CHAMBERLIN KEASTER & BROCKMAN, LLP

Recent Developments and Emerging Issues in Environmental Claims

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CERCLA Liability for Government Entities Based on Activities as Regulator

In a decision with potentially far-reaching implications for CERCLA litigation around the country, in *Nu-West Mining Inc. v. United States*, No. CV 09-431-BLW (Dist. Idaho, March, 2011), the District Court granted Nu-West's Motion for Partial Summary Judgment on liability and held the Federal Government's permitting, inspection and other involvement in mining activities at the mine sites over time were sufficient to warrant imposition on the U.S. of liability under CERCLA for cleanup costs as an arranger and operator.

The *Nu-West* case arises from cleanup of selenium contamination at four former phosphate mines located on the Caribou-Targhee National Forest in Idaho. The four mines operated from the 1960s to the 1990s. A naturally occurring element, selenium, is found in a rock layer between phosphate-bearing ore zones. The four mines are all currently leased to Nu-West. When the selenium contamination was discovered in the late 1990s, Nu-West entered into an Administrative Order of Consent ("AOC") with the U.S. to remediate the sites. Nu-West claims to have incurred $10 million to date on those remediation efforts and sought to recoup those costs, as well as certain future costs, in this action.

In reaching this result, the *Nu-West* court relied on the tests for arranger liability as set out in *Burlington Northern & Santa Fe Railway Co. v. U.S.*, 129 S. Ct. 1870, 1879 (2009) and for operator liability as set forth in *U.S. v. Best Foods Inc.*, 524 U.S. 31, 66-67 (1998). The critical facts the Court focused on in granting Nu-West's Motion for Partial Summary Judgment on liability were the following:

- The government awarded mining leases, via competitive bid process, on the National Forest after it determined there were phosphate ore deposits large enough to warrant mining;
- The leases authorized the mining operations that took place;
- The leases ran for 20 years and the government retained authority to terminate the leases whenever it determined the lessee's operations were not in compliance with the lease or regulations in force at the time;
- Along with the leases, the government also issued Special Use Permits ("SUPs") for construction of waste rock dumps on adjacent National Forest lands;
- From at least 1965 forward, the government monitored environmental conditions at the mining sites, including water quality sampling and hydrology studies;
- The government also required lessees to meet certain production requirements and to pay a royalty fee to the government, based on production;
- The leases also required the lessee to be subject to inspections by the government to ensure, among other things, that the lessee "was properly disposing of mining waste and paying a full royalty to the Government."
- The government directed the lessee, in detail, how to dispose of the waste rock in the waste dump areas pursuant to the SUPs.

In short, the Court found the federal government:

> was a very active participant in designing and locating the waste dumps, in inspecting mine operations, and in ensuring compliance with all rules and plans.

Slip op. at 14. As such, the Court found the requisites for imposition of CERCLA liability on the U.S. as an operator and arranger had been met. The Court left the determination of the extent of the government's share of liability, as compared to that of Nu-West, the mine operator, for later resolution.

The *Nu-West* decision will undoubtedly be appealed by the U.S. to the Ninth Circuit Court of Appeals. Unless it is modified or reversed on appeal. the *Nu-West* decision provides support for imposition of liability on the U.S. or other government regulators where the government's level of involvement, regulation and oversight of operations and/or waste disposal practices at a site is sufficient to warrant imposition of arranger or operator liability under CERCLA. Each case will, of course, turn on the facts specific to that case.

Illinois Court of Appeal Finds Coverage Was Validly Assigned from Named Insured to Successor Entity

In *Illinois Tool Works Inc. v. Commerce & Indus. Ins. Co*., 2011 Ill.App. Lexis 881 (Aug. 16, 2011) the Illinois Court of Appeals held that a successor to the named insured was entitled to assert a claim for coverage under liability policies issued to a predecessor entity to address environmental liabilities arising from the predecessor's manufacturing operations. In reaching this result, the Court relied on an express assignment in the corporate deal documents to the successor entity of all rights under insurance policies issued to the predecessor prior to the closing date for claims arising from operations of the predecessor entity prior to closing. The Court also noted it was reaching this result, in part, because the predecessor entity (the original named insured) had not sought coverage from the insurers. The Illinois Court held this was a valid assignment of policy rights, notwithstanding the lack of insurer consent, since the original insured had not retained any rights and in its view the assignment did not expand the scope of the risk faced by the insurers. The Court ruled this amounted to an assignment of a "chose in action," which did not require insurer consent under Illinois law. The Court held the "chose in action" for the purposes of this analysis was the contamination of the site as a result of operations over time, rather than the underlying lawsuit against the successor entity for which coverage was sought.

The *Illinois Tool Works* opinion adds to the growing body of case law around the country addressing the extent to which insurers are bound by a purported assignment of insurance policy rights from a named insured to a successor entity in corporate deal documents in the absence of insurer consent. For now, pending review by the Illinois Supreme Court, the *Illinois Tool Works* decision can be added to the short, but growing, list of courts permitting assignment of policy rights without insurer consent under certain circumstances.

California Appellate Court Finds No Coverage for Civil Penalties for Alleged Statutory Violations in Insured's Sale of Products

In *Ultra Salon, Cosmetics & Fragrance, Inc. v. Travelers Prop. & Cas. Co*., 197 Cal. App. 4th 424 (2d Dist. 2011), the California Court of Appeals upheld the trial court's dismissal of the action below on demurrer, holding civil penalties sought for the insured's alleged failure to

comply with Prop. 65, the State Safe Drinking Water Act, in failing to give clear warnings about their cosmetics did not seek recovery of "damages" within the scope of coverage under a CGL policy. The Court found these were not sums the insured was legally obligated to pay as damages because of bodily injury or property damage. As such, Travelers had no duty to defend or indemnify the insured. Speculation the insured might later be sued for bodily injury did not change this result.

Virginia Supreme Court Affirms Trial Court's Dismissal of Climate Change Insurance Coverage Claims

In *Steadfast Ins. Co. v. AES Corp*., 2011 WL 4137936 (Sept. 16, 2011), the Virginia Supreme Court addressed the issue of whether the insured, AES, a power company, had coverage under its CGL policies for claims arising from the insured's alleged emissions of green house gases ("GHG"). In the underlying action, plaintiffs allege that twenty oil, coal, and electric utility companies, including AES, are responsible for thinning sea ice and increased storm surges that are forcing the native village of Kivalina Alaska village to relocate. *Native Village of Kivalina v. ExxonMobil Corp., et al*. CV 08-1138 (N.D. Cal.) (filed Feb. 26, 2008). Plaintiffs in the *Kivalina* case allege Defendants' GHG emissions constitute a nuisance and seek to recover monetary damages (up to $400 million) for the costs of relocating the entire village.

The Virginia state trial court entered summary judgment in favor of Steadfast, holding it had no obligation to defend or indemnify AES in the *Kivalina* case as there was no "occurrence" alleged. The trial court relied on allegations in the Complaint that climate change was the foreseeable result of the insured's routine discharge of millions of tons of carbon dioxide over the years. The trial court did not reach absolute pollution exclusion issue.

On appeal, the Virginia Supreme Court affirmed summary judgment for Steadfast. allegations that a utility's deliberate emissions of greenhouse gases contributed to global warming failed to seek recovery on account of an "occurrence." In the Court's view:

> the gravamen of Kivalina's nuisance claim is that the damages it sustained were the natural and probable consequence of AES' intentional emissions.

As such, the Court found that under Virginia law, the Complaint did not allege an occurrence potentially triggering coverage under the policy.

Interestingly, the Complaint against the insured in the underlying *Kivalina* case alleged negligence and intentional injury-causing conduct by the insured. The Complaint alleged AES both "knew" and/or "should have known" that its emissions would cause global warming. Given this, it is certainly possible the outcome of this case would have been different in other venues. In particular, it has been argued that in certain other jurisdictions, a duty to defend would potentially have been found to exist. That said, as with the trial court's decision, the Virginia Supreme Court did not reach what was probably Steadfast's strongest argument, that coverage was barred by the absolute pollution exclusion clause in the insurance policy.

It seems unlikely that the Virginia's Supreme Court's decision in the *Steadfast* case will be the final word on the extent of coverage available under CGL or other liability insurance policies for climate change-related exposures. It remains to be seen to what extent other Courts will follow the reasoning of this important first decision in this area. Round One: Insurers.

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