

Pullman Not Bound By Exxon, DuPont Cleanup Pact

By **Bill Wichert**

Law360 (April 20, 2020, 11:02 PM EDT) -- A New Jersey state appeals court on Monday said The Pullman Co. did not have to contribute to cleanup costs for a polluted site under a cost-sharing agreement with ExxonMobil Corp., DuPont Co. and other companies, saying it was not subject to that deal.

The panel upheld Pullman's victory over a contract claim against it from ExxonMobil, Dupont and other companies in the so-called Borne Group. Superior Court Judge Kenneth J. Grispin properly found that another business signed the agreement on Pullman's behalf, but did not have actual or apparent authority to bind Pullman to the deal, the panel said.

"We shall not disturb Judge Grispin's factual findings, as we are not 'convinced that they are so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice,'" the panel said, citing the New Jersey Supreme Court's 1974 decision in *Rova Farms Resort, Inc. v. Investors Ins. Co.*

The legal squabble concerns contamination at a property in Elizabeth, New Jersey, where the defunct Borne Chemical Co. previously operated, the opinion said. State environmental regulators have claimed that members of the Borne Group "discharged or were in any way responsible for hazardous substances" at the site, the opinion said.

The case has turned in part on the interplay of the 2008 contract and a 1996 asset-purchase agreement between Pullman and Mark IV Industries, or MIV, according to the opinion.

In 1996, MIV purchased, through a subsidiary, the business assets of a Pullman division, with the MIV unit assuming "various environmental liabilities of Pullman or its subsidiaries" at the Borne property and other sites, the opinion said. The agreement required Pullman's prior consent if a settlement involved "non-monetary damages," the opinion said.

Without obtaining Pullman's consent, MIV's general counsel executed the 2008 contract on Pullman's behalf with the Borne Group, the opinion said. The agreement identified MIV as a party, not Pullman, and allocated certain shares of cleanup costs to MIV, not Pullman, representing 15.5% of one set of expenses and 19% of another, the opinion said.

Soon afterward, MIV stopped making payments and declared bankruptcy, the opinion said.

The Borne Group ultimately went after Pullman in a 2010 lawsuit, seeking money both under the 2008 agreement and the state's Spill Compensation and Control Act, the opinion said. After Judge Grispin nixed the Spill Act claim, he ruled in Pullman's favor after a bench trial over whether Pullman authorized MIV to bind it to the 2008 contract, according to the opinion.

On the Borne Group's appeal of the contract claim ruling, the appellate panel said Judge Grispin properly reasoned that MIV lacked actual authority based on the "non-monetary damages" provision of the asset-purchase agreement. Given that the liability imposed by the 2008 contract "could change over time, it constituted 'non-monetary damages,'" the panel said.

"The court found that the 2008 agreement required the parties' continuing cooperation, as well as MIV's continuing cooperation with the Borne Group and a promise to make continuing future payments to support clean-up activities and Borne Group operations," the panel said. "The court concluded that MIV needed Pullman's consent to enter that sort of executory contract."

The judge also was correct that MIV lacked apparent authority, the panel said, noting in part how "Judge Grispin found that the Borne Group's attorney 'never questioned the blurred lines between Pullman/Mark IV.'"

Such "lack of concern constitutes the kind of 'indifference' from which apparent authority may not arise," the panel said, citing the state Appellate Division's 1986 opinion in *Wilzig v. Sisselman*.

"Although the Borne Group attorney's lack of concern about corporate identities may have been 'understandable' when the checks were forthcoming, plaintiffs failed to demonstrate that it was objectively reasonable to conclude that MIV's general counsel had authority to sign the 2008 agreement on behalf of Pullman, an entirely separate corporation," the panel said.

Counsel for the parties did not immediately respond to requests for comment Monday.

Appellate Division Judges Mitchel E. Ostrer, Heidi Willis Currier and Jessica R. Mayer sat on the panel.

The plaintiffs are represented by Paul Francis Carvelli and Alicyn Beth Craig of McCusker Anselmi Rosen & Carvelli PC.

The Pullman Co. is represented by Nicole R. Moshang and Diana A. Silva of Manko Gold Katcher Fox LLP.

The case is *AGIP USA Inc. et al v. The Pullman Co.*, case number A-0173-16T1, in the Superior Court of New Jersey, Appellate Division.

--Editing by Jay Jackson Jr.