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Case Study: City Of Stockton V. BNSF Railway

Law360, New York -- On June 28, the Ninth Circuit issued a significant decision addressing recurring issues for environmental lawyers. Redevelopment Agency of the City of Stockton v. BNSF Railway Co., 643 F.3d 668 (9th Cir. 2011) ("City of Stockton") fills previous gaps in the case law regarding the applicability of the Comprehensive Environmental Response, Compensation and Liability Act, California nuisance law and "discharger" liability under California Water Code Section 13304 where a property redeveloper acts only passively and without knowledge of an existing nuisance.

City of Stockton clarifies that CERCLA liability should only be imposed on actual title-holders of land ("owners") or those whose activities directly related to the disposal of the hazardous substances ("operators"), not on those parties who did not hold title at the time of disposal and whose activities were unrelated to the initial release of hazardous substances into the environment.

With respect to nuisance liability and discharger liability under Section 13304, the Ninth Circuit held that even if a party's conduct is a "but-for cause" of contamination on the property that is not enough to impose liability. Rather, the party must have either directly spilled or released the contaminants into the environment or affirmatively and knowingly caused or permitted the contamination to migrate.

Facts

In City of Stockton, two railroad companies entered into an agreement with the state of California in 1968 to complete certain activities on state-owned property, which included grading and drainage improvements to the property and installing a French drain beneath the roadbed. The railroads laid track on the property and agreed to maintain the track, roadbed and drainage in exchange for a right-of-way across the property from the state.

The railroads began running trains over the track in 1970. In 1983, the state transferred the property's title to the railroads and in 1988 the railroads transferred title to the Redevelopment Agency of the City of Stockton.

In 2004, during excavation as part of a commercial redevelopment, petroleum contamination was discovered in the soil along the path of the french drain and in the groundwater beneath the property. It was confirmed that the contamination likely was released from a nearby bulk petroleum facility where there had been several spills in the early 1970s.

Nevertheless "[i]t [was] undisputed that the french drain [designed and constructed by the railroads] served as a preferential pathway through which the petroleum contamination migrated underground onto the Property." Id. at 672. The agency eventually spent approximately $1.3 million to remove the contaminated soil and perform other remediation work at the property. The agency brought an action for cost recovery and an injunction against the Railroads in California state court, and the action was removed to the United States District Court for the Eastern District of California. Id.

The agency alleged that the railroads were liable for the clean-up costs under California's Polanco Redevelopment Act as well as the common law of nuisance. In ruling on the parties' cross-motions for summary judgment, the district court concluded that the railroads were responsible for the contamination under California nuisance law and the Polanco Act's incorporation of California Water Code Section 13304, but not under the Polanco Act's adoption of CERCLA's liability provisions.[1] Both the railroads and the agency appealed the district court's ruling.

The Ninth Circuit reversed the district court's determination regarding both nuisance and Section 13304 discharger liability, finding that the railroads were not liable under either legal theory. Similarly, it affirmed the district court's holding that the railroads were not owners of the property at the time of any disposal of hazardous substances and therefore were not liable under CERCLA.

Railroads Not Liable Under California Nuisance Law

The Ninth Circuit rejected the agency's claim that the railroads' activities on the property made them liable under California nuisance law. The railroads could be liable only if they either created or assisted in the creation of the nuisance, or if they "acted unreasonably as possessors of the Property in failing to discover and abate the nuisance." Id. at 673.

The court rejected the trial court's analysis that the railroads had created or assisted in the creation of a nuisance simply because the french drain was a but-for cause of the contamination reaching the property. "[S]uch passive but-for causation" is insufficient for nuisance liability to attach. Id. at 674. According to the Ninth Circuit, "[u]nder California law, conduct cannot be said to 'create' a nuisance unless it more actively or knowingly generates or permits the specific nuisance condition." Id.

Here, the railroads "did not spill the petroleum or otherwise release it into the environment" and did not "affirmatively direct its flow or knowingly permit it to migrate into the french drain and onto the Property." Id. The court concluded that it would "decline to hold that an otherwise innocent party who builds or installs a conduit or structure for an unrelated purpose which happens to affect the distribution of contamination released by someone else is nonetheless liable for 'creating or assisting in the creation' of a nuisance." Id. at 675.

The Ninth Circuit also addressed whether the railroads could be liable for failing to abate a nuisance, noting that under California law "[p]ossessors of land can be liable for a nuisance on that land even when they did not create the nuisance." Id. The court stated that the proper inquiry was "whether the Railroads knew or should have known of the contamination." Id. The "should have known" inquiry centered on whether the railroads had a duty to inspect for the contamination and whether the contamination would have been discoverable by a reasonable inspection.

The court rejected the agency's argument that the railroads had a duty to inspect the subsurface of the property because they should have known that the petroleum-storing activities of their neighboring landowners might have served as a source of contamination on their property, reasoning that "it is untenable that a possessor of land, simply because his neighbor is a potential polluter, thereby becomes responsible for investigating the subsurface in order to discover and control the neighbor's pollution." Id. at 676. Because there was no basis to conclude that the railroads knew or should have known of the contamination, they were not liable for failing to abate a nuisance.

Railroads Not Dischargers Under California Water Code Section 13304

The Ninth Circuit relied on its nuisance analysis to address whether the railroads could be liable as "dischargers" under Water Code Section 13304, stating that "Section 13304 should be construed harmoniously with the law of nuisance." Id. at 677. The court questioned the district court's characterization of the contamination from the French drain as the relevant "discharge," since the French drain "merely acted as a conduit for the waste that had been initially released into the environment at [the neighboring petroleum storage facility]." Id. at 677.

The railroads, of course, had no involvement with the initial discharge of petroleum at the neighboring site. The court reasoned, however, that even if the emission of contamination from the French drain was the relevant discharge, the railroads would still not be liable under Section 13304. "Just as but-for causation is insufficient to impose liability for a nuisance, it is insufficient to impose liability for discharge under section 13304." Id. at 677.

Applying the principle that the words "causes or permits" under Section 13304 were not intended "to encompass those whose involvement with a spill was remote and passive," the court reasoned that "[t]he Railroads' involvement with the petroleum spill was not only remote, it was nonexistent; and their involvement with the emission of contamination from the french drain was entirely passive and unknowing." Id. at 678.

Because the railroads "engaged in no active, affirmative, or knowing conduct with regard to the passage of contamination through the french drain and into the soil," the court held that the railroads did not "cause or permit" a discharge under Section 13304. Id.

Railroads Not Liable As "Owners" or "Operators" Under CERCLA

Finally, the court addressed whether the railroads could be liable as "owners" under CERCLA — an independent basis for liability under California's Polanco Act. As a threshold matter, the court pointed out that the state had not transferred title to the property to the railroads until 1983, well after the petroleum release occurred in the 1970s. The railroads, therefore, did not hold title to the property at the time it became contaminated.

The court rejected the agency's claim that the doctrine of equitable conversion made the railroads equitable owners of the property when they entered into an agreement to use and maintain it in 1968. The court reasoned that the 1968 agreement did not constitute a valid land sales contract because it did not sufficiently describe the extent of any property to be transferred from the state to the railroads.

Further, the 1968 agreement did not indicate that the state intended to convey a fee simple interest to the railroads. Because of this, the railroads could not be CERCLA "owners" under the equitable conversion theory. The court also rejected the agency's argument that the railroads were CERCLA "owners" of the property because they possessed an easement across it by virtue of the 1968 agreement. The Ninth Circuit affirmed its precedents holding that "[h]aving an easement does not make one an 'owner' for purposes of CERCLA liability." Id. at 679.

Additionally, although the issue had not been raised on appeal, the Ninth Circuit concluded that the district court had properly held that the railroads were not liable as "operators" under CERCLA, as they "did not 'manage, direct, or conduct operations specifically related to [the] pollution, that is, operations having to do with the leakage or disposal of the hazardous waste.'" Id. at 680, citing United States v. Best Foods, 524 U.S. 51, 66-67 (1998). This statement suggests that the Ninth Circuit will require a direct tie between a party's activities and the release of hazardous substances into the environment in order to establish "operator" liability.

Significance of City of Stockton

City of Stockton is significant for practitioners in California because of its interpretation of Water Code section 13304. It clarifies that discharger liability under Section 13304 should track California nuisance law. Prior to this decision, no case law or State Water Resources Control Board decision had addressed the question of discharger liability in similar factual circumstances. By adopting a narrow interpretation of nuisance and discharger liability, the decision will assist those whose development or redevelopment activities merely redistribute or redirect contamination caused by others.

The court's rejection of "but-for cause" of contamination as a basis for nuisance liability should be welcome relief to many in the property development business. Essentially, a redeveloper must either directly release the contaminants into the environment or actively, affirmatively and knowingly spread the contamination to be liable. In other words, the court's reasoning would seem to exclude from liability those who unknowingly engaged in activities that had the effect of bringing contamination to a property or otherwise distributed existing contamination to new areas on the property.

In City of Stockton, the Ninth Circuit acknowledged that the petroleum contamination would never have reached the property at issue were it not for the railroads' installation of the French drain. Even so, the railroads were not liable because they had nothing to do with the initial petroleum spill and their involvement with the emission of contamination from the French drain was passive and unknowing.

If the railroads, whose activities actually brought the contamination to the property at issue, were held to not be liable, then developers of already contaminated property should not be liable for activities that unknowingly spread or distribute existing contamination, caused by others, throughout a property.

Finally, with respect to CERCLA liability, City of Stockton clarifies that the terms “owner” and “operator” will be strictly construed in the Ninth Circuit. A non-title holder user of land who engages in activities wholly unrelated to the disposal of hazardous substances will not be considered an “owner” or “operator” under 42 U.S.C. § 9607(a).

The Ninth Circuit summarized its reasoning, stating that CERCLA holds liable (1) the passive title owner of land who acquiesces in another’s discharge of harmful pollutants on his property and (2) the active (or negligent) operator of the facility who holds only a possessory interest but is in fact responsible for the disposal of the hazardous substance.

A user of land who does not hold title to the property at the time of disposal and is not responsible for the actual release of the hazardous substance into the environment (even if its activities were a “but for” cause of the hazardous substance reaching the property) will not be liable as an “owner” or “operator” under CERCLA.

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[1] Under the Polanco Act, a redevelopment agency may clean up contaminated property and then seek reimbursement from others, including those who meet the definition of “discharger” under Water Code Section 13304 or those who meet the definition of “responsible party” under Section 9607(a)(2) of CERCLA. See Cal. Health & Safety Code § 33459(h).