

HAZARDOUS WASTE AND SITES

When we can't agree, we litigate!

(I'm not talking about litigation OF the statutes,
I'm talking about litigation UNDER the statutes)

CERCLA Does Not Care About You

- Liability:
 - Strict
 - Joint and Several
 - Retroactive
- Party seeking recovery of costs must show
 - (1) current/former owners/operators; generators/arrangers; transporters
 - (2) Release or Threatened Release
 - (3) Of “hazardous substance”
 - (4) From a “facility”

Apportionment vs. J&S Liability

- The question *BNSF* (556 U.S. 599) asks:
 - Is the harm capable of apportionment?
 - Does a reasonable basis for apportionment exist?
- The question we all ask ourselves:
 - Does BNSF really matter?
- Perception that BNSF might lead to more apportionment not necessarily occurring:
 - single post-BNSF instance where apportionment was deemed appropriate. *Reichold, Inc. v. U.S. Metals Ref. Co.*, 655 F. Supp. 2d 400, 448–49 (D.N.J. 2009) (finding that each of two PRPs had contributed sufficient contamination to require a cap, and therefore the costs could be reasonably apportioned between them, with each responsible for one-half).
 - Note: court did not consider amount of contamination each PRP was responsible for – just considered that either PRP's action was sufficient to cause remedial action

Arranger Liability

- Arranger liability intended to deter and, if necessary, to sanction parties seeking to evade liability by “contracting away” responsibility.
- Doesn't apply to sale of useful product
- Intent to dispose must be established

Arranger Liability

- Transfer of scrap/refuse more likely to result in arranger liability than materials with ongoing commercial uses
- NCR Corp. v. George A. Whiting Paper Co., 768 F.3d 682, 703–05 (7th Cir. 2014)
 - Seller of scrap PCB coated carbonless paper to paper recyclers who discharged PCBs into Lower Fox River not arranger because the sale was intended “to place it on a competitive market and recoup some of its costs of production”; also important were the efforts undertaken to recapture the scrap for sale to the paper recyclers).
- United States v. Gen. Elec. Co., 670 F.3d 377, 382 (1st Cir. 2012)
 - defendant was an arranger after selling “scrap Pyranol” to a paint manufacturer at bargain prices for use as a paint additive, reasoning that defendant had intentionally disposed of the hazardous substance by pursuing other arrangements to dispose of the overstock, lack of marketing as a usable product, and defendant’s specific actions toward the purchaser, which included continued and increasing sales despite paint manufacturer’s complaints the scrap Pyranol was often unusable and repeated failures to remit payment

Cost Recovery and Contribution

- “complimentary but distinct” remedies (you should probably

Section 113 Contribution

- Available to PRPs who

(1) have been subject to 106 civil action or 107 cost recovery claim, or

(2) settled with the gov't through an “administratively or judicially approved settlement.”

Equitable Allocation

- “Gore factors” to divide liability among multiple PRPs:
 - The ability of the parties to demonstrate that their contribution to a discharge, release, or disposal of a hazardous substance can be distinguished;
 - The amount of hazardous substances involved;
 - The degree of toxicity of the substances;
 - The degree of involvement by parties in the generation, transportation, treatment, storage, or disposal of the substances;
 - The degree of care exercised by the parties with respect to the substances;
 - The degree of cooperation of the parties with government officials to prevent any harm to public health or the environment.

Equitable Allocation

Torres Factors:

- The extent to which cleanup costs are attributable to wastes for which a party is responsible;
- The party's level of culpability;
- The degree to which the party benefited from disposal of the waste; and
- The party's ability to pay its share of the cost.

Section 107 Cost Recovery

- Available to gov't, private parties, and PRPs
- Plaintiff must have incurred “necessary costs of response” that are “consistent with” NCP
- Availability can be complex –
 - If you undertook voluntary cleanup, with no civil action or settlement, you get cost recovery
 - If you are subject to a 106 or 107 lawsuit – NO COST RECOVERY FOR YOU!
 - So what about everything that doesn't fall into those two categories?

Who cares if you are in 107 or 113 World?

- Joint and several liability on other PRPs
 - You can get it under 107, but under 113 plaintiff has the burden to demonstrate allocation of liability
 - Statute of Limitations
 - 3 years for 113, 6 years for 107
 - Contribution Protection?
-
- Plead them both!

Practical Considerations

- Availability of documents and witnesses
- Incomplete information
- Getting what little there may be into the record

Other Things to Keep in Mind

- Criminal Liability - Section 9603(d) of CERCLA requires that certain facilities maintain specific records, and makes it a crime to destroy such records.
- Insurance recovery / litigation (lots of timing issues)

Natural Resource Damages

- Damages to “land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources” extending to the “supporting ecosystems,” upon which they rely.
- Natural Resources Trustees assess injuries and remedies
 - Multitude of trustees can complicate litigation where some, but not all, trustees file suit; double recovery of NRD barred
- Damages are recovered solely for the benefit of the public
- Be mindful of state statutes covering NRDs

Natural Resource Damages

- Action must be commenced within three years of either the later of (1) the time it is discovered that a harm is connected to a hazardous substance, or (2) the applicable (DOI) regulations are promulgated.
- A separate provision permits an NRD action to be filed within three years
- after “completion of the remedial action” for a facility that has been designated on
- the NPL.140

RCRA

- Comprehensive “cradle to grave” law regulating the storage, transport, and disposal of solid and hazardous waste.
- Allows private citizens to sue for an injunction where “the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste . . . may present an imminent and substantial endangerment to health or the environment.”

Citizen Suits

- Requires notice letter and opportunity to come into compliance
- RCRA's citizen-suit section provides for preemption where the state or EPA has commenced its own imminent-hazard proceeding, is engaged in a removal action under CERCLA, or has incurred costs to initiate a remedial-action feasibility study under CERCLA.
- Damages and fees available