JUDGE BREYER'S "CERCLA" (SUPERFUND STATUTE) CASES

Judge Breyer has participated in eight cases involving the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), the Superfund statute. None involved Lloyds as a party or by name in any other respect. Moreover, none involved the kind of issue that would have a direct or predictable impact on the insurance industry's Superfund obligations, much less on Lloyd's itself.

The cases address a variety of matters. Most are highly fact-specific. Included among them are decisions that enforce an EPA penalty against a chemical company; apply the judicial doctrine of res judicata (which bars relitigation of the same matter); and confirm the federal government's sovereign immunity from state requests for civil penalties on CERCLA claims.

A summary of the cases is attached.

1. Waterville Industries, Inc. v. Finance Authority of Maine, 984 F.2d 540 (1st Cir. 1993). The issue in this case was the "security interest exception" in CERCLA, which exempts from the statute's definition of "owner" a "person who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility." In an opinion by Judge Boudin, joined by Judge Breyer, the court interpreted the provision and unanimously agreed with the Finance Authority of Maine that it met the requirements of the provision.

Particularly because there is no reason to think that a lender, a borrower, or a property owner is more or less likely to have insurance, the case does not present the kind of issue that would have a direct or predictable impact on the insurance industry's Superfund obligations.

2. State of Maine v. Dept. of Navy, 973 F.2d 1007 (1st Cir. 1992). In this case, the state of Maine sued the United States Navy because one of the Navy's shipyards had not complied with Maine's federally-approved hazardous waste laws. The only CERCLA-related issue was whether the CERCLA statute waives the federal government's traditional sovereign immunity against suits by states for civil penalties. Judge Breyer's opinion held that the CERCLA statute does not waive the federal government's sovereign immunity.

3. Reardon v. United States, 947 F.2d 1509 (1st Cir. 1991) (en banc). The issue in this case was whether landowners are entitled to notice and an opportunity to be heard before the EPA is allowed to place a lien on their property. In an opinion by Judge Torruella, joined by Judge Breyer, the First Circuit applied a recent Supreme Court precedent, which had found a Connecticut attachment lien statute violated due process. The First Circuit held that CERCLA's lien provision had a similar flaw.

The case thus gives people the right to notice and an opportunity to be heard before a lien is put on their property. It concerns the timing of procedures, and in no way eliminates, lessens, or affects the liability of landowners who are responsible for clean-up costs.

4. All Regions Chemical Labs v. EPA, 932 F.2d 73 (1st Cir. 1991). In this case, Judge Breyer's opinion upheld the EPA's imposition of a $20,000 penalty against a chemical company that failed to

notify the EPA immediately about the release of hazardous substances from its property.

In this highly fact-specific case, the decision upholds the EPA's penalty, over the private company's objection.

5. Johnson v. SCA Disposal Services of New England, 931 F.2d 970 (1st Cir. 1991). Judge Brown's opinion, joined by Judge Breyer, applies the judicial doctrine of res judicata, which prohibits relitigation of the same matter. It does not address CERCLA or Superfund issues.

6. United States v. Kayser-Roth, 910 F.2d 24 (1st Cir. 1990). In an opinion by Judge Bownes, joined by Judge Breyer, the court agreed with EPA that a parent company could be found to be an "operator" liable for clean-up costs even if the site was nominally run by a subsidiary. The court also agreed with the EPA that the trial court properly found that the parent company was an "operator" in this case.

The decision does not present the kind of issue that would have a direct or predictable impact on the insurance industry's Superfund obligations. (In many CERCLA cases, there are numerous private parties with conflicting allocation claims, and imposing liability on parent corporations might have different effects on different insurers at different times).

7. United States v. Ottati & Goss, 900 F.2d 429 (1st Cir. 1990). In this decision by Judge Breyer, the court agreed with the district court that, when EPA requests a preliminary injunction under a particular CERCLA provision, the district court has discretion and is not, contrary to EPA's submission, obliged to defer to EPA's request for an injunction unless it is "arbitrary or capricious." The First Circuit emphasized that "to read the statute in this way does not significantly handicap EPA" because the agency may receive full administrative deference at a subsequent stage of the proceedings. The Court of Appeals also reviewed the district court's factual findings, agreed with EPA that the district court should further consider one matter, and found that the district court's other findings were supported by the record. The court also ruled on various miscellaneous issues, including one in which it agreed with EPA that the district court should further consider whether EPA should be entitled to recover certain costs.

None of the holdings in the case presents the kind of issue that would have a direct or predictable impact on the insurance industry's Superfund obligations. The standard for district court consideration of requests for preliminary injunctive relief concerns only district court discretion at a preliminary stage of the proceedings. The factual issues, moreover, are highly case-specific and dependent on the record in the particular case.

8. Dedham Water Co. v. Continental Farms Dairy, 889 F.2d 1146 (1st Cir. 1989). In this opinion by Judge Bownes, the First Circuit agreed with other courts that a plaintiff need show only that a defendant's release of hazardous wastes caused it to incur response costs, not that the wastes actually contaminated the plaintiff's property. Particularly because either side in such a dispute might have insurance, the case does not present the kind of issue that would have a material or predictable impact on the insurance industry's Superfund obligations. (A subsequent opinion in the case specified that a new trial was required. Judge Breyer dissented, arguing that the district court should have discretion to further consider the matter. The issue was unrelated to CERCLA or Superfund. In re Dedham Water Co., 901 F.2d 3 (1st Cir. 1990)).