

Contamination/Asset Purchase Agreement: Federal Appellate Court Interprets Indemnification Provision



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The United States Court of Appeals for the Seventh Circuit (“Court”) addressed in a March 31st Opinion the indemnification provision of an Asset Purchase Agreement (“APA”) involving contamination that was identified subsequent to closing. See *Wisconsin Central Ltd. v. Soo Line Railroad Co.*, No. 19-3129.

One of the questions involved whether a claim had occurred within the meaning of the APA triggering indemnification.

In 1987 Wisconsin Central, Ltd. (“Wisconsin Central”) entered into an APA with the Soo Line Railroad Company (“Soo Line”) to purchase certain rail lines. The APA allocated responsibility between the parties for future environmental liabilities.

Soo Line agreed to retain liability and indemnify Wisconsin Central for:

. . . all claims for environmental matters relating to ownership of the Assets or the operation of LST that are asserted within ten years of the closing of the deal (the “claim period”).

At the end of the claim period Wisconsin Central agreed to assume all liability and indemnify Soo Line for any such claims, regardless of whether Soo Line was at fault.

The transaction closed on October 11, 1987. Therefore, the claim period extended through October 11, 1997.

At some point during the claim period local and state authorities are stated to have discovered contamination in a public recreation area. A Wisconsin state agency (i.e., Wisconsin Department of Natural Resources [“WDNR”]) identified an inactive old manufacturing gas plant (“MGP”) as the likely source of contamination.

WDNR issued a potentially responsible party (“PRP”) letter to the MGP owner (Northern States Power Company [Northern States]). The letter required it to investigate and potentially clean up the contamination.

Northern States claimed that the responsibility for such contamination should be assigned to both Soo Line and Wisconsin Central. This claim was based on the fact that the railroad right-of-way ran through the contaminated area. Northern States is stated to have determined through residents’ memories that railcars regularly dumped waste on the ground which included coal tar. Consequently, Northern States requested that WDNR identify both railroads as PRPs. WDNR did not do so.

Northern States lobbied Wisconsin Central to voluntarily assist in its efforts to remediate the contamination. This included arguments that Wisconsin Central had potential responsibility for such contamination. It included an assertion that WDNR would inevitably undertake action to involve Wisconsin Central. Wisconsin Central is stated to have kept Soo Line informed of these events.

Wisconsin Central and Soo Line's attorneys discussed the various developments. They allegedly agreed that a cooperative stance with both Northern States and the WDNR should be undertaken. However, they also agreed that it would be a mistake to affirmatively seek a PRP letter. Neither Northern States nor WDNR are stated to have threatened to take legal action against either railroad during the 10 year claim period.

In January 1997 (nine months before the end of the claim period) Wisconsin Central sent Soo Line a notification that it was seeking indemnification for the alleged railroad line contamination. Soo Line rejected the claim and did not agree to either indemnify or defend Wisconsin Central.

In 2002 the United States Environmental Protection Agency ("EPA") designated an area that included the railroad lines as a Superfund site under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"). Northern States subsequently requested that EPA issue a Superfund Notice to itself, Wisconsin Central, Soo Line and others naming them as PRPs for the site. Further, in 2012 Northern States filed an action against parties that included Wisconsin Central and Soo Line for the expenses it had incurred cleaning up the contaminated area.

EPA subsequently reached an agreement with Wisconsin Central and Soo Line in which each would pay half of \$10.5 million (plus interest) to settle the Superfund claims. Both railroads reserved the right to seek indemnification from each other.

Wisconsin Central subsequently filed a breach of contract action against Soo Line arguing that the environmental claims were asserted during the claim period. As a result, it sought indemnification for the amount it had paid in the settlement (plus interest, fees, and costs). Soo Line counterclaimed arguing no claim was asserted until after the 10 year claim period expired.

The Federal District Court granted summary judgment to Soo Line. It found that no claim had been asserted against the railroads during the 10 year claim period.

On appeal, Wisconsin Central argued that the environmental claims against the railroads were first asserted during the claim period and that Soo Line's indemnity obligation was triggered for the entire cost of the claims. It further argued that even if such claims were not asserted until after the 10 year period, it should only be responsible for the portion of the environmental damages attributable to the exact land and operations that it purchased from Soo Line.

The Court reviewed the EPA's indemnification clause, which states:

"... [Wisconsin Central] shall assume the following liabilities and obligations of Soo [Line]: ...all claims for environmental matters relating to the ownership of the Assets or the operation of LST that are asserted after the tenth anniversary of the Closing Date ..."

Therefore, the question was whether a "claim" was "asserted" within the 10 year period. In other words, were the various actions by Northern States, EPA, or WDNR "claims."

In reviewing this issue, the Court notes Wisconsin Central's argument that Minnesota law takes a broad view of the actions and/or communications that constitute claims under Minnesota law in the environmental context. The Court noted that in those cases a government regulator had taken some formal action against the party or the property against whom a claim or suit had been asserted. The relevant governmental requests are characterized as formal mechanisms by which a party is brought under the authority of the regulator. Costs or fines are risked if they are rejected.

The Court notes that in this instance WDNR took no actions against the railroads during the claim period. It contrasted Northern States' lawsuit and the fact that EPA named the railroad as PRPs after the expiration of the claim period. No suits were filed or threatened during the claim period.

The Court upholds the United States District Court's granting of summary judgment to Soo Line. No claim is deemed to have arisen which would have triggered the indemnification.

A copy of the Opinion can be downloaded [here](#).