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Fox River Superfund Litigation, Seventh Circuit Opinions

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On September 25, 2014, the Seventh Circuit issued long awaited decisions in the Fox River Superfund Litigation in *NCR Corp. v. George A. Whiting Paper Co. et al.* (No. 13-2447) and *U.S. v. P.H. Glatfelter and NCR Corp.* (No. 13-2436). The Fox River is one of the largest and potentially most expensive Superfund sites in the country. The Seventh Circuit's decision involved the review of summary judgment rulings first issued in 2009, the decisions from two district court trials that took place in 2012, and an appeal of the District Court's decision upholding EPA's remedy selection. Some of the Seventh Circuit's holdings have broad implications in CERCLA litigation, while others address issues specific to the Lower Fox River litigation. This article will discuss those holdings with broad, potentially national implications.

Background Facts

The underlying facts regarding how Polychlorinated Biphenyls ("PCBs") came to be located in the Lower Fox River ("LFR") are not in dispute. Between 1954 and 1971, NCR (or its licensees/affiliates) manufactured carbonless copy paper, known as "CCP," using a microencapsulated dye emulsion that contained approximately 3.4% PCBs. PCBs were discharged to the LFR by NCR (or its licensee/affiliates) during the manufacture of the CCP through emulsion loss, which was approximately 2-3% of total emulsion used. In addition, the manufacture of the CCP generated paper trimmings, known in the industry as "broke and trim," which were coated with the PCB-containing emulsion. NCR (or its licensee/affiliates) gathered and baled this "broke and trim" and sold it as

recycled paper to be used by other paper manufacturers in their manufacturing processes. Over time, PCBs became ubiquitous in paper, and it was virtually impossible to manufacture recycled paper without having the potential to release PCBs.

The first category of potentially responsible parties ("PRPs") includes NCR and its licensee/affiliates that manufactured the CCP. The second category of PRPs are paper mills that manufactured their paper products using previously made paper as a significant portion of their raw material (known in the industry as "furnish").

Since 1998, the EPA and the Wisconsin Department of Natural Resources ("WDNR") have been investigating and developing cleanup plans for the Site. The Site was divided into five operable units ("OUs"). The EPA selected a remedy for OUs 2-5 in 2003 and issued a Record of Decision ("ROD") adopting a dredging remedy, with an estimated cost of approximately $580 million. In 2007, the EPA amended the remedy for OUs 2-5, and added more capping and sand covering to the remedy that lowered its estimated cost of the remedy to approximately $390 million (in 2005 dollars). In 2010, after determining it had underestimated the costs of the amended OU 2-5 remedy, EPA issued an Explanation of Significant Differences ("ESD"), increasing the estimated cost of the remedy to $701 million, a 62% increase (in 2009 dollars). Over the course of time, EPA entered into several consent decrees and administrative orders on consent pursuant to which several of the PRPs performed work in various OUs. The EPA also issued a Unilateral Administrative Order ("UAO") in 2007 to NCR and several other parties requiring the parties to perform cleanup work in OUs 2-5.

NCR initiated cost recovery litigation against the other paper manufacturers in 2008. At the Defendants' suggestion, the District Court agreed that the "knowledge" of each of the parties regarding PCBs and the potential risks PCBs posed during the relevant time period was a critical allocation factor, and phased discovery to address that issue. After completing approximately two years of discovery, in December 2009 the Court granted the Defendants' motion for summary judgment, finding that NCR essentially had sole knowledge of the risks associated with PCBs prior to 1971, and held that that factor was sufficient as a matter of equity to preclude NCR from being able to recover any costs from the other PRPs, at least with regard to OUs 2-5. The Court declined to extend its ruling to OU1, finding that questions of fact existed concerning whether NCR had "arranger" liability in OU1. In a later decision in 2010, the Court ruled that the Defendant paper manufacturers were also entitled to recover 100% of their response cost in contribution from NCR, again limiting its ruling to those costs incurred for OUs 2-5.

The issue of whether NCR had "arranger" liability in OU1 was tried in February 2012. After trial in February 2012, the Court ruled that NCR did not have liability for any releases of PCBs into OU1. In December 2012, a second trial took place, centering on the United States' entitlement to a permanent injunction under Section 106 of CERCLA for implementation of the remaining remedial actions, countered by divisibility of harm defenses asserted by the various defendants. In May 2013, the Court issued its decision, upholding the EPA remedy, rejecting the Defendants' divisibility of harm defenses, and finding that EPA was entitled to a permanent injunction against the parties requiring them to perform work under the UAO. The District Court also issued a determination that held that Appvion (formerly API/Appleton Coated Paper Company – a manufacturer of CCP) was not a PRP. This was a reversal of a prior decision by the Court where it had imposed PRP liability on Appvion. All of these decisions were the subject of appeals to the Seventh Circuit, and were addressed by the Seventh Circuit in its two September 25, 2014 decisions.

NCR Was Limited To Claims Under 113(f)

The first issue decided was whether NCR could proceed against the other PRPs under CERCLA section 107(a), or was it limited to a 113(f) contribution claim? NCR argued in the court below that much of the money it had expended complying with the series of cleanup orders from the EPA were "voluntary" in nature, and that it was therefore entitled to proceed to recover from other PRPs under section 107(a) of CERCLA and its far more lenient standard of proof. The Seventh Circuit ultimately determined that NCR was limited to claims under section 113(f).

The Seventh Circuit noted that "[w]hether a party must proceed under section 107(a) or 113(f) depends on the procedural posture of the claim" (citing *U.S. v. Atlantic Research Corp.*, 551 U.S. 128, 139-140(2007)). If a party was already subject to an action under section 106 or 107, or had resolved its liability to the United States, "it must proceed under section 113(f)" (citing *Bernstein v. Bankert*, 733 F.3d 190, 201-02 (7th Cir. 2012.)). Conversely, if a party was not the subject of a prior enforcement action and was not a party to settlement, it may be entitled to proceed under section 107(a).

Given that the United States had initiated an enforcement action against NCR, the Court held that NCR was limited to seeking contribution under section 113 from other PRPs. To the extent NCR argued that the costs it incurred between 2007 and 2010 were "voluntary," the Court declined to allow NCR to slice and dice costs in such a manner, finding that doing so "makes little sense when a party's liability for all of those costs will ultimately be determined in the enforcement action."

The Court reached a similar result concerning the costs for work under a 2004 AOC. The Court noted that the covenants not to sue in the AOC took effect "upon the Effective Date," as opposed to upon completion of the work, and therefore "the agreement resolved NCR's liability and so the District Court correctly held that it limited NCR to proceeding under section 113(f)."

Appvion Was Not Limited To Claims Under 113(f)

The Seventh Circuit saw Appvion in a materially different position than NCR. Appvion's status in this litigation was unique: Appvion was initially identified and found to be a PRP, then later was found not to be a PRP, and is now only on the hook for response costs as NCR's indemnitor. The Court noted that it "is not readily apparent which statutory mechanism is the proper one for reimbursing the erroneously imposed costs paid by the non-PRP. But it seems apparent that something should be available." After some analysis, the Court held that section 107(a) "turns out to be a reasonably good fit, if one characterizes Appvion's response payments as constructively voluntary." Once it was determined that Appvion was not legally obligated to pay the response costs that it had paid, "the nature of those payments had to be reconsidered."

Had Appvion been properly characterized from the beginning, "any payments it might have made would have been wholly voluntary. It makes sense, we think, to apply that lack of compulsion retroactively. Under *Atlantic Research Corp*., Appvion is therefore entitled to bring a section 107(a) action against the PRPs sharing liability for the Lower Fox River site." The Court stressed that this was not because Appvion was an indemnitor, but expressly because it was not indemnifying NCR when it made its own payments under the order.

This is new analysis under CERCLA. How much impact it will have in other matters is debatable, as it is unlikely many other parties will be similarly situated to Appvion. However, parties wrongfully identified as PRPs that perform work under a UAO can now potentially seek cost recovery under section 107(a) rather than being limited to contribution under section 113(f).

Rights of Contribution - Was Knowledge Enough?

A key issue evaluated by the Seventh Circuit was whether the District Court had abused its discretion finding NCR was 100% responsible for the costs based solely on its "knowledge" of the risks or potential risks of PCBs as compared to the other PRPs. The District Court limited discovery, focusing on the issue of when each party knew that recycling CCP would result in the discharge of PCBs to a waterbody, and what, if any,

action each party took upon acquiring that knowledge. At the conclusion of discovery on the knowledge issue, the Defendants' moved for summary judgment against NCR. In the Seventh Circuit's opinion, the District Court believed the "record left no doubt that NCR and Appvion knew long before others that PCBs posed a long-term risk to the environment. The importance of this early knowledge, it [the District Court] thought, drowned out all other equitable factors."

NCR appealed the District Court's decision, raising two arguments, summarized by the Seventh Circuit as follows: 1) whether it was an abuse of discretion to determine at the stage it did that the "equities so clearly favored the defendants as to make NCR responsible for 100% of the costs of response," and 2) whether the District Court impermissibly resolved disputed questions of fact.

With regard to the second issue, the Seventh Circuit quickly rejected the argument. In its view, the "district court faithfully applied the appropriate standard for summary judgment, and the conclusions it reached about the parties' relative knowledge and awareness of the risks of PCBs were consistent with the undisputed evidence in front of it."

The first issue really turned on whether the District Court had abused its discretion by "allocating 100% of the Lower Fox River responses costs to NCR at [that] juncture." The Court acknowledged that well-established CERCLA precedent "grants the court the authority to decide which equitable factors will inform its decision in a given case," (citing *Kerr-McGee Chem. Corp. v. Lefton Iron & Metal Co*., 14 F.3d 321 326 (7th Cir. 1994) and that "a court may consider several factors, a few factors, or only one determining factor . . . depending on the totality of circumstances presented to the court" (citing *Envtl. Transp. Sys., Inc. v. ENSCO, Inc.*, 969 F.2d 503, 509 (7th Cir. 1992). The issue in the Seventh Circuit's view was whether "the district court is authorized to *preselect* the equitable factor that it believe most likely to determine the outcome, and then conduct limited discovery into that factor to see if it can reach an equitable determination." In response to this question, the Seventh Circuit said no.

The Court noted a "distinction between *determining* an action based on a single factor, and *considering* only certain factors on the away to the decision." The former is appropriate, the latter is not. The "district court must decide what is relevant based on the record as a whole; an allocation based on otherwise permissible factors will not be rescued if it does not explain why the court has chosen to disregard the apparently relevant information." The Court believed the District Court's analysis was "thorough and thoughtful, and reasonable as far as it went. The problem is that the court's reasons for rejecting consideration of other factors leaves us unable to say whether the record

adequately supported the court's decision to select knowledge as the decisive factor." In the Court's view, "the district court must decide what is relevant based on the record as a whole; an allocation based on otherwise permissible factors will not be rescued if it does not explain why the court has chosen to disregard other apparently relevant information." While it did "not lightly impose the burden on either the parties or the court of additional complex and time-consuming discovery," the case was remanded "so that the district court can decide which factors will guide its decision on the basis of a more complete record."

NCR Did Not Have Arranger Liability

One of the paper manufacturers, P.H. Glatfelter, appealed the District Court's decision that NCR did not have "arranger liability" in OU1. Glatfelter's theory against NCR was that its predecessor, Appleton Coated Paper Company ("ACPC") "arranged" for the disposal of PCBs when is sold the broke and trim generated during its production of CCP to the mills. The District Court disagreed. Notwithstanding finding that ACPC has no use for the broke and trim and otherwise would have had to dispose of it, the court found that ACPC did not have sufficient knowledge regarding the risk of PCB discharge from the recycling of the broke and trim to impose arranger liability. Further, the District Court found that ACPC had dedicated significant resources to getting the broke ready for sale, that it was not selling the broke and trim to get rid of it, but as a "useful" product.

The Seventh Circuit agreed. It found that "once the recycling mills obtained Appleton Coated's broke, what happened to the PCBs embedded in the broke was completely out of the seller's hands." The Seventh Circuit reasoned: "This lack of control is a good reason to find Appleton Coated was not arranging for disposal (though we do not mean to suggest that an ostrich approach would work)." It is likely that this will be viewed as an extension of the "useful product" defense under CERCLA.

NCR's Liability for Natural Resource Damages

NCR appealed the District Court's ruling that the other PRPs could recover 100% of any natural resource damages ("NRDs") from NCR. NCR appealed this decision, raising two arguments. First, that as an equitable matter, NCR should not be responsible for 100% of the NRDs. The Seventh Circuit left that issue to be addressed on remand when the District Court considers the appropriate equitable factors in the underlying contribution action.

Second, NCR argued that it should not be liable for NRDs at all unless a direct causation with a release was established. Regarding this second argument, the Seventh Circuit found the District Court got it right, and that there is a 2-step process under 107(a)(4)(C) to determine if a party has liability for NRDs: 1) is a party liable for NRDs under 107(a); and, 2) is a party equitably entitled to contribution for those costs from another party liable under 107(a)? "[T]he causation requirement of section 107(a)(4)(C) was satisfied when the *defendants* were found liable for natural resource damages." In short, once a party is a liable party under section 107(a) of CERCLA, they have satisfied the causation requirement to seek contribution. The Court held that other PRPs could properly seek contribution for NRDs from NCR.

Court Upholds Remedy Selection

Several PRPs challenged EPA's selected remedy, asserting that the selected remedy was arbitrary and capricious. The Government argued below that the 62% increase in the cost estimate was "only marginally" outside the acceptable cost range in EPA's guidance of -30% to +50% at the ROD stage. The Seventh Circuit rejected the government's argument regarding the 62% being only marginally outside the acceptable range, but found "another ROD amendment was not necessarily required." In the Court's view EPA's approach was in line with the preamble to the National Contingency Plan, which states: "Where a new requirement would affect a basic feature of the remedy, such as timing or cost, but not fundamentally alter the remedy specified in the ROD (i.e., change the selected technology), the lead agency would need to issue an explanation of significant differences announcing the change." The Court thereafter affirmed the district court's entry of summary judgment in favor of the government on this issue.

Court Remands Divisibility of Harm Ruling

After the December 2012 trial the District Court rejected the defendants' divisibility of harm defenses and entered a declaratory judgment and permanent injunction requiring the defendants to comply with EPA's 2007 UAO. NCR appealed both rulings.

NCR argued that the harm from all of the parties' releases of PCBs was capable of apportionment, and as a result the costs should have been divisible. The Seventh Circuit agreed with NCR.

As to whether the harm in OU 4 was capable of apportionment, the Court found that contrary to the District Court's view, "the harm resulting from the PCB contamination in the Lower Fox River cannot be characterized as binary." The District Court had viewed the remediation costs as an "on/off" switch – sediments below 1 ppm PCB did not need

cleanup and those above 1 ppm did, and that the costs would be the same for any concentrations above 1 ppm. The Seventh Circuit viewed things differently, and found that the harm "would be theoretically capable of apportionment if NCR could show the extent to which it contributed to PCB concentrations in OU4. And if NCR cleared that hurdle, we think a reasonable basis for apportionment could be found in the remediation costs necessitated by each party." The Seventh Circuit therefore reversed and remanded for further proceedings.

The Seventh Circuit decision will provide a basis for NCR and future PRPs to argue that divisibility of harm can be established through the use of complex fact and transport models. How detailed these models will have to be to satisfy various district courts around the country remains to be seen. But CERCLA counsel can anticipate further complexity, as well as added costs, in contribution and cost recovery actions down the road.

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