ENERGY & ENVIRONMENT

Cleaning Up Their Act

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The New Jersey District Court's July 22 order in *United States v. Sensient Colors, Inc.*, 2009 U.S. Dist. LEXIS 62728, took the unusual step of ordering the deposition of a former regional director of the Environmental Protection Agency. High-ranking government officials are generally not subject to deposition, but the extraordinary circumstances of the case and the strong evidence of impropriety by EPA officials caused the court to deem the deposition appropriate. The decision reminds us that the public's trust in government officials, which has already been bruised as of late, will not tolerate government improprieties. Today, accountability by our public officials is vital to our system of justice, and if credible allegations of impropriety arise, then the courts must be willing to allow an appropriate investigation to preserve our confidence in government and particularly in our courts.

The EPA filed a cost recovery action under the Comprehensive Environmental Response, Compensation and Liability Act, commonly known as Superfund, against Sensient in March 2007. The act allows the EPA to pay for the cleanup of hazardous waste sites and then pursue reimbursement from the parties (or their successors) that created the waste. The EPA alleged that Sensient was responsible for the "removal costs" that it had incurred in cleaning up the abandoned General Color site in Camden, N.J. Sensient acquired the Warner-Jenkinson Company, the former site owner, in 1984. Warner-Jenkinson had manufactured inorganic and organic pigments and dyes at the site. Lead and other hazardous substances, including chromium, cadmium, mercury and benzo(a)pyrene, contaminated the site and threatened to contaminate the groundwater. The EPA began work at the site in 1998 and spent more than $16 million to excavate and remove tanks and structures and over 125,000 tons of contaminated soil. At the same time, Camden engaged in a major redevelopment effort.

The EPA styled its claim against Sensient as a petition to recover its costs for a "removal action," a response appropriate for sites requiring immediate attention because of threats to public health. The Comprehensive Environmental Response, Compensation and Liability Act has a statutory time and dollar limit on removal actions: $2 million or one year in duration, absent certain limited exceptions (that did not apply to this cleanup). A "remedial action," a different type of cleanup response under the act, does not have these limits, but it imposes much greater procedural and substantive requirements for cost recovery. Sensient charged that the EPA had deliberately mischaracterized its response as a removal action, when it should have been a remedial action following all the concomitant rules, in order to force Sensient to pay for the redevelopment of the site and the impoverished city of Camden. In an earlier order in the case, the district court had approved Sensient's use of this mischaracterization as an affirmative defense.

In an ordinary case, Sensient would not have been able to depose the EPA officials involved, who in this matter included Jane Kenny, the former Region II EPA director with jurisdiction over the General Color cleanup response, and David Rosoff, the EPA on-scene coordinator. Certainly Kenny, and likely Rosoff, would have qualified for deposition immunity under the Morgan doctrine, named for a 1941 Supreme Court case that protected high-ranking government officials from having to submit to deposition. But two documents uncovered in discovery changed the situation dramatically.

An e-mail written by Rosoff became the "smoking gun," in the words of the court, that pushed this case into the realm of extraordinary circumstances where *Morgan* does not apply. Rosoff wrote that the response at the General Color site was really a remedial action and that he had in fact used removal funds to pay for the cleanup. His "secret [wa]s to spread it out and they don't realize how much you're spending. … There is no real [$2 million] limit so I have learned." His e-mail made specific reference to support from "Jane" as having been crucial to the success of this scheme. Kenny herself had written a letter to a Camden city official explaining that the contamination at the General Color site was not an immediate threat, but that if Camden took action to demolish buildings at the site, it *would* become a threat and the EPA would take action. She then stated that she looked forward to assisting in the revitalization of Camden. Kenny was also responsible for approving the EPA's expenditures at the site. After the Rosoff e-mail and the Kenny letter came to light in discovery, Sensient sought their depositions.

Sensient argued that those communications revealed that these two EPA officials had personal knowledge about a key defense, which made their depositions necessary. The district court agreed, reversing an earlier order by a magistrate judge. The court reasoned that Sensient would need an official of Kenny's status in order to understand the strategic decisions made regarding the General Color cleanup and associated costs. Together with the credible assertions of bad faith made based on the e-mail and letter, the court found that Sensient needed Kenny's deposition to explore its defense that the EPA had improperly characterized the response costs.

After finding that Sensient could take Kenny's deposition, the court had no trouble in ordering that Rosoff also submit to deposition. His status as the site coordinator and extensive involvement with the site, as well as his statements in the e-mail, made him "uniquely situated" to give Sensient relevant information. The court reasoned that Rosoff's and Kenny's personal knowledge about the cost recovery action and the EPA decision to call it a "removal action," despite the statutory restrictions, was essential to Sensient's defense. The court stressed that it was the personal involvement of Kenny and Rosoff in the alleged scheme to overcharge Sensient for the General Colors cleanup, and Sensient's inability to obtain information about the e-mail and letter from an alternative source, that eliminated the Morgan protections. The court concluded that the Morgan doctrine did protect former EPA Administrator Christine Todd Whitman, whose deposition Sensient had also sought, because Sensient could not connect her personally with the alleged scheme.

The court did not deny the protections of *Morgan* lightly. The court explained the purpose in shielding high-ranking government officials from deposition: The judiciary recognizes an interest in respecting the executive decision-making processes. Public disclosure of the internal deliberative processes of government officials could stunt the flow of communication and ideas. If any party to litigation could depose a government official at whim, officials would have no time for their public service responsibilities. Further, the idea of being deposed for every decision made might be enough to keep qualified people from even pursuing a government service career.

But the court cautioned that extraordinary circumstances, such as the misconduct Sensient argued had taken place in this case, would trump the protections of *Morgan*. The court found that where an official possesses personal knowledge or was personally involved in conduct that could form the essential basis to a party's claim or defense, and the evidence is not available through less burdensome or alternative sources, *Morgan* must yield. Allegations of improper motive, like misusing the EPA's power to charge property owners with Comprehensive Environmental Response, Compensation and Liability Act response costs, can trigger the extraordinary circumstances that overcome Morgan's protection.

The *Sensient* decision teaches that public officials who act egregiously and improperly are not immune to answering for their actions in depositions or other discovery. If Sensient's allegations regarding Kenny's and Rosoff's conduct are proved to be true, then these officials should be held accountable for any impropriety. Federal officials are not immune to critique, and if evidence supports a finding that improper actions have occurred, then there must be consequences. The *Morgan* doctrine provides officials with a heightened level of protection from scrutiny that private persons do not enjoy. That privilege brings the responsibility not to abuse government power. When officials commit an egregious breach of the public trust, it is only fair that the wronged party have an opportunity to investigate. The benefit of the doubt afforded to public officials must be tempered by a recognition that these same officials must be subject to consequences when there is credible doubt that their actions are for the public's benefit. These principles may be especially apt for an agency charged with protecting public health and the natural environment.

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