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Second Circuit Examines Collateral Source Rule in CERCLA Cost Recovery and Contribution Case

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On September 11, 2014, the Second Circuit issued its decision in New York State Electric & Gas Corp. v. FirstEnergy Corp., No. 11-4143, a CERCLA cost recovery and contribution case arising from the cleanup of coal tar contamination at sixteen manufactured gas plants in New York. New York State Electric & Gas Corp ("NYSEG") filed a section 107(a) cost recovery action against FirstEnergy Corporation, alleging FirstEnergy bore liability as a successor to NYSEG's former parent company. FirstEnergy brought section 113(f) contribution counterclaims against NYSEG and I.D. Booth, Inc., a current owner of one of the sixteen sites. The district court found NYSEG could recover under its section 107(a) claims, while FirstEnergy could recover contribution from I.D. Booth.

On appeal, the Second Circuit decided a number of issues. Among them was whether NYSEG's award against FirstEnergy could be reduced by a portion of the $20 million NYSEG had received in a prior insurance recovery. The district court and Second Circuit both found that the "collateral source rule" does not apply in the CERCLA context. The collateral source rule prevents payments from a collateral source from reducing an otherwise recoverable award. The district court had held that the collateral source rule was barred by Section 114(b) of CERCLA, 42 U.S.C. § 9614(b). The $20 million award had been allocated among 38 sites, so the district court reduced NYSEG's contribution recovery here by 42.1 percent (16/38) of the $20 million award, or $8,421,052. The Second Circuit affirmed.

If you'll recall, David Mandelbaum previously discussed the collateral source rule on this blog. That examination of cases found that courts have generally held that the collateral source rule does not apply in the CERCLA context, but that courts will often apply an equitable analysis to avoid an unfair double recovery. Here, the Second Circuit found that, although there was no risk of NYSEG obtaining a double recovery, it was within the district court's "broad discretion" to equitably reduce NYSEG's recovery based on the insurance recovery. Accordingly, the Second Circuit seems to endorse an equitable analysis, rather than some mechanical rule, when addressing prior insurance recoveries in CERCLA contribution cases.

In addition, the Court of Appeals held (1) a covenant not to sue did not preclude NYSEG's cost recovery claims; (2) that there could be no direct liability for a parent that did not sufficiently participate in the activities of the plant during its ownership of the plant; (3) FirstEnergy was liable on a veil piercing theory; (4) NYSEG's claims were barred as to certain sites by CERCLA's statute of

limitations provision; (5) the district court's allocation of liability based on total gas production was not in error; (6) the district court did not err by not reducing recovery based on economic benefit of the cleanup or based on delay in cleaning up; and (7) I.D. Booth was not entitled to a third-party defense under section 107(b)(3) because it did not exercise due care with respect to the cleanup, as I.D. Booth caused delays in negotiations and, in turn, the cleanup.

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