

Wis. Judge Reverses NCR Superfund Divisibility Ruling

By **Juan Carlos Rodriguez**

Law360, New York (October 19, 2015, 6:02 PM ET) -- A Wisconsin federal judge on Monday reversed his earlier decision that NCR Corp. can't be held fully liable for part of a \$1.5 billion Superfund cleanup and said he now finds that the company's evidence was unreliable.

The U.S., Georgia-Pacific LP, P.H. Glatfelter Co., U.S. Paper Mills Corp. and various other defendants all had asked U.S. District Judge William Griesbach to reconsider his May 15 ruling that NCR had established a divisibility defense. The ruling had the effect of limiting NCR's liability to 28 percent in one of the five sections of the Lower Fox River and Green Bay Superfund site.

In an order released Monday, Judge Griesbach said he now thinks that NCR failed to establish its divisibility defense because the evidence and testimony that backed up its claims were unreliable. This marked the third time the judge has ruled on the divisibility defense question. He rejected it in 2013, but the Seventh Circuit last year remanded the case with instructions that he take another look at it. In May, he reversed his prior ruling and awarded the divisibility defense to NCR. Now, after the various parties' motions for reconsideration, he again reversed himself.

First, the judge said he now finds that the harm from the polychlorinated biphenyl pollution is not theoretically capable of apportionment. The Seventh Circuit had said that the harm is "theoretically capable of apportionment if NCR could show the extent to which it contributed to PCB concentrations in [the section of the site at issue]."

"The government appeared to have all-but conceded this point, but in its subsequent motion practice it has launched a vigorous assault on [a Georgia Pacific expert's] estimates, which the Seventh Circuit has asked this court to consider on remand," Judge Griesbach said.

He said the Georgia Pacific expert's estimates were then used by an NCR expert, but only in later briefing, to which the other parties had not had a chance to respond until recently.

The biggest problem with the Georgia Pacific expert's estimates is that they contradict facts already found by the court, the judge said. For example he said several of the parties note that the expert's estimates "probably dramatically" overstate the PCBs attributed to U.S. Paper, one of the four key sources of PCB contamination.

"This calls into doubt both the general framework used by Dr. Wolfe [the Georgia Pacific expert] as well as his specific conclusions. Most problematic is the fact that his estimates for NCR were not unfavorable

or conservative, as I had previously concluded, but instead were based on the flawed premise that U.S. Paper was a substantial polluter of PCBs into the river,” Judge Griesbach said.

As for the separate issue of remediation costs necessitated by each party, the judge said the trial record does not provide complete estimates for all of the dischargers, and so the NCR expert’s use of those estimates must be based on “mere guesswork” rather than supportable science.

He said that contrary to his earlier belief, it was not simply a matter of NCR’s expert using another expert’s mass estimates and running them through an apportionment model.

“Instead, two of the key estimates are missing from the data set that Butler [the NCR expert] relied upon in reaching his conclusions,” the judge said. “The trial testimony suggests that Butler did not have complete data from Wolfe, contrary to this court’s earlier assumptions.”

A second reason for rejecting NCR’s expert’s apportionment approach is that he was operating under an approach that is no longer operative, the judge said. He said the NCR expert’s approach to apportioning costs produced results that changed NCR’s share very little, even if the PCB mass assumptions varied widely.

NCR and its counsel did not immediately respond to requests for comment Monday.

NCR is represented by Evan R. Chesler, Darin P. McAtee, Teena-Ann V. Sankoorikal and Yonatan Even of Cravath Swaine & Moore LLP, John M. Heyde of Sidley Austin LLP, and Linda R. Larson and Bradley M. Marten of Marten Law PLLC.

Georgia Pacific is represented by Michael J. Nelson, Mary Rose Alexander and Margrethe K. Kearney of Latham & Watkins LLP.

Glatfelter is represented by David G. Mandelbaum, Francis A. Citera, Caleb J. Holmes, Jillian C. Bunyan, and Kaitlyn R. Maxwell of Greenberg Traurig LLP.

U.S. Paper is represented by Scott W. Hansen and Steven P. Bogart of Reinhart Boerner Van Deuren SC, and Thomas R. Gottshall of Haynsworth Sinkler Boyd PA.

The government is represented by Jeffrey A. Spector, Randall M. Stone and Kristin M. Furrie of the U.S. Department of Justice; and Assistant U.S. Attorney for the Eastern District of Wisconsin Susan M. Knepel.

The case is USA et al. v. NCR Corp. et al., case number 1:10-cv-00910, in the U.S. District Court for the Eastern District of Wisconsin.

--Editing by Kelly Duncan.