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DO NOT JUDGE A BOOK BY ITS COVER: MEGA-SITE ENVIRONMENTAL COVERAGE LITIGATION IS NOT INHERENTLY MORE COST AND TIME EFFICIENT THAN SINGLE SITE CASES

By

Richard A. Fogel, Esq.

McMillan, Rather, Bennett and Rigano, P.C.
Melville, New York

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by Richard A. Fogel

[Editor's Note: Mr. Fogel is an attorney at McMillan, Rather, Bennett and Rigano, P.C., in Melville, New York, and represents clients in environmental coverage litigation. This commentary does not express the firm's opinion nor any of its clients. Responses are welcome.]

COMMENTARY

One of the overlooked aspects of the New Jersey Appellate Division's seminal decision in Westinghouse Elec. Corp. v. Liberty Mutual Ins. Co.,[1] is the underlying assumption by the court that "mega cases," involving many hazardous waste sites in different states and dozens of companies that entered into insurance contracts with the insured over an extended period of time, are the most efficient way to litigate environmental coverage disputes. Indeed, this is gospel among many insureds and courts, and some insurance companies. In the four and one-half years that transpired since Westinghouse was filed, empirical[2] data and experience suggests the contrary. Mega cases are proportionately more expensive and time consuming to litigate than single site cases.

The Assumptions and the Paradox

The obvious attraction of the mega case from an efficiency perspective is that it puts all the potentially relevant parties and issues in one forum at the same time. Accordingly, many insureds and courts believe that splitting a mega case into several separate lawsuits is wasteful. The assumptions are that much of the discovery will be duplicative, and legal expenses will increase exponentially with the number of different law firms and jurisdictions involved. Moreover, it is generally assumed that settlement possibilities are enhanced at an early stage in the litigation in a mega case.

The Westinghouse court noted that it is not logical that hundreds of substantially similar insurance contracts entered into by the same insured over a fifty year time period should be governed by the law of 23 different states merely because the underlying liability against the insured arose in different locations. The court's opinion emphasizes that regardless of the complex facts, a hazardous waste coverage case is basically a contract dispute.

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If the foregoing assumptions are correct then why are mega cases rarely resolved, extremely time consuming and proportionately more expensive to litigate than single site cases? The answer is that the assumptions are oversimplified and only partially accurate. The efficiencies achieved by mega cases are much less beneficial in practice than anticipated. Moreover, there are unique synergistic factors present in a mega case that cause an exponential growth in delay and cost that vastly overwhelm the modest economies that are gained.

An Environmental Insurance Case Is Basically A Contract Dispute But . . .

It is true that an environmental coverage case is ultimately a contract dispute that often is resolved by motion practice. Nevertheless, a contract dispute cannot be resolved in a factual vacuum. It is not unusual for insurers to raise thirty or more specific contractually based defenses in pollution coverage cases, most of which require detailed discovery of facts surrounding the hazardous waste site.[3] Insureds usually disagree that detailed factual discovery at the site is necessary, but research has not located a single hazardous waste coverage decision where a court did not ultimately permit the insurers to take the site discovery they demanded.[4] Comparatively, there are many decisions that limit the "contract based" discovery (e.g. drafting history, corporate insurance executives, brokers), which presumably is equally relevant to each of the sites.[5] Moreover, the amount of contract based discovery is generally far more limited and less time consuming than site discovery. Usually, the vast majority of the sites have few common facts, witnesses or other "overlapping" discovery that are relevant to more than one site. Thus, there is less efficiency gained in discovery from combining all the sites in one case than anticipated.

The relatively minor amount of overlapping discovery can be consolidated by less drastic measures than combining all the sites into one mega case. Combined discovery for common depositions can be provided for by coordinated case management by the parties using innovative procedures like the method employed by Aetna in the Bruton and Katz depositions in Boeing Co. v. Aetna Cas. & Sur. Co.[6] The insurers and the insured can utilize national coordinating counsel to arrange such efficiencies. This procedure has the advantage of taking the court "out of the loop" and eliminating the many complicating factors that otherwise synnergize to bring the litigation process in a mega case to halt. The parties could probably stipulate to the application of federal procedural law for the purpose of governing the coordinated deposition, with the understanding that each party retains the right to argue the choice of law that governs the substantive issues in any particular case, as well as the admissibility of the testimony from the coordinated deposition.

Choice Of Law Is Not Simplified By Mega Cases

Choice of law is the real issue that is at the heart of the strategic maneuvering by both sides in environmental coverage mega cases. Ultimately, the courts must accept the blame for causing the wasteful procedural gamesmanship that has become routine practice in these cases. Both sides recognize that the differences in insurance common law is so disparate between different jurisdictions, including state and federal jurisdictions in the same district,

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that the resolution of the substantive issues is largely dependent on choice of law. Moreover, each side is well aware that notwithstanding the sophisticated choice of law rules set down in each jurisdiction, in practice, most courts will find some reasonable justification (i.e. one that will withstand appeal) to resolve the issue by applying their home state's law.[7] While there may be legitimate federalism concerns that justify the disparate substantive law, it is the lack of a uniform and clearly defined test to resolve the choice of law issue that invites forum shopping and the resulting extensive procedural maneuvering.

Contrary to the Westinghouse analysis, from an efficiency point of view, choice of law issues are vastly complicated by mega cases rather than simplified, because the analysis is not nearly as simple as the appellate court assumed. Indeed, in Johnson Matthey Inc. v. Pennsylvania Mfrs' Ass'n Ins. Co.,[8] a different panel of the same New Jersey Appellate Division that decided Westinghouse, stated that not only may different law apply to different sites, but different law may apply to different issues arising out of the same contract at the same site.[9] On remand, the Westinghouse trial court immediately decided to proceed only with respect to New Jersey sites, barring any other discovery.[10] After Johnson Matthey was decided, the trial court further held that New Jersey law applies to the New Jersey sites but once again, ignored the other sites.[11] Thus, nothing in the subsequent proceedings in Westinghouse or other New Jersey appellate cases support the assumption that mega cases simplify the choice of law issue.[12]

Splitting up the mega cases by site vastly simplifies the choice of law issues. In most cases where all the sites are located in the forum state, the court applies the law of the forum state on the ground that it has the most significant interest in the dispute. Even if a court were to follow the convoluted analysis of Johnson Matthey, the determination of choice of law is greatly simplified by eliminating the complicating factor of sites in different states. Consequently, the costs of litigating the issue will decrease and courts will reach a determination much more quickly. The net result of a quicker choice of law determination is that counsel will be able to analyze the coverage issues with much more precision at an earlier point in the litigation, causing more cases to be resolved at less cost to the litigants and the legal system.

The Synergism Factor In Mega Cases - 1 + 1 Does Not Equal 2

Probably the most glaring logical error assumed by proponents of mega cases is the oversimplified belief that one case in one forum handled by one law firm, is cheaper to litigate than 10 cases in 10 different forums handled by 10 different law firms. It does not follow that a mega case will cost 1/10 the legal expense of 10 separate lawsuits.

In the first place, a mega case that combines 10 sites is logically 10 times larger and more complex than the 10 separate cases. As previously discussed, the largest legal expense and most time consuming activity in the typical environmental coverage case is site oriented discovery. Thus, assuming the parties will take the same site discovery in a mega case that they would have taken if the cases were all separate, the costs should be approximately the same.[13]

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Even this analysis, although logical, is oversimplified, because it fails to take into account issues that must be resolved that are not present or otherwise significant in 10 separate lawsuits. In broader terms, the foregoing analysis considers the efficiencies gained by mega litigation, but fails to consider the inefficiencies created by mega litigation. The most consequential inefficiency, is the dramatic change in the litigation strategy and behavior of each party in a mega case caused by the relative increase in exposure. Each procedural and substantive issue that must be addressed in a mega case, no matter how minor, is minutely scrutinized by the parties for its potential magnifying effect on the substantive issues. This process is probably further exacerbated by the willingness of clients to fund more expansive discovery in mega cases.[14] Although the insurers' exposure at any one site is theoretically the same as it is in a single site case, if an insured attempts to aggregate its loss at all the sites into one policy year or one occurrence, the combined exposure is considerable and will change the insurers' strategy. The net result is a much more hotly contested litigation in which the participants are willing to devote a great deal of time and legal expense to issues and discovery that they would not otherwise be willing to expend in ten separate lawsuits for each individual site.

Consider, for example, pre-answer motion strategy. In mega cases it has become de rigueur to file pre-answer motions to dismiss or otherwise clarify the complaint because of failure to state a claim or vagueness. Typically, for strategic and practical reasons,[15] the insured's complaint lacks some information about the specific nature of its involvement at each site, the time period during which it was involved at each site, the potential liability of the insured at each site, the effective dates and liability limits of all the insurance contracts that may be involved, and which insurance contracts must respond to each site. The insurers require this information to gauge their exposure, and decide on their litigation or settlement strategy. Moreover, the insurers are well aware that the insured will probably present a case management plan that proposes to limit discovery to only one or two "test" sites with facts that are probably most favorable to the insured's coverage case. Additionally, the insured will typically seek to proceed with immediate motion practice and trial (if necessary) on the test sites, hoping to establish favorable "law of the case." Thus, the insurers need to immediately know which sites present the greatest exposure to the insured and to themselves, and which sites are most likely to contain facts that are the most damaging (and most favorable) to the insured's coverage case.

In a single site case, these considerations become much less important. The insurers are not concerned about a test site discovery plan and can organize their early document based discovery to quickly inform them about their exposure. Additionally, clients are less willing to expend resources to non-dispositive motion practice in such circumstances. Thus, pre-answer motions to dismiss the complaint are rarely brought in single site environmental coverage cases.

An examination of other pre-answer motion practice such as forum non conveniens, 1404 transfer and removal motions would result in a similar analysis. In fact, in mega cases, there is also an exponential increase in motion practice and disputes regarding the many other

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issues that arise in coverage cases, such as case management and protective orders, limits on non-dispositive motion practice, joint defense agreements, discovery procedure, discovery motions, choice of law, jurisdictional motions, etc. All this additional litigating synnergizes to bring the proceedings to a virtual standstill at enormous legal expense.

Strategic Considerations in Mega Cases Make Early Settlements Nearly Impossible

Mega cases are far less likely to be resolved by early settlement than single site cases. Generally, the insurers have little incentive to enter into a piecemeal, site by site settlement in mega cases, because such settlements are unlikely to significantly decrease their litigation expense. Attempts at global settlement usually bog down because the conflicting strategic interests of the parties are so diverse and complex, that any potential agreement becomes extremely convoluted and based on too many unknown factors. Thus, the parties typically decide to litigate rather than settle, to maneuver themselves into better negotiating position.

Settlements of groups of particular types of sites are also extremely difficult in a mega case. Consider for example, the aforementioned ten site case. Typically, approximately half the sites are owned and the others are locations to which the insured (or a contractor on behalf of the insured) shipped wastes. Assume that the insured's potential cleanup liability for these sites can be roughly divided into three categories: $2-3 million each for the five unowned sites, $10-15 million each for three of the owned sites and $25 plus for the two other owned sites (not unusual numbers in an environmental coverage case).

Common sense mandates that the parties have the greatest incentive to settle the two largest sites rather than risk a total loss. However, the fact that the insured owned the two most serious sites (which is why it has the greatest liability potential at those sites) indicates that it probably carried on its worst polluting activities at those two sites. Accordingly, the insurers have the most coverage defenses available to them at those sites and perceive themselves to be in a good negotiating position. Additionally, the insurers will be loathe to litigate the mega case without the sites present where the insured exhibited the worst polluting behavior. The insurers want the ability to educate the trier of fact about the insured's bad character, so that their defenses will be more convincing at the unowned sites, where the insured's behavior may have been less culpable.

The insured, on the other hand, is unlikely to reach an early partial settlement with the insurers respecting the large sites, unless it is very favorable. It probably commenced the litigation primarily because of its exposure at the two large sites. It is unlikely that there are other potentially responsible parties who will share the liability for the cleanup at an owned site. This is a particularly significant factor because estimated cleanup costs of a serious site can increase tenfold overnight if an environmental agency decides that a more expensive solution must be undertaken. Therefore, the insured will be unwilling to accept an early settlement where it will bear the risk of escalating cleanup costs. This position directly conflicts with the aforementioned desire of the insurers to avoid a "long tailed" settlement that does not completely end further expense.

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Sometimes, the insurers are willing to negotiate a settlement with the insured to resolve, as a group, the less significant sites. The insurers' incentive is to devote more resources to the sites with the greatest exposure, focus the trier of facts attention on the insured's more culpable behavior at those sites, and get rid of the sites where their coverage defenses are the weakest. The insured, however, has little incentive to get rid of these sites for the exact same reasons that the insurer would like to settle them. Moreover, the most important strategic significance of the mega case to the insured is that it makes the case so complicated, that the court may be attracted to the argument that site facts are a "red herring" and the case should be decided solely as a simple contract dispute. Removing the majority of the sites from the case eliminates this persuading factor. Finally, as a practical matter, it is often the case that many of the less significant sites are not "mature," even though the insured chose to include them in the coverage lawsuit. In other words, little may be known about the cleanup of these sites and no governmental agency is actively pursuing the insured for cleanup costs. Thus, the insured may not be in a position to arrive at any realistic estimate of its potential exposure at these sites, and is not under any financial pressure to reach an early settlement.

Conclusion: Splitting Up a Mega Case is a Viable and Efficient Alternative

The foregoing examination of the many unique facets of mega cases show that it is not, inherently, the revolutionary adaptation that makes litigation of complex environmental coverage disputes more efficient. Obviously, clients, particularly insurers, can utilize the legal expense data that they currently possess for mega litigation and comparable single site cases, to make a subjective judgment for themselves on which is more efficient and under what circumstances. Moreover, the coverage bar probably has sufficient data in their time records to assess whether mega cases take proportionately less time to resolve than single site cases. The maxim that there is beauty in simplicity should not be forgotten in the debate over the most efficient procedure to litigate environmental coverage disputes.

ENDNOTES

1. 233 N.J. Super. 463, 599 A.2d 435 (App. Div. 1989).

2. Although an exhaustive review of every hazardous waste case in every jurisdiction has not been completed, experience and reports from sources such as Mealey's indicates that mega cases are among the most expensive and time consuming. Many of these cases take years to resolve such preliminary issues as pre-answer motion practice, confidentiality and case management orders.

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Comparatively, large single site cases proceed at a brisk pace, usually moving into substantive document discovery within six months after the complaint is filed, and deposition discovery within a year.

3. This discovery is required regardless of the endless dispute between insurers and insureds of whether the contractual language at issue is ambiguous.

4. This argument is made by the insureds for strategic considerations. The insureds know that site factual discovery usually turns up damaging evidence of polluting activity. Thus, the insureds want to "educate" the court at an early stage to focus the court's attention on the contract issue rather than the pollution circumstances. Further, by complaining about "unnecessary" site discovery at an early stage, the insureds hope to set up a later argument to limit site discovery because the insurers are "wasting time and prolonging discovery." See discussion on synergistic factors, infra.

5. See, e.g., In re Environmental Ins. Declaratory Judgment Actions, No. UNN-L-08573-89 (N.J. Super. Ct. Law Div., Aug. 7, 1990) (discovery order in consolidated environmental coverage actions including Westinghouse upon remand, limits contract based discovery).

6. No. C86-352WD (W.D. Wash.).

7. Most states follow some version of the "significant interests" or "comparative impairment" test set down in the Restatement (Second) of Conflicts Law. Although the underlying reasons for the problems in applying these choice of law tests are beyond the scope of this commentary, from a litigator's point of view, these are so complicated in practice, and raise so many ambiguities, that creative attorneys have little difficulty making a respectable argument to apply the law most favorable to their client's interests. Thus, notwithstanding all of the theoretical problems with the old lex loci contractus test, it is much easier to apply than current tests, and would inevitably result in much less procedural maneuvering and forum shopping.

8. No. A-5546-89T1F, slip. op. at 14-20 (N.J. Super. Ct. App. Div., July 23, 1991).

9. The court noted that there is nothing inherently illogical or inefficient in the application of different controlling substantive law to different pollution sites. The court compared the situation to typical underlying tort claims that arise against the insured, remarking that both the insured and the insurer knew when they entered into the contract that different and possibly conflicting state law may apply to these claims. Thus, it is logical that the legal interpretation of the contract governing the coverage for these claims also changes. Obviously this analysis is controversial and further discussion is beyond the scope of this commentary. The main point is simply that the assumption of the Westinghouse court that a mega case is more efficient because it simplifies choice of law is incorrect.

10. See In re Envtl. Ins. Declaratory Judgment Actions, No. UNN-L-08573-89, slip op. at 8 (N.J. Super. Ct. Law Div., May 23, 1990) (case management order in consolidated environmental coverage action that includes Westinghouse upon remand, limits discaovery to New Jersey sites).

11. See In re Envtl. Ins. Declaratory Judgment Actions, No. UNN-L-08573-89 (N.J. Super. Ct. Law Div., July 29, 1991) (in a letter opinion for a consolidated environmental coverage litigation, including Westinghouse upon remand, the court holds that New Jersey law applies to all New Jersey sites, following Johnson Matthey).

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12. Compare Potomac Elec. Power Co. v. California Union Ins. Co., No. 88-2091 (D.D.C., Sept. 30, 1991) (all sites governed by insured's location of headquarters) with Chesapeake Util. Corp. v. American Home Assur. Co., No. 86-501-JLL (D. Del., Jan. 9, 1989) (applying the law of state in which the site is located to each site).

13. As previously discussed, there is some efficiency achieved in the mega case by overlapping discovery, but this is relatively minor compared to the amount of non-overlapping discovery. The parties in the ten separate cases can achieve the same efficiencies by use of the coordinating counsel, as explained infra.

14. In mega cases where there is much more exposure, clients are much more likely to request that counsel take discovery on more marginal issues or investigate leads that are less likely to yield relevant evidence. If the mega case were split up into smaller cases, clients would probably be much more frugal with legal expense.

15. Strategically, the insured wants to begin the process of "educating" the court by focusing the court's attention on the contractual nature of the dispute rather than the site based factual nature of the dispute that is likely to involve unfavorable information about the insured's polluting activities. Moreover the insured wants to give up as little information as possible that may be used against it. Practically, the insured wants to keep the complaint short and simple, minimizing cost to its client. This has the added strategic benefit of making the dispute appear straightforward at an early stage in the litigation, which will bolster the insured's argument to limit discovery. Additionally, the insured may not possess much of the information desired by the insurers.

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