Cir. 2012)
 - § 107 claim unavailable to PRP for recovery of cleanup costs incurred pursuant to a consent decree; only available remedy under § 113(f)
 - Petition for certiorari denied in October 2012
- *Bernstein v. Bankert*, 2013 WL 3927712 (7th Cir. 2013)
 - Limitations on contribution under § 113(f)(3)(B)

Apportionment

- *BNSF*: Apportionment of harm is appropriate where a “reasonable basis” exists
- Requires fact-intensive, site-specific analysis
- Courts still reluctant to apportion harm
- Recent case law:
 - *PCS Nitrogen Inc. v. Ashley II of Charleston LLC*, 714 F.3d 161 (4th Cir. 2013) – cert. petition pending
 - *United States v. NCR Corp.*, 2013 WL 1858597 (E.D. Wis. May 1, 2013)

Arranger Liability

- “Useful Product Defense”
- Requires fact-intensive inquiry
- Central inquiry: Is there evidence to support a reasonable conclusion that the entity planned for the disposal of hazardous substance?
- *Georgia-Pacific Consumer Products LP v. NCR Corp.*, Case No. 1:11-CV-483 (W.D. Mich. Sept. 26, 2013)

Bona Fide Prospective Purchaser (BFPP) Exemption

- Requires landowner to establish 8 criteria under CERCLA § 101(40)
- Compare with Innocent Landowner Defense
- Recent case law:
 - *Voggenthaler v. Maryland Square LLC*, 724 F.3d 1050 (9th Cir. 2013)
 - *PCS Nitrogen Inc. v. Ashley II of Charleston LLC*, 714 F.3d 161 (4th Cir. 2013)

Insurance Issue #1: Subrogation

- Common law principle of subrogation not available under CERCLA § 107(a)
- Right to subrogation under CERCLA § 112(c) is limited by certain requirements
- *Chubb Custom Ins. Co. v. Space Systems/Loral, Inc.*, 710 F.3d 946 (9th Cir. 2013)

Insurance Issue #2:

Duty to Defend

- 104(e) Letter & General Notice Letter as “suits” under OECAA
 - *Anderson Brothers, Inc. v. St. Paul Fire & Marine Ins. Co.*, No. 12-35346 (9th Cir. Aug. 30, 2013)
- Scope of Duty to Defend & Reasonableness of Costs
 - *Ash Grove Cement Co. v. Liberty Mutual Ins. Co.*, 2013 WL 4012708 (D. Or. Aug. 5, 2013)

Insurance Issue #3: Oregon SB 814

- Governor signed an amendment to the OECAA, ORS 465.476 *et seq.*, on June 10, 2013
- Provides rules of construction for ambiguous or undefined policy terms
- “Owned Property” Exclusion
 - *Northwest Natural Gas Co. v. Associated Electric & Gas Ins. Svcs. Ltd.*, Multnomah County Case No. 1012-17532