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Webinar

2015 an 'Interesting' Year In Superfund Litigation, Lawyers Say

BY STEVEN M. SELLERS

Settlement risks, divisibility questions and arranger liability issues made 2015 an ''interesting'' year in Superfund litigation, lawyers say.

The common thread in a Dec. 17 webinar by a panel of Superfund lawyers was one of lingering uncertainties in the Comprehensive Environmental Response, Compensation, and Liability Act—35 years after the law was enacted.

''This year is one of the most interesting to study,'' Richard Faulk, of Hollingsworth's office in Washington, D.C., said. When it comes to settlements, ''we're getting into a series of problems the courts are compounding exponentially,'' Faulk said.

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RICHARD FAULK, HOLLINGSWORTH LLP

''CERCLA settlement jurisprudence is about as improvisatory as one can imagine,'' Faulk said, citing differing approaches taken by the circuits for calculating Superfund settlement liability in contribution claims against non-settling parties.

''Is CERCLA uniform or nebulous?'' Faulk asked. ''It requires different negotiating skills in different circuits, and with no guidance from the Supreme Court.''

He added that the calculus was made more challenging when the Ninth Circuit held in *Arizona v. City of Tucson*, 761 F.3d 1005 (9th Cir. 2014), that state-led settlements are entitled to less deference than those handled by the EPA (29 TXLR 684, 8/7/14).

Divisibility Issues Percolate. Kirsten Nathanson, of Crowell & Moring in Washington, D.C., said divisibility questions also percolated in 2015, particularly in long-running litigation over polychlorinated biphenyl contamination in the Lower Fox River in Wisconsin.

She referred to a series of rulings in *United States v. NCR Corp.*, E.D. Wis., No. 10-cv-00910, over the divisibility of liability in the case (30 TXLR 1024, 10/22/15).

''The key issue in the *NCR* case is how we define harm and then determine how it is to be apportioned,'' Nathanson said.

''Why do we have this litigation? It's because the price tag kept going up and up and up,'' Nathanson said.

NCR's willingness to challenge the federal government on liability is itself noteworthy, Nathanson said, because ''the litigation might give some leverage to those in settlement negotiations with the government.''

Arranger Liability In the Air. Christopher Bell, of Greenberg Traurig's Houston office, cited as significant a ruling by the Eastern District of Washington that a Canadian smelter has Superfund ''arranger'' liability for airborne pollutants deposited in Washington State (30 TXLR 40, 1/8/15).

That ruling (*Pakootas v. Teck Cominco Metals Ltd.*, 2014 BL 367498, E.D. Wash., No. 04-cv-00256, 12/31/14), which is on appeal to the Ninth Circuit, has drawn significant amicus curiae interest from industry, the Justice Department and the Canadian government (30 TXLR 1025, 10/22/15).

''The [industry] amici are concerned that once you're in a CERCLA case, it's very hard to get out,'' Bell said. ''In this situation, you've got the contaminants in the air quite a while, and they crossed the border. But what if they go 50 feet or 75 feet?''

But Bell said the CERCLA question shouldn't obscure other bases of liability in aerial emission cases.

''The weight of the case law is that you can have air emissions coming out of your smokestack in full compliance with your Clean Air Act permit, but that may not stop your neighbor from bringing a common law nuisance action against you. That may be the bigger issue,'' Bell said.

The webinar was hosted by the American Law Institute in Washington, D.C.

To contact the reporter on this story: Steven M. Sellers in Washington at ssellers@bna.com.

To contact the editor responsible for this story: Peter Hayes at phayes@bna.com.

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