

Summary Judgment Awarded to Defendants in Lower Fox River Contribution Suit

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The U.S. District Court of the Eastern District of Wisconsin recently decided two cases involving liability for PCB pollution in the Lower Fox River. *Appleton Papers Inc. v. George A. Whiting Paper Co.*, No. 08-C-16, 2009 WL 5064049 (E.D. Wis. Dec. 16, 2009) (“*Appleton Papers*”); *United States v. George A. Whiting Paper Co.*, No. 09-C-692 (E.D. Wis. Dec. 16, 2009) (“*Whiting*”). *Appleton Papers* was a contribution suit brought by two companies against eleven other potentially responsible parties (“PRPs”) pursuant to the Comprehensive Environmental Response, Compensation and Liability Act (“CERCLA”). *Whiting*, in turn, involved the lodging of a settlement between the United States and the state of Wisconsin, on the one hand, and those eleven PRPs, on the other hand, protecting the PRPs from the contribution suit. In essence, both cases addressed the question of who should be responsible for funding an ongoing cleanup project designed to remove the PCBs, which the court said “is thought to be the largest of its kind ever undertaken anywhere in the world” and may cost over \$1 billion. The court dismissed the *Appleton Papers* case, granting summary judgment to the defendants, and approved the settlement of those same parties in the *Whiting* case, placing nearly the entire financial burden of the cleanup on two companies. In light of the stakes, we expect the decisions may be appealed.

Appleton Papers Case: Decision and Order Dismissing Plaintiff’s Claims for Contribution:

In *Appleton Papers*, two PRPs performing the cleanup project sued eleven other PRPs for contribution for the cleanup costs. The plaintiffs are both successors-in-interest to the Appleton Coated Paper Company (“Appleton”). Appleton manufactured a carbonless copy paper (“CCP”) containing PCBs until 1971. The defendants can be split into two categories: one composed of municipalities, “utilities and sewerage districts that treated or released PCB contaminated wastewater into the river”; the other composed of paper mills operating along the river that recycled paper scraps of the plaintiffs’ CCP. All of the defendants released PCBs into the river, but all of those PCBs originated in the plaintiffs’ CCP.

The court granted summary judgment for the defendants, foreclosing the plaintiffs’ efforts to recover any money in contribution from the defendants. The court assumed that roughly 98% of the PCBs were discharged pre-1971, while Appleton was manufacturing CCP using PCBs. The court attributed sole liability to the plaintiffs for the pollution that occurred during this time because a balancing of the equities “overwhelmingly” favored the defendants. According to the court, the plaintiffs were in a better position than the defendants to recognize and act on the warning signs of environmental contamination and potential public health hazards. Next, the court decided that the plaintiffs must bear not only the cost of cleaning up PCBs discharged pre-1971, but also those discharged post-1971 (*i.e.*, the 2% of pollution that occurred after the plaintiffs stopped manufacturing CCP). The court reasoned that determining with precision whether the 98% should be slightly lower or higher, or determining the exact share of each defendant, was not worth the effort, even though a small change in percentage would have a significant monetary impact. Instead, the court reflected that “the key factor is that the overwhelming majority – whether 98 percent or 92 – of PCBs had been released during the production period” and, therefore, the plaintiffs should be held financially responsible for the entire cleanup process.

The court considered several other equitable factors in its decision. It noted:

- A clear difference between the plaintiffs, who produced the PCBs by manufacturing CCP, and the defendants, who contributed to the pollution by either recycling the CCP waste or by playing a role in the conveyance of wastewater to the river: “[B]y creating the product in the first place, [the plaintiffs] set in motion the pollution that has given rise to this cleanup effort. And because the disposal of the waste products . . . was a necessary byproduct of the manufacture of CCP, [the plaintiffs’] involvement in the creation of the pollution was paramount.”
- The plaintiffs were “sluggish” in their response to data raising questions about the possible toxicity of PCBs. The court was especially concerned that “more than half [of the PCBs were] produced after knowledge” of the chemical’s toxicity, and that the companies actually “increased production” after having knowledge of the potential toxicity of PCBs.
- The court hoped to encourage manufacturers to exercise extreme caution by holding them solely responsible for their use of toxins.

Whiting Case: Decision and Order Approving Consent Decree

In *Whiting*, the United States and the state of Wisconsin filed suit against the same eleven entities, alleging that the entities were liable for the PCB pollution found in the Lower Fox River. The court entered a Consent Decree that required the defendants to pay \$2,029,545.45, or roughly .1355% of the total cost of the cleanup project. The plaintiffs in the *Appleton Papers* case challenged the Consent Decree by arguing that the eleven entities were liable for more pollution than indicated by the relatively small amount the defendants would be required to pay under the Consent Decree. As in *Appleton Papers*, however, the court determined that the defendants’ involvement in the pollution was “extremely attenuated” and, therefore, placing extensive costs on them would have been unreasonable.