

Update on the Law

THIRD CIRCUIT HOLDS NRD CLAIMS ARE CLEAN-UP COSTS

The Third Circuit Court of Appeals in *Pharmacia Corp. v. Motor Carrier Corp.*, 309 Fed. Appx. 666; 209 U.S. App. LEXIS 2549 (2009) recently affirmed the decision of the New Jersey District Court on a matter involving property involved in the ongoing Passaic River cost recovery litigation. The case primarily involved the interpretation of an agreement by which Motor Carrier acquired property, which abutted the Passaic River in Kearny, New Jersey, previously owned by Pharmacia (formerly known as Monsanto). The agreement addressed the apportionment of responsibility for the costs of clean-up of the property. The responsibility for reimbursing the USEPA for certain costs associated with EPA's Remedial Investigation and Feasibility Study (RI/FS) was litigated and the court found in favor of Pharmacia based upon the language of the agreement. The District Court held that Motor Carrier and successor entities were required to indemnify Pharmacia "for any and all costs for which Pharmacia is or becomes liable to NJDEP or USEPA...or any future action NJDEP, USEPA or any other regulatory agency related to the remediation of the Lower Passaic River, and for future cleanup of the Kearny site." Subsequently the National Oceanic and Atmospheric Administration (NOAA) informed Pharmacia that it was potentially liable for Natural Resource Damages (NRD) to the Lower Passaic River under CERCLA. On appeal, Motor Carrier argued that the District Court

erred in finding it responsible for the remedial costs, but even if it was so liable, that it was not liable for the NRD claims since they were “compensatory damages for natural resource injury,” not “clean-up costs” under the agreement. The Third Circuit rejected this argument stating that the “ ‘primary purpose’ of EPA-mandated cleanups under CERCLA ‘is to protect human health.’” The Court drew a distinction between and NRD assessment, which determines the degree and extent of the NRD, and NRD damage claim, which is to be used for “ ‘ remedial’ activities, such as ‘restoration’ or ‘rehabilitation’ of the Passaic River.” Accordingly, the Court held that the NOAA’s NRD action falls within the definition of “Clean-up” under the agreement.

The Courts are continuing to wrestle with the developing laws on NRD claims under both federal and state laws. Parties continue to face the effects of this “new” theory of cost recovery, which may not have been fully considered in prior agreements and settlements. This “unreported” decision, while not precedential under the Federal Rules, is nonetheless informative and a reminder that NRD issues must be considered in any agreement addressing environmental responsibilities and any settlement of environmental litigation.

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