

NCR Wins Liability Cap In Wisconsin Superfund Row

By Juan Carlos Rodriguez

Law360, New York (May 19, 2015, 8:27 PM ET) -- A Wisconsin federal judge has handed NCR Corp. a unique win, reversing a prior ruling and finding the company successfully established a divisibility defense that shields it from full liability for part of a \$1.5 billion Superfund cleanup.

U.S. District Judge William Griesbach's Friday ruling followed the Seventh Circuit's September order that he take another look at NCR's divisibility defense, which he had rejected. Judge Griesbach found, upon reconsideration, that based on the appeals court's analysis, NCR could show that the damages in one of five sections of the Lower Fox River and Green Bay Superfund Site could be split up among the various potentially responsible parties, and that its own portion is 28 percent.

The federal government unsuccessfully argued that there was enough evidence already in the record to again toss the divisibility defense. According to the judge, the divisibility defense has two components: the first question asks whether the harm is theoretically capable of being divided, while the second asks whether there is a reasonable way of apportioning the damages.

He said that when he originally attempted to answer the first question, he viewed the issue as not how much each party contributed to the concentrations, or toxicity, at the site, but how much their discharges gave rise to the need to remediate portions of that river section.

After the Seventh Circuit's analysis, however, Judge Griesbach found that the harm can't be viewed primarily with respect to the remedy or costs the polychlorinated biphenyl pollution might have triggered. Instead, he found the harm is primarily defined with respect to the PCBs' actual toxicity.

"Simply put, the more PCBs, the more harm. Thus, the harm is more properly defined as a release's toxicity or danger to health and the environment, as opposed to the release's propensity to trigger a costly remedy," the judge said.

Forty miles of the Fox River and 1,000 square miles in Green Bay, Wisconsin, are contaminated with carcinogenic polychlorinated biphenyl from area mill operations and the manufacturing of carbonless copy paper, according to the U.S. Environmental Protection Agency, which along with the state sued various potentially responsible companies in 2010.

Because the harm is "essentially" toxicity, the judge said he no longer needed to assess whether NCR's discharges would have given rise to the need for a specific remedy in a portion of the river. He said the primary issue to determine whether the harm is theoretically capable of being divided is, instead, the

extent to which NCR contributed to the contamination at the site.

“The Seventh Circuit’s definition of ‘harm’ opens the door to a simple volumetric approach to divisibility,” the judge said.

And he said he didn’t need to hear any more evidence because the expert testimony from NCR and another defendant, Georgia Pacific Consumer Products LP, supplied enough information for him to make a decision.

Based on that information, the judge said at the high end, NCR is responsible for 43 percent of the PCBs in the upper half of “Operable Unit 4,” the section in question, and 27 percent in the lower half.

“It requires no stretch of science or logic to conclude that NCR would also be responsible for a similar amount of the cleanup costs,” he said. “NCR has established the harm is theoretically capable of division and that there is also a reasonable basis to apportion its share of the remediation costs of OU4 at 28 percent.”

The judge added that NCR has not claimed the harm in OU2, 3 and 5 is divisible, and thus its liability for remediation of those areas is joint and several. He also said NCR discharged no PCBs in OU1, and therefore has no divisible share of the clean-up costs for that area.

The Seventh Circuit was the first to give the issue of divisibility a thorough consideration since the U.S. Supreme Court’s 2009 ruling in *Burlington Northern & Santa Fe Railway Co. v. United States*, which allowed for divisibility when the responsibility of separate parties can be proved with a reasonable amount of certainty.

NCR is represented by Evan R. Chesler, Darin P. McAtee, Teena-Ann V. Sankoorikal and Yonatan Even of Cravath Swaine & Moore LLP; John M. Heyde of Sidley Austin LLP; and Linda R. Larson and Bradley M. Marten of Marten Law PLLC.

Georgia Pacific is represented by Mary Rose Alexander, Margrethe K. Kearney and Michael J. Nelson of Latham & Watkins LLP.

The government is represented by Jeffrey A. Spector, Randall M. Stone and Kristin M. Furrie of the U.S. Department of Justice; and Assistant U.S. Attorney for the Eastern District of Wisconsin Susan M. Knepel.

The case is *U.S. et al. v. NCR Corp. et al.*, case number 1:10-cv-00910, in the U.S. District Court for the Eastern District of Wisconsin.

--Additional reporting by David McAfee and Gavin Broady. Editing by Kelly Duncan.

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