FOX RIVER PCB CLEANUP LITIGATION – EQUITY PRECLUDES APPORTIONMENT

On December 16, 2009, only days before trial, Judge William Griesbach of the United States District Court for the Eastern District of Wisconsin issued a ruling requiring two responsible parties to bear the entire cost of the PCB cleanup of the Lower Fox River – a cost estimated to exceed one billion dollars – rather than apportioning the cleanup costs among other polluters of the river.[1] Interpreting the contribution provision of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601 et seq. ("CERCLA"), Judge Griesbach dismissed the contribution defendants, concluding that equity required the two primarily responsible parties to bear the entire cost of the PCB cleanup.[2]

Background

Beginning in 1954, the two primarily responsible parties – Plaintiffs NCR Corp. and Appleton Papers Inc. ("Responsible Parties")[3] – manufactured and sold carbonless copy paper, referred to as "CCP" in the opinion.[4] A key component of CCP was a type of PCB manufactured by Monsanto known as Aroclor 1242.[5] The Responsible Parties manufactured CCP with Aroclor 1242 between 1954 and 1971, a span the parties referred to as the "production period."[6] The CCP manufacturing and recycling processes resulted in significant discharges of PCBs into the Lower Fox River.[7] In fact, the Wisconsin Department of Natural Resources ("DNR") estimated that 98% of all PCBs in the Lower Fox River had been released into the river by the end of the production period.[8]

In responding to the PCB contamination of the Fox River, the United States Environmental Protection Agency ("USEPA") ordered the Responsible Parties to fund an extensive cleanup of the PCB-laden sediment that is expected to last nine years and cost upwards of $1.5 Billion.[9] The Responsible Parties brought suit seeking contribution from other alleged polluters of the Lower Fox River pursuant to CERCLA § 113.[10] Among the contribution defendants (the "Defendants") were paper mills who recycled the CCP and "thereby unwittingly released PCBs into the river[,]" as well as municipalities, utilities and sewerage districts that treated and/or released wastewater that contained the same PCBs into the river.[11] Just before the initial phase of the contribution trial was set to begin, Judge Griesbach dismissed the contribution claims concluding that the cost of trial far exceeds the benefit of the litigation.

Analysis

The Responsible Parties sought contribution from the Defendants pursuant to CERCLA § 113.[12] According to that provision, "the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate."[13] The court noted that its "power in this context [is] 'broad and loose[,]'"[14] but not unfettered

because its analysis should be guided by "traditional principles of equity, such as the relative fault of the parties, any contracts between the parties bearing on the allocation of cleanup costs, and the so-called 'Gore factors.'"[15] In the end, however, the court noted that it had discretion to "consider any factors appropriate to balance the equity in the totality of the circumstances[.]"[16]

Balancing equities, the court addressed two principle arguments raised by the Responsible Parties. First, the Responsible Parties argued that many of the Defendants knowingly polluted the Fox River for many decades with various contaminants that contributed to the overall "unhealthy condition of the river[,]" such that the Defendants should not be able to "assert that they are 'innocent' parties upon whom it would be unfair to impose some liability for the PCB cleanup."[17] The court quickly dispensed with this argument. It noted that, under other circumstances, some of the Defendants may be responsible for their "polluting actions."[18] However, the court explained that this case was not about all polluting actions, but rather was "about a very specific toxin – PCBs, primarily in the form of Aroclor 1242 – and it is the presence of that toxin that has given rise to the massively expensive cleanup action that has itself given rise to this case."[19] Thus, the court acknowledged the Defendants' potential responsibility for other kinds of pollution, but found that those other kinds of pollution were not the driver of either the cleanup or the claims before the court. Accordingly, the court refused to consider the Defendants' other "polluting actions" in its equity balancing analysis.[20]

The large majority of the court's opinion focused on the issue of knowledge and the Responsible Parties' second principle argument that "none of the parties knew about the dangers of PCBs during most of the production period, and thus the equities balance out and liability for the cleanup costs should be shared."[21] In its discretion, the court bifurcated the trial into two phases at the suggestion of the Defendants.[22] The first phase – which was the only phase in the end – consisted of "evidence probative of what each party knew, and when, about the dangers of PCBs and their release into waterways."[23] The court explained: "In a case governed by principles of equity, [] parties who knew, or should have known, about the dangers of PCBs should bear the brunt, or even the entirety, of any cleanup costs resulting from PCB contamination."[24]

The court acknowledged that none of the parties knew about the dangers of PCBs during some of the production period.[25] However, the court found that the Responsible Parties knew about the toxic nature of PCBs and their CCP much earlier than any of the Defendants.[26] The court discussed at great length the evidence of the Responsible Parties' knowledge. For instance, the Responsible Parties' European affiliate began investigating the PCBs in CCP in 1964.[27] And, in the late 1960s, the Responsible Parties routinely met with representatives of Monsanto, the maker of Aroclor 1242, to discuss the toxicity of the substance, its effects, potential alternatives, and strategies for dealing with the negative publicity surrounding their use of PCB-containing products.[28] Based on this evidence and more, the court concluded that the Responsible Parties knew "'in the late 1960's' that PCBs were a dangerous environmental toxin."[29] In contrast, the court concluded that the Defendants did not learn of the risks of PCBs, or that the CCP they recycled even contained PCBs, until after the production period.[30]

More importantly to its equity balancing analysis, the court found that the Responsible Parties took a passive approach to the PCB investigation and were concerned more about "the impact of adverse publicity on the

companies' bottom line[.]"[31] In fact, the Responsible Parties accelerated production of CCP in 1969 and 1970, which period resulted in the most environmental damage.[32] The court characterized the Responsible Parties' approach to the PCB investigation as "a risk management strategy to accept the risk of potential environmental harm in exchange for the financial benefits of continued (and increasing) sales of carbonless paper containing Aroclor 1242."[33]

The court also concluded that equity favored the Defendants with respect to the environmental harm caused by PCBs released during the period when no party knew of the dangers inherent in the use and recycling of PCBs.[34] "[B]etween parties who *produced* the product and those who merely processed it and recycled it along with all other paper products or water sources, these latter parties are significantly less blameworthy."[35] The court also noted that writings belonging to the Responsible Parties themselves indicated that "'the recycling companies are innocent victims of circumstance'" created by the manufacturers of CCP.[36]

Finally, the court concluded that the Responsible Parties were not entitled to contribution for PCB releases to the Lower Fox River during the post-production period.[37] The court recalled that the DNR estimated that 98% of the PCB discharges to the Lower Fox River had occurred by the end of the production period.[38] The court acknowledged that this figure was not binding on it or established for summary judgment purposes, but was rather a "reasonable estimate."[39] Yet the court concluded "it is enough that the overwhelming majority of the release occurred before any of the Defendants appreciated the risk; as such I see no reason to forestall entry of judgment merely to sort out a few percentage points."[40] The court recognized the high litigation costs in proceeding through a multi-phase trial and stated "[t]he cost of sorting out this puzzle would far exceed any benefit."[41] Additionally, the court explained "there has been no evidence, nor any real suggestion, that the relatively minimal actions of the Defendants in the post-production period have added anything significant to the overall cost of remediation."[42] Instead, it appeared to the court that the cleanup costs would be substantially the same even without the Defendants' minimal post-production discharges.[43]

Conclusion

In the end, the court dismissed the contribution Defendants and found the Responsible Parties liable for the entire cost of the PCB cleanup. The court succinctly summarized its reasoning:

> [W]hen [the Responsible Parties] introduce a toxin into a manufacturing process which they know or should know results in the discharge of that toxin into the environment, and then take a 'wait and see' approach and view the danger as a matter of risk management and publicity control, equity will not allow them to later receive contribution from entities who are either completely faultless or nearly so, and who had no role to play in the risk strategy [the Responsible Parties] undertook, a strategy that has now proved quite costly.

The court acknowledged tht many, if not all, of the Defendants could have been independently liable to the government for cleanup costs. But it pointed out that this case was not a cost recovery case, but was rather a case in contribution focused on equitable principles. And, according to Judge Griesbach, equity did not favor the Responsible Parties.

1 *Appleton Papers Inc. v. George A. Whiting Paper Co.*, No. 08-C-16 (E.D. Wisc. Dec. 16, 2009) (decision and order dismissing Plaintiffs' claims for contribution), at 3-4, 47.

2 *Appleton Papers,* at 47.

3 Herein, the term Responsible Parties includes one or more of the Plaintiffs, Appleton Papers Inc. and NCR Corp., as well as their predecessors, who by merger or otherwise were identified as potentially responsible parties for the environmental damage done to the Lower Fox River by the USEPA. *See Appleton Papers,* at 1-2, 6 and n.8.

4 *Id.* at 5.

5 *Id.* at 1, 5-6.

6 *Id.* at 6.

7 *Id.* at 6-7. The Lower Fox River constitutes a 39-mile stretch of the Fox River from Lake Winnebago to Green Bay and into Lake Michigan. *Id.* at 2.

8 *Id.* at 6. The DNR estimated that 39% of all PCBs found in the Lower Fox River can be attributed to the CCP manufacturing process. Further, 56% of the PCBs discharged into the river resulted from the CCP recycling process during the production period, which recycling was handled by a number of the contribution defendants. The DNR estimated that only 2% of all PCBs in the Lower Fox River were discharged after the production period, resulting from CCP stock that had lingered in offices and was later recycled along with other carbonless paper that did not contain Aroclor 1242. *Id.* at 6-7.

9 *Id.* at 2-3.

10 *Id.* at 3.

11 *Id.*

12 *Id.* at 21.

13 42 U.S.C. § 9613(f)(1).

14 *Appleton,* at 21 (citing *Browning-Ferris Industries of Illinois, Inc. v. Ter Maat,* 195 F.3d 953, 957 (7th Cir. 1999)).

15 *Id.* (citing *Kerr-McGee Chemical Corp. v. Lefton Iron & Metal Co.,* 14 F.3d 321, 326 (7th Cir. 1994)).

16 *Id.* at 22.

17 *Id.* at 29-30.

18 *Id.* at 30.

19 *Id.*

20 *Id.* ("This is, at its core, a case about money – who should pay for that cleanup. Although several of the Defendants may have polluted the river in other ways, that pollution simply did not result in the EPA-ordered cleanup. Accordingly, any arguments based on the existence of *other* kinds of pollution do not speak to the equities of whether any of the Defendants should pay for the cleanup of PCBs in the Lower Fox River").

21 *Id.* at 29.

22 *Id.* at 3.

23 *Id.*

24 *Id.* at 3-4.

25 *Id.* at 8, 32 ("the toxic nature of the discharged product was not appreciated by most of the dischargers until almost all of the environmental damage had already occurred") (defining the period when no parties could have been aware of the dangers inherent in the use and recycling of PCBs as 1954 through the mid-1960s).

26 *Id.* at 31 ("Accordingly, it is clear that a large percentage of the releases occurred when [the Responsible Parties] would have known that there was risk of environmental damage. As such, [their] premise that both sides were equally ignorant of the risks during the production period is simply not accurate.").

27 *Id.* at 9, 25-26.

28 *Id.* at 12-19, 25-26.

29 *Id.* at 26.

30 *Id.* at 28-29 ("Not only do the Plaintiffs lack any evidence that Defendants appreciated the risks of PCB use during the production period, it appears likely from the record that few, if any, of the Defendants learned of the risks until significantly later. In fact, there is no evidence that the Defendants even knew NCR broke *contained* PCBs during the production period").

31 *Id.* at 14-19, 25-26, 35-36.

32 *Id.* at 36 ("Even so, the decision to move forward and accelerate production in 1969 and 1970 despite having frequent meetings about PCBs and increasing danger signs is enough, in my view, to preclude Plaintiffs from recovering from the Defendants. These were the highest-selling years of the production and resulted in the most environmental damage").

33 *Id.* at 26, 37 ("But even so, the strategy of waiting was a deliberate acceptance of a large amount of risk to the environment and public health, and in fact the records suggest that the parties viewed their decisions through the lenses of risk.").

34 *Id.* at 32 (a period of time from 1954 through the mid-1960s).

35 *Id.*

36 *Id.* at 21, 33.

37 *Id.* at 38-46.

38 *Id.* at 40.

39 *Id.*

40 *Id.* at 40, 43 ("Although Plaintiffs have cited various studies and interactions with government officials during the 1970's that suggest that different defendants knew (or should have known) about PCB dangers at various times, it would be a Herculean task to isolate and apportion contribution among the Defendants given the shifting time frames and the fact that the Defendants would only be responsible for a tiny fraction of the entire total in any event").

41 *Id.* at 44.

42 *Id.* at 45.

43 *Id.*

44 *Id.* at 47.