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SUPERFUND LITIGATION UPDATE

SECOND CIRCUIT

Gary P. Gengel and Kegan A. Brown

Next Millennium Realty, LLC v. Adchem Corp.

On March 23, 2016, the U.S. District Court for the Eastern District of New York held in a Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) action that a dissolved corporation that has wound up its affairs lacks the capacity to be sued. Plaintiffs, the current owner of property on Long Island, asserted that Lincoln Processing Corp. (Lincoln), a bonding and laminating company that operated at the property from 1966 through 1973, was liable for response costs associated with perchloroethylene (PCE) contamination at the property. Lincoln was dissolved in 1977 or 1978 and alleged that the wind-up process was completed by 1979; plaintiffs filed their CERCLA claim against Lincoln in 2003.

Lincoln filed a motion for a determination that, as a dissolved corporation, it lacked the capacity to be sued under CERCLA. Construing Lincoln’s motion as one for summary judgment, the court, relying on Marsh v. Rosenbloom, 499 F.3d 165 (2d Cir. 2007), noted that “CERCLA does not pre-empt state statutes that limit a party’s capacity to be sued.” Prior to Marsh, several district courts held that CERCLA preempts state statutes that limited the capacity of dissolved corporations to be sued. The Second Circuit overruled those district court decisions in Marsh. Thus, the relevant question was whether, under the law governing Lincoln—the New York Business Corporation Law (BCL)—a dissolved corporation can be sued and held liable under CERCLA. Resolution of this question hinged on whether Lincoln had “wound up” its operations, as the BCL prevents corporations from being sued for pre-dissolution events if the corporation’s affairs are “fully adjusted and wound up.”

Here, Lincoln asserted that its affairs were fully adjusted and wound up in or around 1979. Nevertheless, plaintiffs argued that because the BCL does not include a time limit for winding up a dissolved corporation’s affairs, the period to wind up is indefinite and, by logical extension, Lincoln still can be sued under CERCLA. The court disagreed, finding that because the BCL is silent on the period of winding up, it should apply a reasonable period of time. The court then concluded that “one cannot reasonably credit the notion that a corporation that dissolved in the mid-1970s has not completed winding up by the mid-2000s.” Thus, the court held that Lincoln had wound up its affairs and did not have the capacity to be sued under CERCLA.

The Next Millennium case needs to be considered in light of the Supreme Court’s decision in United States v. Bestfoods, 524 U.S. 51 (1998). Bestfoods held that CERCLA does not preempt bedrock corporate law principles (e.g., that absent a basis to pierce the corporate veil, a parent corporation will not be liable for the torts of its subsidiary). Next Millennium applies both this Bestfoods holding and the holding from Marsh (that CERCLA does not preempt state statutes that limit a party’s capacity to be sued) in finding that Lincoln could not be sued under CERCLA.

DMJ Assocs. v. Capasso **(E.D.N.Y. Mar. 31, 2016)**

On March 31, 2016, the U.S. District Court for the Eastern District of New York held that a terminated administrative consent order with the New York State Department of Environmental Conservation (NYSDEC) does not “resolve” a party’s CERCLA liability, and therefore does not trigger a party’s right to assert a section 113 contribution claim (leaving that party with an ability to assert a section 107 cost recovery claim). See https://cases.justia.com/federal/district-courts/new-york/nyedce/1:199

7cv07285/159733/1608/0.pdf?ts=1459600189.

In the underlying action, plaintiff DMJ Associates, LLC (DMJ) brought a cost recovery claim against various defendants, including Exxon Mobil (Exxon) and Quanta Resources Corp. (Quanta). During the pendency of that action, in 2002, Exxon and Quanta (and others) entered into an administrative order on consent (AOC) with NYSDEC. The AOC required Exxon and Quanta (and others) to remediate the sites at issue, and provided that their liability would be resolved once the sites were remediated to NYSDEC's satisfaction.

In November 2004, Exxon and Quanta asserted CERCLA cost recovery and contribution claims against certain third parties (the "third-party defendants"). In June 2005, Exxon and Quanta settled the litigation with DMJ, which required in part that DMJ apply to have the sites placed in the NYSDEC's Brownfield Cleanup Program (BCP). Upon approval of DMJ's BCP application in September 2005, NYSDEC terminated the AOC with, among others, Exxon and Quanta.

After further amendment of the claims against the third-party defendants, the third-party defendants filed a motion for partial summary judgment, arguing that because Exxon and Quanta were sued by DMJ and then entered into an AOC with NYSDEC, they were precluded from asserting a section 107 cost recovery claim and relegated to a section 113 contribution claim (which does not result in joint and several liability). In response, Exxon and Quanta argued that they could assert a cost recovery claim because, since the AOC with NYSDEC was terminated, they did not "resolve" their liability as required by section 113; they therefore did not have a section 113 contribution claim; and as a result, they may assert a section 107 cost recovery claim.

In deciding the third-party defendants' motion, the court relied on Bernstein v. Bankert, 733 F.3d 190 (7th Cir. 2013), which held that a party does not "resolve" its liability in an administrative settlement agreement if, under the terms of that agreement, the resolution of liability is contingent on some future event that does not occur. Here, because the AOC was terminated by NYSDEC before Exxon and Quanta remediated the sites to the agency's satisfaction, the AOC did not resolve their liability for purposes of section 113. Thus, Exxon and Quanta did not have a section 113 contribution claim, leaving them with a section 107 claim for costs incurred pursuant to the AOC. Notably, the court disagreed with the third-party defendants' argument that because Exxon and Quanta had been sued under section 107, they were limited to a section 113 contribution claim. Instead, the court's analysis focused on whether the AOC met the statutory requirements to trigger a section 113 contribution claim.

Finally, the court held that Exxon and Quanta may pursue both section 107 and section 113 claims, as the costs sought fell into four different categories: (1) directly incurred response costs, (2) costs paid to reimburse third parties pursuant to a settlement agreement, (3) costs incurred as a result of DMJ's claims, and (4) costs incurred pursuant to the terminated AOC with NYSDEC. However, despite the ability to assert both section 107 and 113 claims, the court made clear that "none of the listed costs are recoverable under both sections simultaneously."

This decision is a further example of district courts' efforts to grapple with the interplay between CERCLA cost recovery and contribution claims, particularly when administrative orders are entered but subsequently terminated.

New York v. Next Millennium Realty, LLC

On February 9, 2016, the U.S. District Court for the Eastern District of New York ruled on the state of New York's and defendants' competing motions for summary judgment concerning volatile organic compound contamination at and emanating from the New Cassel industrial area in North Hempstead, N.Y. (the "site"). See http://www.lawandenvironment.com/wp-content/uploads/sites/5/2016/02/Bloomberg-Law-Document-New-York-v.-Next-Millennium-Realty-LLC-No.-06-CV-1133-SJFAYS-2016-BL-35748-E.D.N.Y.-Feb.pdf. The state had asserted both cost recovery and natural resource damages (NRD) claims against defendants under CERCLA.

In resolving the parties' motions, the court held that the state had proven all of the elements required to hold defendants liable under section 107 of CERCLA. Certain defendants then argued that, under Burlington N. & Santa Fe Ry. Co. v. United States, 556 U.S. 599 (2009), defendants' CERCLA liability was capable of being apportioned and should not be joint and several, primarily based on environmental data and figures that depicted three distinct groundwater plumes at the site. The state, however, argued that the groundwater plumes were commingled, and defendants' reliance on certain environmental figures was misplaced. Given the parties' competing positions, the court held that a genuine issue of material fact existed on the issue of apportionment and denied the motion for summary judgment.

The court also rejected defendants' argument that the state's NRD claim was time barred. Defendants argued that section 113(g)(1) of CERCLA requires that NRD claims be asserted "within 3 years after the later of" either the "date of the discovery of the loss and its connection with the release in question" or "the date on which [the natural resource damage assessment] regulations are promulgated," and that the state's claim was untimely because the contamination was discovered in 1986, the natural resource damage assessment regulations were promulgated in 1987, and the litigation was filed in 2006. 42 U.S.C. § 9613(g)(1); California v. Montrose Chem. Corp., 104 F.3d 1507 (9th Cir. 1997). The state countered, and the court agreed, that once the site was listed on the National Priorities List (NPL) (which occurred in 2011), the limitations period was reset to "within 3 years after the completion of the remedial action (excluding operation and maintenance activities)". 42 U.S.C. § 9613(g)(1); U.S. v. ASARCO Inc., 28 F. Supp. 2d 1170, 1179–80 (D. Idaho 1998). The court explained that the plain language of CERCLA compels this conclusion because "[w]ith respect to any facility listed on the NPL . . . an action for damages under this Act must be commenced within 3 years after completion of the remedial action . . . *in lieu of*" the two other limitations periods for NRD claims in section 113(g)(1). 42 U.S.C. § 9613(g)(1) (emphasis added). Consequently, once a site is listed on the NPL, the limitations period for an NRD claim is replaced by a "virtually unlimited duration because it does not begin to run until EPA has completed its remedial action."

The court's ruling reinforces the difficulty of obtaining an apportionment ruling (at least at the summary judgment stage) and the ability of NRD trustees to assert otherwise time-barred NRD claims at older sites so long as the site is listed on the NPL.

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