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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Role Of Contracts, Ownership In AISLIC Trial And Beyond

Law360, New York (June 08, 2012) -- The final phase of a bench trial just concluded before Judge A. Howard Matz in the Central District of California and is under submission. The case is a rarity these days — a Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) matter tried to its conclusion — and therefore stands to create important precedent, particularly as to the government's allocation of liability when its own contractor's actions led to contamination at a site.

The site in question, located in Santa Clarita, Calif., was home to operations of the Bermite Powder Co. and, later, Whittaker Corp. after it acquired Bermite.[1] Bermite's production at the site was overwhelmingly dedicated to fulfilling its duties to the government, with over 90 percent of its production from 1954 to 1987 devoted to the United States.[2]

Among those products were ammunition and rocket motors and, in fulfilling its work for the government, Bermite used ammonium perchlorate, a significant fact because perchlorate now contaminates the site.[3]

The United States' liability in the matter came under scrutiny pursuant to its own contracts or agreements dated between the late 1960s and mid 1980s.[4]

Of interesting note, if not central to the present subject matter, is that many of the contracts addressing Bermite's production of rocket motors for the government "have been lost ... [] at least in part" because of the United States' own document retention policies.[5]

Apparently, after just five to seven years, it is the government policy to destroy contracts.[6] In fact, the government's own Rule 30(b)(6) witness testified to this fact.[7]

Thus, for example, of the contracts concerning Bermite's production of Chaparral and Sidewinder rocket motors for the United States, the earliest dated contract in existence is from 1971.[8]

These actions led to a trial of two consolidated actions brought by American International Specialty Lines Insurance Co. (AISLIC) against the United States, alleging, among other things, "that the United States owned the facilities — in particular the equipment and containers — at which hazardous substances were initially disposed of" and "that the United States arranged for the disposition of hazardous substances at these facilities."[9]

The substances at issue include perchlorate, depleted uranium and other solvents.[10]

Key to the case has been Whittaker's role as a government contractor during the time period in question and, more importantly, the role of those contracts between the United States and Whittaker in the allocation phase of the trial, which has yet to be decided.

AISLIC argued in its 2010 memorandum of contentions of fact and law that government contracts covered "[m]uch of the equipment connected to the discharge of perchlorates."[11]

In its briefing, AISLIC points to a California appellate court case in which the court held that the term found in the government contracts "vests absolute title in the United States over parts, materials, inventories, work in progress, special tooling and nondurable tools."[12]

Plaintiff AISLIC further argued that the United States not only could dictate disposal methods at the site, but it also owned the final products, whether they ultimately were viable or not, as well as the tools and propellants used to make those products.[13]

And — most importantly for both AISLIC and future litigants — the government owned the perchlorate and solvents, including trichloroethylene (TCE).[14]

The government, of course, disagreed. It contended in its own memorandum of contentions of fact and law pursuant to Local Rule 16-4 that there was evidence that Whittaker purchased the ammonium perchlorate and solvents, that Whittaker "owned and maintained the site" and that the contracts were not "for the sole purpose of the treatment or disposal of hazardous waste as required under the traditional arranger theory."[15]

Moreover, the government's Rule 30(b)(6) witness, Theodore Tamada, opined in his 2010 revised declaration that the progress payments clause "does not make the Government the owner of a contractor's waste or make the Government responsible via contract for the waste that contractor generates at their facility."[16]

Tamada later testified at trial that it was not only his experience that the relevant contracts with which he had dealt did not intend to transfer ownership of waste to the government, but that he had never experienced a contractor claiming that waste ownership was transferred by means of the progress payment provision.[17]

The court, in concluding there was owner liability against the United States, noted that its determination fell in line with other federal courts' decisions and — significantly — the government's own position in other proceedings.[18]

Indeed, in concluding that the United States owned the rocket motors under assembly at the Bermite site pursuant to the contracts[19], the court observed that "[t]he United States has suggested that the Title Vesting Clause may give the United States only a security interest in the inventory. However, in other cases, the United States has consistently argued that such provisions vest the Government with ownership."[20]

The court then noted that the U.S. Court of Appeals for the Seventh Circuit and bankruptcy courts have both applied a "literal reading of the Title Vesting Clause."[21] The government's cited precedent, on the other hand, was "squarely the minority view on title-vesting clauses."[22]

Taking the next step, the court concluded that: (a) a disposal of a hazardous substance — namely perchlorate — occurred from a government-owned facility when each rocket motor was test-fired and concluded that (b) the government was "liable as an owner under 42 U.S.C. § 9607(a)(2)."[23]

The court also declined to see it the government's way with respect to ownership of the contaminating waste.

Among other things, the court concluded that the government owned the perchlorate because, considering the title-vesting provisions included in some of the contracts, "[o]nce perchlorate was purchased and allocated to one of the rocket motor contracts, the United States held absolute title to and an ownership interest in this 'material'" and "[o]nce the perchlorate was inserted within one of these engines, the United States owned the perchlorate."[24]

Moreover, the court determined that the government arranged for disposal of perchlorate by means of both test-firing and through the rejection of certain rocket engines.[25] The United States was found to have arranger liability, at least in part, "because it intentionally arranged for the disposal of a hazardous substance."[26]

In coming to its ultimate conclusion on arranger liability, the court wrote:

> "By virtue of the title-vesting provisions in its contracts for the manufacture of new rocket engines, the United States owned the 'materials' allocated to the contracts. Once perchlorate was purchased and allocated to one of the rocket motor contracts, the United States held absolute title to and an ownership interest in this 'material.'"[27]

The court, however, seemed intent to influence a broader swath of cases than just the one before it. Indeed, the court noted that the government's position would run counter to public policy, as it would only benefit polluters who could then essentially contract out of liability.[28]

In 2012, the government filed an expert declaration, executed in 2010, in which that expert stated that "[w]ith respect to the Degree of Involvement Element — Ownership of materials causing contamination," the United States should be allocated just a "minimal" share, in his opinion.[29] He attacked AISLIC's expert's focus on the government contracts in allocating contamination to the United States.[30]

Even so, the government's own expert writes in a 2009 report that, "[i]n [his] view, the elements most relevant to the parties' respective degrees of involvement include the following: ... Ownership of materials causing contamination."[31]

The expert also admits that the "[o]wnership of materials causing contamination" "is particularly relevant if a customer supplied materials causing contamination and continued to own them through the work in progress."[32]

However, with at least some liability determined — and the significance of the government contracts acknowledged and employed by the court — only allocation remains to be considered.

Given that the government has been found to have both owner and arranger liability due, at least in part, to its ownership of the rocket motors and perchlorate pursuant to the contracts, how much of the cleanup costs must the United States pay for the contamination that resulted from the disposal of that substance? Who now "owns" the contamination?

With so few CERCLA cases tried in various jurisdictions, the answer to the question currently under submission stands to weigh heavily on litigation strategy in cases across the nation.

As expected, both sides had their positions, their witnesses and their rebuttals. Only the court now will have its say.

--By Jeffrey D. Dintzer and Dana Lynn Craig, Gibson Dunn & Crutcher LLP

Jeffrey Dintzer is a partner and Dana Craig is an associate in Gibson Dunn's Los Angeles office.

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[1] Findings of Fact and Conclusions of Law (Liability Phase; Post-Trial), see generally at 1-2, Am. Int'l Specialty Lines Ins. Co. v. United States, No. 09-01734 (C.D. Cal. June 30, 2010), Dkt. 179.

[2] Id. at 2:23-24.

[3] Id. at 1:7-8, 3:4-23.

[4] Id. at 3:1-3.

[5] Id. at 7:6-11.

[6] Id.at 7:7-9.

[7] Reporter's Transcript of Proceedings at 716:13-21, Am. Int'l Specialty Lines Ins. Co. v. United States, No. 09-01734 (C.D. Cal. Mar. 11, 2010), Dkt. 162.

[8] Findings of Fact and Conclusions of Law (Liability Phase; Post-Trial) at 7:12-15, Am. Int'l Specialty Lines Ins. Co. v. United States, No. 09-01734 (C.D. Cal. June 30, 2010), Dkt. 179.

[9] Plaintiff American International Specialty Lines Insurance Company's Memorandum of Contentions of Fact and Law at 1:1-13, Am. Int'l Specialty Lines Ins. Co. v. United States, No. 09-01734 (C.D. Cal. Jan. 19, 2010), Dkt. No. 93.

[10] Id. at 1:4-7.

[11] Id. at 5:27-6:2.

[12] Id. at 6:2-5 (quotation omitted).

[13] See, e.g., id.at 8:18-20, 9:26-10:2, 12:19-22, 13:20-14:4.

[14] E.g., id. at 14:14-21.

[15] Defendant United States of America's Memorandum of Contentions of Fact and Law Pursuant to Local Rule 16-4, e.g., at 6:10-15, 7:5-9 (quotation omitted), 10:13-16, Am. Int'l Specialty Lines Ins. Co. v. United States, No. 09-01734 (C.D. Cal. Jan. 19, 2010), Dkt. No. 88.

[16] Revised Declaration of Theodore Tamada in lieu of Direct Testimony at ¶ 12, Am. Int'l Specialty Lines Ins. Co. v. United States, No. 09-01734 (C.D. Cal. Mar. 1, 2010), Dkt. 148.

[17] Reporter's Transcript of Proceedings, at 756:22-757:12, Am. Int'l Specialty Lines Ins. Co. v. United States, No. 09-01734 (C.D. Cal. Mar. 11, 2010), Dkt. 162.

[18] Findings of Fact and Conclusions of Law (Liability Phase; Post-Trial) at 42:16-25, Am. Int'l Specialty Lines Ins. Co. v. United States, No. 09-01734 (C.D. Cal. June 30, 2010), Dkt. 179.

[19] Id. at 44:8-10.

[20] Id.at 42:16-19.

[21] Id.at 42:19-25 (citing cases).

[22] Id. at 43:14-15 (quotation omitted).

[23] Id. at 45:1-5, 46:3-5.

[24] Id. at 48:1-10.

[25] Id. at 48:11-18.

[26] Id. at 50:3-5.

[27] Id. at 48:1-5.

[28] Id. at 49:23-50:2.

[29] Declaration of Matthew Low in lieu of Direct Testimony at ¶ 15, Am. Int'l Specialty Lines Ins. Co. v. United States, No. 09-01734 (C.D. Cal. Mar. 12, 2012), Dkt. 239.

[30] Id. at ¶¶ 20-21; see, e.g., id. at Expert Report on Allocation with Respect to the Whittaker-Bermite Site at 12 (Aug. 24, 2009) (attachment to Low Declaration).

[31] Declaration of Matthew Low in lieu of Direct Testimony at Expert Report on Allocation with Respect to the Whittaker-Bermite Site at 19 (Aug. 24, 2009) (attachment to Low Declaration), Am. Int'l Specialty Lines Ins. Co. v. United States, No. 09-01734 (C.D. Cal. Mar. 12, 2012), Dkt. 239.

[32] Id. at 22.

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