

Tyco Unit Amends RCRA Claims Against Rowe

By Julie Zeveloff

Law360, New York (August 19, 2010) -- A Tyco International Ltd. unit has updated its Resource Conservation and Recovery Act claim in an environmental cleanup suit against Rowe Industries Inc., following a federal judge's ruling that Tyco may be able to seek prospective relief — but not past damages — under RCRA.

The amended complaint, filed Wednesday in the U.S. District Court for the Northern District of California, is the latest twist in protracted litigation over liability for the cost of cleaning polychlorinated biphenyls at a former electrical transformer manufacturing plant in Redwood City, Calif.

Tyco's Tyco Thermal Controls LLC unit acquired the plot as part of its 2001 acquisition of Raychem Corp.

The company filed suit in 2006, seeking to recover cleanup costs under the Comprehensive Environmental Response, Compensation and Liability Act, RCRA and California state law. Tyco has estimated the cleanup and monitoring will cost between \$1.67 million and \$2.61 million, according to a court order filed Aug. 12.

After the judge overseeing the case held that Tyco failed to comply with RCRA's pre-suit notice requirement as to Rowe, the plaintiff re-filed its RCRA claim against Rowe in a separate lawsuit. That suit was amended Wednesday.

The other two co-defendants in the litigation — Redwood Industrials and Carlisle Cos. Inc., which owned and subletted the land, respectively — settled with Tyco earlier in August. Under the terms of the court-approved settlement, Redwood will pay \$275,000 and Carlisle will pay \$150,000.

The court also decided to allocate liability under Tyco's CERCLA and state law claims using the proportionate share method, as opposed to the "pro tanto" approach favored by Tyco.

"Under that [pro tanto] scheme, the potential injury will be suffered by the nonsettling defendant, who has no ability to affect the settlement amount," the court wrote. "Accordingly, the

proportionate share approach makes it more likely that pre-trial settlements and the overall litigation will achieve the equitable allocation of liability among all responsible parties.”

Under the selected apportionment method, Tyco bears the risk for any costs above those ultimately assigned to Rowe, according to Mordecai Boone of Gordon & Rees LLP, who represents Rowe in the matter.

In considering Rowe's motion to dismiss Tyco's RCRA claim, the court ruled earlier in August that Tyco could not recover for any previously incurred investigative costs because they are considered damages and therefore barred under the RCRA. It also held that costs based on a remediation plan adopted prior to the instant action could not be recovered.

However, it gave Tyco leave to amend its RCRA complaint, writing, “it is conceivable that plaintiff may be able to plead a claim for prospective relief recoverable under RCRA.”

The complaint filed Wednesday seeks injunctive or other relief requiring Rowe to pay investigation and remediation costs, or an order requiring Rowe to take over the cleanup effort. It also sought declaratory relief.

Tyco's CERCLA and state law claims against Rowe are also still pending in the related case.

According to Jordan Stanzler of Stanzler Law Group LLC, who represents Tyco, the investigation costs may be even higher than those previously estimated since the U.S. Environmental Protection Agency has not yet approved the cleanup plan.

Tyco is represented in the matter by Stanzler Law Group LLC.

Rowe is represented by Gordon & Rees LLP.

The cases are Tyco Thermal Controls LLC v. Redwood Industrials et al., case number 06-cv-07164; and Tyco Thermal Controls LLC v. Rowe Industries Inc., case number 10-cv-01606; both in the U.S. District Court for the Northern District of California.