

### Seventh Circuit Superfund Decision

On December 19, 2012, the United States Court of Appeals for the Seventh Circuit reversed the United States District Court for the Southern District of Indiana and reinstated an action brought by the Trustees of the Third Site Trust Fund to compel the property owners and their insurance carrier to pay toward the ongoing cleanup of the Third Site located in Boone County, Indiana. The cleanup is pursuant to an Administrative Order on Consent issued by the United States Environmental Protection Agency (EPA) in 2002 under the Comprehensive Response, Compensation and Liability Act (CERCLA - also known as the Superfund statute). The action by the Trustees was brought under CERCLA and the Indiana Environmental Legal Actions (ELA) statute. Norman W. Bernstein of N.W. Bernstein & Associates, LLC (Rye Brook, N.Y.) handled the CERCLA issues for the Trustees and George Plews and Fred Emhardt of Plews Shadley Racher & Braun (Indianapolis, IN) handled the ELA part of the case for the Trustees.

In reinstating the CERCLA claim for costs incurred in carrying out the 2002 Order, the Court clarified the rights of companies that are performing Consent Orders to recover under CERCLA 107(a). It rejected arguments by the property owners that only costs “voluntarily” incurred could be recovered under CERCLA 107(a). The Court also noted that concerns about contribution bars in Consent Orders preventing equitable apportionment counterclaims were inapposite because under the U.S. Supreme Court’s *Burlington Northern* decision the property

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owners could defend against imposition of joint and several liability by showing a reasonable basis for apportionment. Because the Third Site cleanup is ongoing, the liability to the United States had not been resolved and thus the Seventh Circuit ruled that the Trustees could bring the action under CERCLA 107(a). Under CERCLA 107(a) the applicable statute is three years after the cleanup is complete. Since the cleanup is not complete, the Court also ruled that CERCLA statute of limitations had not begun run. The Court also reinstated the Trustees' CERCLA declaratory judgment count for cleanup costs to be incurred.

A CERCLA claim arising out of an earlier 1999 Order to do a study of Third Site, however, had been completed before the 2002 Order was entered. Accordingly, the Court held that the liability to the United States had been resolved as to that Order and therefore only a contribution action could be brought. According to the Court, a different and shorter statute of limitations (three years from the date of the Order) applied to CERCLA contribution actions. Thus, the claim under CERCLA on the earlier 1999 Order was time barred.

As to Indiana state law ELA claim, the Court also reversed the District Court and reinstated the Trustees' claim under that statute. It held that prior to a recent amendment to the ELA statute, the ten-year catch-all statute of limitations applied - not the six-year property damage statute. Although the Trustees could not sue under CERCLA for the costs incurred in implementing the 1999 Order, those costs were incurred less than 10 years before the ELA action was commenced in 2008. Accordingly, the Court held that those costs too could be recovered by the Trustees under the ELA count.

On January 15, 2013, the insurance carrier petitioned for panel or en banc rehearing, arguing that the lawsuit is barred by *res judicata* (claim preclusion). On January 17, 2013, the

property owners petitioned for panel or en banc rehearing on the CERCLA issues. The property owners argued that the Seventh Circuit's decision is in direct contradiction with an opinion from the Sixth Circuit.

On March 14, 2013, the Department of Justice (DOJ) filed an amicus brief on the CERCLA issues in support of the property owners' petition for rehearing or rehearing en banc.

On April 4, 2013, N.W. Bernstein & Associates, LLC filed an answer in the Seventh Circuit to the petitions for rehearing or rehearing en banc and to DOJ's amicus brief in support of rehearing of the CERCLA issues.