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UNRAVELING SOME MYSTERIES OF ENVIRONMENTAL LIABILITY

To most small business owners and general practice attorneys, the laws of environmental contamination liability seem oppressive and mysterious. We recently had the opportunity to go through the maze of environmental liability law, by representing the tenant of an industrial building accused of contaminating the surrounding land. We were fortunate enough to convince the plaintiff-owner, and his attorneys, to voluntarily dismiss their lawsuit — twice — because we showed them that they could not win. Along the way, we learned that there is a lot more common sense involved in the environmental liability laws than we previously realized. The following is a summary of this learning experience.

1. *THE FACTS*: Our client, a small manufacturer and distributor of industrial lubricants, leased an industrial building in an industrial park from 1980 to 1985. There were eight underground storage tanks ("UST's") in the yard outside the building. The prior tenant, which manufactured glue and other adhesives, leased the property from 1968 to 1980. A third company that manufactured ink leased the property after our client.

When the last lease expired in 1990, the owner decided to sell the property. However, a Phase One environmental assessment revealed that the soil surrounding the UST's was contaminated with "BETX" (benzene, ethylbenzene, toulene and xylene). The owner had to spend about $110,000 to remove the UST's, and clean up the contaminated soil.

Of course, the owner then filed a lawsuit against all three tenants to recover the clean-up costs. However, the third tenant had gone out of business, leaving only our client and the earlier tenant "holding the bag."

When the lawsuit was first filed, our client assured me that it could not have been responsible for the contamination, because none of the products it stored in the UST's, such as kerosene, mineral spirits and other petroleum products, contained any BETX (benzene, ethylbenzene, toulene or xylene) which was found in the soil. We then filed a Motion for Dismissal, supported by Affidavits from our client stating that none of the products it used contained any BETX. To our surprise, however, the owner-plaintiff responded with an Affidavit from an environmental scientist, stating that all crude oil contains BETX, and since the petroleum distillation process does not remove all of the BETX from any petroleum products, the kerosene, mineral spirits and other petroleum products that our client stored in the UST's did indeed contain BETX, to some degree. This statement turned out to be true, so our first line of defense was lost.

The lawsuit progressed to the "discovery" stage, where each side is required to share information, by exchanging relevant documents, and giving depositions. One of the documents in our client's files was a handwritten note of a telephone conversation between our client and the former tenant, about what the prior tenant had stored in the UST's.

According to that note, the prior tenant told our client that Tank No. 4 was a "leaker." I could imagine the delight of the plaintiff-owner and its attorney when they saw that note. When our client gave a deposition, it confirmed not only that Tank No. 4 was "a leaker," but that several other tanks leaked as well. Of course, our client testified that it didn't use the tanks that leaked — not because it was concerned about contaminating the soil, but because it did not want to lose valuable product.

Things didn't look so good for us after that deposition. There was no evidence that our client did use the tanks that leaked, but the undisputed evidence was that the soil around the tanks was contaminated with BETX, our client stored products containing BETX in the tanks, and both tenants knew that some of the tanks leaked.

2. *ENVIRONMENTAL-LEGAL ISSUES*: We were most concerned about two legal principles involved in environmental law. The first is the concept of "strict liability," which basically means that liability can be based on mere involvement, regardless of fault. In most cases, a defendant is not liable for damages unless he or she is somehow "at fault," by breaching a contract, failing to use a reasonable amount of care, etc. However, in rare situations, the law assesses "strict liability" for certain situations, regardless of fault. We knew that strict liability was sometimes the rule in environmental cases.

The second legal doctrine that most concerned us was that of "joint and several liability," meaning that our client could potentially be liability for the entire $110,000 in clean-up costs, even if it was only responsible for 1% of the contamination. The expert environmental witness retained by the owner-plaintiff contended that our client must have contributed some of the contamination, because it had the tanks filled with petroleum products hundreds of times, and some spillage is bound to occur when the tanks are filled. If that were true, our client could be held responsible for all of the contamination, even if only a few gallons was spilled when the tanks were filled, based on "joint and several liability."

At this point, things didn't look too good for our client. However, we were able to convince the Judge that our client should not be held to the "strict liability" standard, because strict liability only applies when the State or Federal Governmental bears the costs to clean up contamination. When a private owner is suing for environmental clean-up costs, the owner must prove that the defendant was guilty of some degree of fault, such as by breaching a contract, or failing to use a reasonable amount of care. Therefore, since no governmental body paid the clean-up costs, the "liability without fault" doctrine could not be asserted against our client.

However, the second legal issue remained: There was a still a possibility that our client could be held responsible for the contamination caused by the other tenants, if the plaintiff-owner could prove that our client was "at fault" for causing any of the contamination. That possibility was because the environmental laws generally call for "joint and several liability" for environmental contamination caused by "hazardous substances." However, although the definition of "hazardous substances" includes BETX, our research eventually revealed that BETX that is derived from crude oil is exempt from the definition of "hazardous substances." Thus, our client could not be held responsible for the contamination caused by the other tenants, even if the Judge concluded that our client caused some of the contamination.

3. ***DISMISSAL OF THE FIRST CASE*****:** Even though we were pleased with the results of our legal research, we knew that our client could still be held liable for whatever portion of the contamination the jury determined was caused by our client. The expert witness retained by the owner-plaintiff was a member of the firm that discovered the contamination, and cleaned up the soil, so he had most of the first-hand knowledge about the case. He believed that whenever underground storage tanks are filled, there is bound to be some "over-fillage" of petroleum products into the ground, from pumping more product from the supply truck than the tanks can hold; and some "spillage" of product into the ground, from when the supply hose is retracted from the tanks back to the supply truck. Thus, this expert honestly and sincerely believed that some of the contamination must have occurred during the hundreds of filling operations conducted during the five years our client was a tenant of the property.

Since this expert witness was giving honest and truthful opinions, we were able to get him to admit a variety of facts at his deposition that were helpful to our defense. For example, he admitted that the soil could have been contaminated by sources other than the UST's, such as by rinsing dirty chemical drums on the property; use of contaminated soil as backfill when the tanks were originally installed; or even underground migration from nearby properties. He also admitted that the contamination could have been caused by the first tenant before 1978, which was the statute of limitations deadline. Finally, he admitted that even if spills and overfills invariably happen when filling tanks, it would be "pure guesswork" to try to say how much of the contamination was caused by our client. The law generally will not assess liability based on "pure guesswork," so these admissions by the owner's expert greatly helped our case.

The owner's expert also testified at his deposition that when the soil was being cleaned up, he recommended that the owner run tests to obtain a chemical "profile" of the contamination, to identify which of the tenant's products had contaminated the soil; but the owner declined to have these tests conducted, because he did not want to pay the extra costs for the tests.

Based on those admissions from the owner's expert witness, the owner and his attorneys realized that they probably could not win the case at trial, so they voluntarily dismissed the case the day the trial was to begin.

4. ***DISMISSAL OF THE SECOND CASE*****:** When a plaintiff voluntarily dismisses a case before trial, he or she is allowed to re-file the case within one year, which is what happened in our case. In the meantime, however, the second tenant also went out of business, leaving our client as the only remaining defendant.

As we anticipated, the owner-plaintiff found a new expert witness for the second case. This new expert came up with a theory whereby he could identify <u>when</u> the contamination occurred, by performing a "Chemical Aging Analysis" of the contaminants found in the soil. At first, the report of this Chemical Aging Analysis was incomprehensible to non-scientific laymen, such as ourselves. The report was full of chemical theory, and indecipherable mathematic calculations:

$$0.0000032 = 0.00000655\ e^{-2.43396\ x} =$$
$$0.48855 = e^{-2.43396\ x} =$$
$$ln\ 0.48855 = -2.43396\ x$$
$$-0.71631/-2.43396 = 0.29430 = x$$

Of course, the new expert concluded that the contamination occurred in July of 1991, when our client was the tenant.

We hired our own scientific expert to help us evaluate the new Chemical Aging Analysis, and we began an investigation into the qualifications and background of the plaintiff-owner's new expert witness. Unlike the first expert hired by the owner-plaintiff, the second expert turned out to be a "hired gun"; he apparently was willing to sell whatever opinions he felt his client needed, supporting those opinions with scientific garbage. Our investigation into his background revealed that he had passed himself off as a Ph.D., although he had only a Bachelor's degree in biology. (We would have forced him to prove at trial that he really had a Bachelor's degree, but we fortunately did not even get to trial.)

Before taking the deposition of the new expert, we discovered that there was a problem with his indecipherable mathematical equations: He forgot one zero after the decimal point in computing 320 parts per billion (0.000000320) of Xylene contamination. When the correct number was plugged into his formula, the result, according to his theory, was that the contamination occurred in 1954, rather than 1981. When we took his deposition, the new expert struggled for about fifteen minutes to deny that he had made an error. He finally concluded that because of a typographical error, the 320 parts per billion of xylene in his report should really have been 320 parts per million. However, when we later plugged 320 parts per million into the Chemical Aging Analysis formula, the result was a negative number, indicating that the chemical spill had not yet occurred.

Because we were able to "pull down the pants" of this new expert witness at his deposition, the plaintiff-owner and his attorneys again realized that they could not win their case at trial, so they voluntarily dismissed the case for a second time. Under Illinois law, you only get two bites at the apple, so the second dismissal was final.

5. *CONCLUSIONS*: We still don't know whether or not our client actually caused or contributed to the contamination, but the plaintiff-owner was not able to prove that we did. Since the plaintiff was not able to prove its case, our client did not have to pay for any of the clean-up costs.

Everyone involved in this case learned something. In spite of its earlier beliefs, our client learned that its products really do contain BETX, which was found in the soil. We learned that in spite of the mysteries involved in environmental law, our client still could not be held liable without proof that it was at fault. The owner-plaintiff and his attorneys learned that they could not extract a settlement or verdict without good evidence that our client caused the contamination. The second expert witness hired by the owner-plaintiff learned that he could not create liability of our client, by trying to cover up trash science with incomprehensible chemical theory and mathematical equations.

We like to think that the law makes sense. This case reaffirmed our belief that the legal system generally comes up with the right result.

Prepared by James D. Skaar
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