Useful Product Defense Post Burlington Northern

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August 24, 2015

WARD TRANSFORMER SITE

Ward Background:

- 1964, the Ward Transformer property, consisting of approximately 11 acres, was developed for use as a transformer repair, reconditioning, rebuilding, manufacturing and sales facility in Raleigh, N.C.
- Facility operated at its present location 1965-2006
- 1981 Criminal investigation of Ward owner. Robert Earl Ward, Jr. was found guilty on eight counts of unlawful disposal of toxic substances.
- Ward bought and sold used electrical equipment.
- Ward also serviced and repaired used and damaged electrical equipment.
- Constituent of concern (“COC”) = polychlorinated biphenyls (“PCBs”).

Ward background continued:

- An August 9, 2004, EPA inspection report of the Ward Facility found impacted surface water runoff from PCB-contaminated areas of the Ward Site.
- On August 9, 2004, EPA conducted a removal site assessment of the Ward Site and determined that an unacceptable risk existed at the Site.
- In October 2004, EPA sent notice/demand letters to the Performing Parties as well as other companies. (Not to GPC)
- September 16, 2005, Consol, Bassett Furniture, CP&L, Ward, certain Ward related entities, and EPA entered into an Administrative Settlement Agreement and Order on Consent.
- Estimated cost of cleanup at time ASA signed were $5 million.
- Performing Parties estimate that the total removal action costs will exceed $74 million.

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GPC Connection To The Ward Site

- In January 1980, Savannah Electric sold 20 used substation transformers to a third party partner of Ward.
  - Ward resold all 20 used transformers
  - Ward sold the units for more than what they paid for them.
- Between 1983 and 1984, GPC sold 101 used transformers to Ward.
  - Transformers were sold through a competitive bid process.
  - Ward resold all 101 of the GPC used transformers it purchased.
  - Ward sold all 101 units for more than the purchase price.

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Litigation

- In June 2009, Consol and CP&L filed separate suits against Georgia Power Company in the U.S. District Court Eastern District of North Carolina.
- Complaints alleged that GPC was a Potentially Responsible Party under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA").
- GPC volunteers to be "Sales Only" test case.
- Motions for Summary Judgment filed in January 2012.
- February 1, 2013, the Court ruled that GPC was not liable under CERCLA because GPC did not intend to dispose of hazardous substances. Instead, GPC sold a useful product to Ward.
- District court decision appealed to the 4th Circuit Court Of Appeals.
- After oral arguments, 4th Circuit issued an opinion in March 2015 affirming summary judgment for GPC.
- No appeal to U.S. Supreme Court pursued.

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Defense

- Developed and Demonstrated these facts:
  - Documents from the1970s to the 1980s
    - Environmental policies & procedures
    - Analytical results
    - Waste contracts and manifests
    - Sales documents, bid results, accounting records
  - Interviews of past and present employees
  - Depositions of past and present employees

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Defense

- Basic Arguments around the facts:
  - GPC had 2 tracks for retired transformers – disposal and resale. Ward was not in the disposal business.
  - GPC, in most cases, drained the oil prior to selling.
  - Sold to Ward in competitive process where Ward was the highest bidder.
  - Ward resold 100% of the GPC transformers and generated revenues from these transactions.

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Questions

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