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Without Actual Collection of Damages, Mere CERCLA Liability Not Barred as Double Recovery, Says Ninth Circuit Ground Water Quality Standards

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On April 15, in *Santa Clarita Valley Water Agency v. Whittaker Corp., et al.*, No. 22-55727, slip op., -- F.4th – (9th Cir. 2024) (SCVWA), the U.S. Court of Appeals for the Ninth Circuit (Court of Appeals) held that in a matter where multiple sources of liability for environmental costs were at issue, a mere finding of liability under the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) did not amount to a barred double recovery because there had not yet been an actual multiple recovery of the same damages. Accordingly, where the trial court had denied CERCLA liability using the potential for a double recovery as its basis, the Court of Appeals reversed and remanded for further proceedings.

Case Background

This case arises from volatile organic compound (VOC) contamination in the Saugus Formation, which is a source of potable water in the area of the Santa Clarita Valley in Southern California. Plaintiff the Santa Clarita Valley Water Agency (SCVWA) is a public body responsible for supplying potable water from the Saugus Formation (among other sources) to its customers in Northern Los Angeles. The VOC contamination at issue is primarily trichloroethylene and perchloroethylene, and it was allegedly caused by a number of potential industrial sources, including the historical operations of defendant Whittaker Corp. (Whittaker) and its predecessor landowners.

The SCVWA's predecessor agency discovered the VOC contamination in or around 1997, when it reviewed samples of groundwater extracted from two specific wells that drew water from the Saugus Formation. The wells were initially taken out of service, but the California Division of Drinking Water allowed the wells to reopen after VOC treatment facilities were installed. In addition to the treatment facilities, however, the SCVWA was required to blend the treated water with contaminant-free water at the point in the treatment process at which VOCs were non-detect. Pursuant to an agreement later negotiated between the SCVWA and Whittaker, Whittaker was to cover the cost of that treatment and pay for any necessary replacement water.

Later, in or around 2010, additional VOC contamination was found at a separate well. The SCVWA and Whittaker entered into a new agreement in 2015, which required Whittaker to install a treatment facility at the additional well and restore the potable water supply in accordance with applicable regulations. As of the date of the Court of Appeals' opinion, that well had not yet been restored for use as a source of potable water. It is instead used as a containment and treatment well. To meet its water supply needs for that well, the SCVWA has been required to purchase water for blending. Whittaker apparently covered the cost of that water from 2012 to 2017, but from 2017 to the date of the opinion, the cost was covered by the SCVWA.

Yet more VOC contamination was found at another well in or around 2012, and while the levels were below the then-existing maximum contaminant levels (MCLs), that well was immediately taken out of commission. Since the discovery of that contamination, the SCVWA has purchased replacement water to meet its supply needs. In 2018, the VOC contamination at this additional well was discovered to have risen above the applicable MCLs. The discovery of those exceedances triggered the SCVWA to commence litigation against Whittaker.

In the litigation, the SCVWA pled a number of counts against Whittaker, alleging multiple violations of state and federal laws and seeking various forms of relief, including recovery of damages and injunctive relief. Among other potential theories of liability, the SCVWA asserted claims against Whittaker for common law negligence, trespass, public nuisance, and private nuisance, as well as cost recovery, contribution, and injunctive relief claims under CERCLA and the federal Resource Conservation and Recovery Act (RCRA).

After an 11-day trial, the jury returned a verdict finding Whittaker liable under the common-law theories and awarding the SCVWA damages for past harm and restoration costs. However, the damages were offset by the jury's determination that the SCVWA and other third parties were also negligent and that the SCVWA had failed to mitigate damages.

After the jury trial, the trial court issued Findings of Fact and Conclusions of Law with respect to the statutory claims being tried by the bench. The trial court denied the SCVWA's RCRA claim because the risk of harm from the migration of VOCs was not "imminent and substantial" as a result of prior remediation and existing containment, monitoring, and government oversight. As to CERCLA, the trial court held that the SCVWA had incurred \$675,000 for investigation, permitting, and design, and it allocated the majority of those costs to Whittaker consistent with the jury's apportionment of fault. But the trial court held that the SCVWA could not establish CERCLA liability against Whittaker for the costs it incurred for water blending and replacement water because recovery of such costs would be duplicative of the jury award and thus precluded by CERCLA under 42 U.S.C. § 9614(b) (barring double recovery of damages). The trial court also held that the SCVWA was not entitled to a finding of CERCLA liability because it had shown that the replacement water costs were consistent with the National Contingency Plan (NCP). The trial court made a number of other ancillary findings related to, among other things, prejudgment interest, and entered a final judgment in the SCVWA's favor. Both Whittaker and the SCVWA appealed several of the trial court's findings.

Analysis

After disposing of Whittaker's three grounds for appeal (which included challenges to (1) the trial court's decision to allow the SCVWA to assert restoration costs in its theory of damages after discovery had closed; (2) the jury's reliance on the groundwater treatment facilities as a measure of damages for the SCVWA's restoration costs claim; and (3) the reasonableness of the total restoration costs award by the jury), the Court of Appeals turned to the SCVWA's appeal of the trial court's rulings on RCRA and CERCLA. The Court of Appeals upheld the trial court's ruling on RCRA injunctive relief because "any threat posed by Whittaker's contamination is not imminent and substantial" as a result of the extensive cleanup performed by Whittaker under governmental oversight.

As to CERCLA, after reviewing the statute's general principles and noting that the majority of the elements of CERCLA liability are not contested, the Court of Appeals addressed the double recovery bar. The trial court denied CERCLA liability for the blend and replacement water costs because the SCVWA had sought "just over \$2.9 million in blend water costs . . . and just over \$4.1 million in replacement water costs" and the jury had returned a verdict of \$7 million for past damages. In light of that jury award, the trial court concluded that an additional finding of CERCLA liability would be a double recovery. Yet the Court of Appeals noted that while the trial court was correct that CERCLA bars a party from "receiving compensation for the same costs," it had misconstrued the SCVWA's request for a CERCLA liability finding. According to the Court of Appeals, the SCVWA had not sought an award of damages under CERCLA but rather sought a holding that Whittaker was liable under CERCLA.

Prior to SCVWA, the Court of Appeals had not had an opportunity to clarify the reach of the CERCLA double recovery bar. In resolving this appeal, the Court of Appeals formally held that CERCLA "does not bar a finding of liability as long as the [trial] court fashions the relief such that the plaintiff will not recover double compensation." In so holding, the Court of Appeals noted that other courts had done just that. In *Price v. U.S. Navy*, 818 F. Supp. 1326, 1332-33 (S.D. Cal. 1992), *aff'd* 39 F.3d 1011 (9th Cir. 1994), the trial court found various parties to be liable under CERCLA but barred any recovery by the plaintiffs because they had already received compensation from the State of California and a settlement, which negated their damages.

The Court of Appeals also noted the potential importance of a CERCLA liability finding, even if there is no immediate recovery of damages. Such a holding "ensures that a party can recover [past response costs] if the damage award otherwise remains unsatisfied . . ." It also "provides a party access to other remedies under CERCLA that it may be entitled to in the future," such as a mandatory declaratory judgment on liability for any future costs, as set forth in 42 U.S.C. § 9613(g)(2).

For those reasons, and after holding that the blended water costs satisfied the NCP element of CERCLA liability but the replacement water costs did not, the Court of Appeals reversed the trial court's decision denying CERCLA liability for the SCVWA's blended water costs and remanded for further proceedings.

Conclusion

As most litigators know, there are critical differences between a liability holding and an actual recovery of damages. Regardless of whether damages are ever collected, a finding by a court that a party is liable can have significant long-term implications. That is particularly so with CERCLA, where—as noted by the Court of Appeals—a liability finding can, among other things, drastically reduce the time and effort needed to secure compensation for future costs that are related to the same contaminated site. As a result, even where damages might be collected under a different theory of liability, or potentially where damages may not be recovered at all, plaintiffs should carefully consider whether pursuing CERCLA liability is a sensible strategic maneuver. If you have any questions about the Court of Appeals' holding, CERCLA liability, contribution, and cost recovery claims, please contact the author of this client alert.

Contact

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