

**ORAL ARGUMENT – 01-14-04**  
**02-0758**  
**STREET V. PILGRIM**

THOMAS: As with the prior case this case also involves a question of first impression under Texas law. At issue is the scope of so called liability under arranger liability, under the Texas Solid Waste Disposal Act. Under §271(a)(3) a party is responsible for solid waste if by contract, agreement or otherwise arranged to process, store or dispose of solid waste.

We believe that the CA made two fundamental errors in this case when it came to the application of this standard. The first error was the actual legal test that the court applied. The court articulated a test of control. That is a party must control the waste disposal decisions at a solid waste facility. However, in application of that standard the court departed from the articulated test and used one of a nexus alone. That is, the CA looked for whether or not my client, RR Street, had any nexus with the waste disposal activities of Pilgrim in this case. As a consequence of a finding of nexus by the CA, the CA concluded that RR Street was responsible for solid waste as a matter of law.

WAINWRIGHT: There are a number of tests out there when you look at the different courts around the country: obligation to exercise control, authority to control, active involvement. What's the appropriate test? Do you criticize the CA's test of control?

THOMAS: The test of control would be an appropriate test. The question is one of application. You are correct that in all the CERCLA cases that are out there, there is a numerous variety of tests that have been articulated. What we have done in our brief is try to provide the court with a survey of relevant CERCLA case law. And what you will see running through all the tests, all of the cases under CERCLA is a question of obligation or one of authority. The courts have held that when you are relying upon obligation you have to have some active involvement with the disposal of solid waste. On the other hand authority alone to control would be sufficient under many CERCLA cases.

So the standard that we've articulated, which would be appropriate under Texas law, is the question did RR Street in this case arrange to dispose of solid waste at the facility? And the instruction would be that a person arranges to dispose of solid waste if they had the obligation to control and exercise some active involvement with the waste disposal decisions. Or alternatively had the authority to dispose of solid waste at the facility.

In this case Pilgrim articulates or argues that the policy of broadly reading this statute is applicable. We say that is not the case.

JEFFERSON: What if they don't have the obligation to control or the authority to dispose of solid waste, but they actually do? They take control.

THOMAS: Clearly under the statute that if you own or possess solid waste, then that may be a theory of liability. But if one does not own or possess the waste, which in this case is the situation with RR Street, then you have to have some authority to control or obligation plus involvement

O'NEILL: But Corbin possessed a certain amount. You don't dispute that. You're claiming it's a trace amount or that it fits the domestic sewage exclusion.

THOMAS: You are correct that that would be an alternative basis of liability that requires separate examination. And yes it's a question of \_\_\_\_\_ quantities. If you go back to the statute, our response to that issue is that that is also not a basis for our liability under the act. Because 1) there was no disposal; and 2) it would not be solid waste under the act because of the domestic sewage exclusion that you referenced.

O'NEILL: Why would it not be disposal?

THOMAS: If you reference down to the definition of disposal on the sheet that we've provided, a disposal is a dumping, spilling, leaking, etc. into land or water. This was deposited into a sewer. One of the very basic issues in this case, and one of the reasons that the CA got around the domestic exclusion is their conclusion on appeal that the sewer pipes leaked. As we've pointed out in the briefing, our jury verdict, defense verdict, was affirmed and the court reviewed the evidence and said there was substantial evidence upon which a jury could conclude that materials dumped in the sewer did not leak and cause environmental contamination. So we have a real dispute, a fact issue in this case, as to whether the sewer pipes leaked.

So we have asked the court to render in our favor. However, that is one of the issues that would be applicable if there is a retrial, and that would be the question of the applicability of the domestic sewage exclusion.

JEFFERSON: Would disposal down a drain (let's assume no leak) there would be no regulation under the act for disposal of solid waste down a drain. It's got to be directly on the land or in the water. Is that your argument?

THOMAS: There is a large body of regulations that addresses that issue. There are substantial regulations as what you can and cannot put in to the sewer. POTW, publically owned treatment works, that receive the waste and treat it have requirements for what you can put in to it. Sometimes too much chemicals will affect the microbes that deal with the waste that goes through the system. So there is a regulatory framework that deals with this. I think the question here is, is there any CERCLA type remedy under the Texas Solid Waste Disposal Act because something was deposited into the sewer? Our contention is there is not, and that is supported by the literal language of the statute, which incorporates both on its face, the domestic sewage exclusion from \_\_\_\_\_ of the statute, and the regulatory exclusion that's been promulgated by EPA.

Furthermore, it's in the second part of the definition as well. If you look down

at .003 in the definition section, number 34, it says it's subject to both of the exclusions that I just mentioned, and then it says it specifically does not include solid waste or dissolved material in domestic sewage.

HECHT: In your brief you say that the tests are - there are two from the federal cases. One is authority and involvement; and 2) is obligation. And I thought I heard you say here that it was obligation and involvement, and the second one was authority. So I'm getting confused on the elements.

THOMAS: I may have to go back and look to the brief. I thought it was obligation plus some involvement and authority.

HECHT: It says no federal court has imposed arranger liability on a party who did not have 1) the authority to dispose of the waste as well as some actual involvement in its disposal; or 2) the obligation to dispose of the waste.

THOMAS: I stand corrected.

HECHT: You're with the brief?

THOMAS: I am with the brief. But it's important with regard to the domestic sewage exclusion to understand what the CA did on this fact issue. The EPA says the domestic sewage exclusion applies from the moment materials are deposited into the sewer if they will ultimately mix with domestic sewage.

The CA relied upon the Lincoln Properties case in California for the proposition that the domestic sewage exclusion didn't apply in this case. That case, it was undisputed as to whether the sewer pipes leaked. And the CA concluded that since the sewer pipes leaked no matter what reading of the domestic sewage exclusion you had, it was inapplicable in this case.

So 1) our contention on appeal to this court is that the domestic sewage exclusion on its face makes the materials deposited into the sewer by Mr. Corbin not solid waste. So it's exempt from the statute and the costs recovery elements of the statute. And 2) if the court does determine that there is a fact issue to be determined on this question, that should be in the remand order back to the TC. Specifically did Pilgrim establish that it was solid waste because it's our contention that it's their burden.

This is a 1-1/4 cc vial of perchloroethylene that's used to test the detergent. I think the court can take judicial notice that the cap to your mechanical pencil is about 1 cc. The evidence in the case is that one spill at a Pilgrim facility was about 75 gallons of pure perchloroethylene. We think that the evidence at trial, the basis for the jury finding in our favor that RR Street was not responsible for the contamination at these sites, was the handling practices and the negligence of Pilgrim in dealing with the solvent, not the activities of a vendor and a salesperson who

visits a plant on occasion.

O'NEILL: But can't the jury take that into account under the present posture of the case in awarding damages?

THOMAS: As you know that's one of the factors in the CA's remand order, to look at the volume and the activities of the parties involved.

O'NEILL: So why doesn't that solve your problem?

THOMAS: It doesn't solve the problem for two reasons. One, on the face of the statute you have to get around what the language of the statute says to reach that conclusion in our opinion. And secondly, in the context of these CERCLA actions for somebody who has little or no responsibility with the decisions with regard to solid waste, are we going to have a policy that imposes liability no matter what, and put somebody to actual trial on the case to have to come up and defend themselves before a jury can make findings upon which a judge can then apportion.

HECHT: But apart from the - just to put a fine point on it, apart from the de minimis aspect of it, if you apply the test that you say should apply, certainly Corbin had the authority to dump the vial down the sink, and he was actually involved in that, so he would meet that test as an arranger with respect to the vial?

THOMAS: This would be that he actually owned or possessed is what your point is. And that while we did raise this issue about if you perform the test it was actually on behalf of Pilgrim and with their authority. I think the answer is yes, that the CA found and the argument was that he actually possessed a de minimis quantity of solid waste and didn't make an arrangement for its disposal, but actually disposed of it. So it wouldn't fit the language or otherwise arrange to dispose of the solid waste that he actually did the disposal himself.

HECHT: Does the record reflect how much the cleaning establishment disposed of in volume over the years?

THOMAS: The record is deplete with a variety of information about how they disposed of, beginning in the mid 1980's with the hazardous waste regulations, waste products from the dry cleaner were taken away by a hazardous waste hauling facility. Prior to that time materials were deposited into the trash because there was no other way to deal with them.

HECHT: But is there any indication of volume, like gallons?

THOMAS: Yes. There are substantial indications of volumes which would include principally the issues of how much was contained in spills? how much was spilled during delivery? how much was spilled during ruptured tanks? how much volume was contained in the waste products themselves?

HECHT: And with respect to Corbin evidence that he disposed of these 1-1/2 cc vials thousands of times, which over 40 years would be a gallon or so.

THOMAS: I don't think we quantified that at trial to how much that came up with how much they came up with. But there is contradicting evidence to that. You have to remember there were numerous plants both in San Antonio and Houston. This test was performed on an 8-10 week basis as he would visit the plants. But then when the hazardous waste regulations came into place in the mid 1980's, the materials were deposited in to the hazardous waste bin. Mr. Corbin successor, Mr. Thumb, actually testified at trial that he was taught to pour it in to the hazardous waste bin by Mr. Corbin himself. Mr. Corbin contradicted that testimony at trial.

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RESPONDENT

HOGAN: Let me begin by suggesting that the court's decision in this case today is going to extend beyond private parties: Pilgrim suing Street for contribution. This statute is quite wide ranging and it includes responsible parties in several of its sections. What this court decides today is going to affect who the state can include in its cleanup efforts. Who the state can sue to recover. Who innocent landowners who purchase property can sue to recover. As innocent landowners have responsibility for sites even though they purchase them and are purely innocent. The statute itself uses responsible parties in various different contexts and in various different remedial and administrative provisions of the statute.

I want to talk about the test that's applied. Street in its brief, all the federal courts that address the question under CERCLA and the CA acknowledged that there isn't a test for arranger status or actually for responsible parties in general. It's a multi-factor analysis. It's a totality of the circumstances to the extent that there is a test, that is the test.

If you read these thousands of CERCLA cases that are out there, there are myriad of circumstances and relationships among parties that the courts consider. This is an equitable remedial statute that is designed to look at and consider and result in some equitable fair result in those myriad of circumstances. A bright line test doesn't suit that sort of remedial equitable analysis and result. Because when you have a bright line rule there are always cases that are inside or outside.

HECHT: But we've got to look to something.

HOGAN: I think you do. And all of these cases give you factors that you look to. And when we come to that, I think that what you are asking J. Hecht is in part something I want you to focus on. Because most the case law that exists out there focuses first on people who have actual involvement in the waste disposal decision. That is at the core of CERCLA. It doesn't then require on top of that an obligation or authority. Where the courts move to obligation or authority is when you don't have actual involvement in the waste disposal.

We've cited some of the cases in our brief. There are numerous others.

HECHT: So if you're just sitting around at the dinner table and one guy says well how do you do it? And he says well I just dump it down the sink. Would that be enough involvement?

HOGAN: I think absolutely it would. Why shouldn't it be? I mean to say that someone who pumps it in to the sewer or who pours it down a drain, who pours it down a toilet industrial waste, who is disposing of it down a toilet, down a drain in to the sewer that that is not disposal. I think that would astonish the legislature.

HECHT: Certainly it's bad conduct on his part to do that. But then is he also liable for - it's just sort of amusing to someone else that he does that, to cleanup their stuff.

HOGAN: I don't think that's what we have here. I mean whether that would be enough in some case...

HECHT: That's what I'm asking. I'm asking how casual does the contact have to be before there is actual involvement?

HOGAN: I think that's why you have a case by case analysis.

HECHT: If it can't be left up to the pre\_\_\_\_\_ of the judge we've got to be guided by some rule that tells us over in this area that's enough and over here it's not enough.

HOGAN: I think there are always going to be hard cases. And there are obviously going to be cases that fall at one end of the spectrum or another. And you can look at - there are certainly cases that are out there where people are not held to be arrangers. There are lots of cases where people are held to be arrangers. I think that courts do look at these factors and what all is there.

HECHT: What are the factors that you said - you said that we should look at factors and you said primary among them is actual involvement, and what else?

HOGAN: In this case, I think that the factors that the court ought to consider are the principal factors first, that Corbin was present for over 4 decades on a weekly basis in these plants repeatedly. He was there virtually on a weekly basis in Pilgrim's plants in Houston and in San Antonio. And what he did while he was there in those plants was that he performed tests himself, he took possession of PCE contaminates and he physically dumped it down the drain. He that absolutely with permission, absolutely open, he had the actual authority to do that, he had the apparent authority to do that. And he did it.

HECHT: It was a tiny amount. Maybe a gallon over the whole 40 years.

HOGAN: And it contaminates 200 million gallons of ground water.

BRISTER: Was there evidence of direct leaks from the pipes?

HOGAN: There is evidence in the record of leaks from those pipes.

O'NEILL: What if there were not? What if the evidence was undisputed that the contamination did not result from a sewer pipe leak?

HOGAN: Perhaps that would be some harder question, but whether or not he's - I think that then switches over to him to prove.

BRISTER: If there was evidence of leaks, then why didn't the jury find against you when they said Street didn't create a nuisance on the property?

HOGAN: It's just like any other cause of action. I don't know why the jury decided that. But there are any number of instructions that go with nuisance that can be where the jury decides the same...

BRISTER: J. Jefferson couldn't have found as a matter of law that these vials actually leaked, because nobody ever traced the vials.

HOGAN: No.

BRISTER: So then if it's possible that these vials leaked out of pipes and possibly not, why doesn't the juries know on the nuisance question settle that?

HOGAN: Because that's not a jury question and it wasn't - that's not even what the jury was asked in the nuisance question.

BRISTER: \_\_\_\_\_ substantially interferes with the use and enjoyment of land. I mean this was all about contamination of land. Right?

HOGAN: Yes. But there are lots of issues that go into that nuisance question. There are lots of issues that go into the negligence and the products questions. We don't normally take the jury's answers to one set of questions and say, okay. Well you answered them that way, so that means therefore that these other issues that were resolved differently by either the jury on a different question or a judge on a different question are somehow now determined by the jury's contrary answers on other issues and other questions.

O'NEILL: The import of my question is, is there a causative element to determining arranger status?

HOGAN: No.

O'NEILL                    And so it would not matter then whether or not it was disputed or undisputed that a leak generated from the sewer pipes to determine as a matter for arranger status?

HOGAN:                    That's absolutely correct.

O'NEILL:                    But that would come out on the damages and causation in enforcement end?

HOGAN:                    That's absolutely correct. That's the way this statute is set up. That's the way it works.

HECHT:                    If we're going to look at actual involvement, and that seems to be the principal factor that you've outlined so far because there's no question that Corbin was present, is that a fact question?

HOGAN:                    No. I don't believe that is a fact question.

HECHT:                    Can't ever be, or just not in this case?

HOGAN:                    I think it's not in this case. I think if Mr. Corbin for example had said, I wasn't there. And we said oh yes you were. That could become a fact question that the jury might have to resolve before the judge could make a decision. But in this case we're talking about only undisputed facts.

I think that what Corbin did while he was there in terms of physically dumping those individual vials, is only a small part of what he did and what the personal involvement was. This is a man who was there on a weekly basis. This was by far his biggest client, and he was hugely profitable to Street because of how much he did with Pilgrim. But what he did with waste was, he came in and the evidence is undisputed that he gave specific disposal instructions. He came in and he told Pilgrim's employees in these various plants that the way to dispose of separator water, which contains PCE, was to dump it down the drains, or to dump it in the toilets.

HECHT:                    They didn't have to believe him. Is that true?

HOGAN:                    Well of course they didn't have to believe him, but he knew that they did believe him. He knew and testified that Pilgrim both considered him to be the expert and that they took his advice, and that he knew that they were taking his advice and instructions. And that that was the way that they were supposed to dispose of the waste. He was in their plants telling them what to do. He saw that they were doing it. He knew that they considered him to be a person who was there to give them that kind of advice, and was an expert on those matters, and that they were taking that advice.

BRISTER:                    So if a lawyer advised them that it's okay to do that, I've looked at the statute and reported in that domestic sewerage is alright, then the lawyer would be in an arrange too?



HOGAN: A lawyer might be, but I think it takes a physical presence. I think it depends on what that lawyer's relationship was, if he was present at the site. I mean physical presence matters.

BRISTER: What does it matter if he's there everyday or just told them what to do and they followed his instructions for 40 years?

HOGAN: It may be that even if he hadn't been there, that it would be enough that they followed his instructions for 40 years. But I do think that it adds to the totality of the circumstances that he was present there. He saw that they were following his instructions. He knew continuously and over time he repeated those instructions and told them to keep doing this. He was doing this for products - I mean when they talk about only being a seller, he was doing this as to waste water that came from products that Street didn't sell. He's talking about things that are sold by other people and what to do with the waste that comes from those products.

WAINWRIGHT: You said two of the factors are actual involvement and presence. I got the impression that you have other factors. What are they?

HOGAN: It's the totality. And moving beyond that in this case, I do think it's an important factor that Street intended that its people, like Mr. Corbin, actually have the physical presence, that they actually go there and develop the relationship of confidence. And being the expert and being the vice president of Pilgrim's cleaning operation, I think that's a very important fact in this case to look at. I think it's a very important fact that Corbin himself knew that he was being relied on, that he had complete access to the plants, that he didn't have to get permission from anyone anytime he arrived at the plants. I think it's an important fact in this case that every disposal decision that was made Corbin played a role in.

JEFFERSON: Is appropriate to remand for a separate trial on damages when liability is contested?

HOGAN: We know what the rule says. No. In this case I don't think that liability in a sense is contested. And I think we've laid out in the brief why it's not contested. This is a case in which the statutory interpretation question, much like a duty question, is a question of law and the facts are undisputed. When that goes back it would be law of the case. We don't send back a duty determination. We don't send back a statutory interpretation question and say that it's for the lower court to be able to open that up and look at it again. Here, the facts that determined whether or not Street is an arranger we say are facts, and the CA held those facts are all undisputed.

HECHT: When the federal courts and other courts have used the idea of obligation to control waste disposal in this context, do you argue that Street had such an obligation here?

HOGAN: I think it's very difficult to say. And I would ask what does authority or obligation mean? We certainly have undertaking. We certainly recognize undertaking duties in Texas. And the federal courts say that it's sometimes appropriate to look at general sort of tort law principles

in order to determine these things. Street certainly came in and undertook to provide specific advice on how to dispose of filters, and muck, and the separator water. And I would say that once it does so has an obligation.

HECHT: Haven undertaken that much it had an obligation to do it right.

HOGAN: It had an obligation to do it right. Absolutely. And the same with authority. No one at trial or at any time has said that Mr. Corbin did not have the authority to pour the stuff down the drain, to give instructions on how all of this waste disposal was to occur. No one said he was active, ultra \_\_\_\_\_. Street didn't claim that he didn't have the authority to do these things on their behalf. Quite the contrary. Street's president and one of Street's VP they offered their testimony at the trial that that's what all of their people were doing, that they knew that those instructions were being provided. So Street never claimed that he lacked the authority to do these things.

WAINWRIGHT: Let's talk about the limits of your actual involvement test. Let's go back to the dinner table. The guy says I just pour my vial down the sink. What if he then says an expert at a conference I went to last week told me that that's the way to do it and I'm going to do it. Is the expert at that conference also going to be liable?

HOGAN: I think if you pull one fact out it's very difficult to say. I'm certainly willing to say that - I mean there are plenty of courts around the country that have said that if all you do is send it MSDS sheet, and we have a couple of those in the records, so you can read those, see what they look like, line that up verses what happened in this case, but if all you do is you supply a product and with that product you send a MSDS sheet or some construction, I think most courts have come to the conclusion that if that is the extent of the involvement, then you aren't an arranger. I don't have a problem with that.

HECHT: We're struggling with where that extent is, because we're not in the habit of imposing millions of dollars of liability on people without knowing kind of in the ball park where the line is.

HOGAN: I think the only way you can get some comfort there probably is to read this body of case law that's out there. We are at the core of that. That I don't think that we are anywhere close to the outside edge in this case. Not when you look at the actual physical presence and involvement.

WAINWRIGHT: I think we understand that. We're trying to figure out if we go the direction you're going, where is it going to take us? This case is important, but we've got to be concerned about the ramifications of it as well. Take another example. Corbin tells an employee at Pilgrim just dump those vials in the sink. I am going to lunch. That employee - let's say he's an employee for Fed Ex - he's delivering a box. Corbin says dump those vials in the sink. They happen to be there every week at the same time for 1 year. The Fed Ex guys does that every week for 1 year while Corbin goes to lunch. Where does your totality of the circumstances take us there?

HOGAN: In your hypothetical we don't know what else Corbin did there. Fed Ex, I would probably say that courts could go either way, and have gone either way. Somebody who comes physically dumps things on to the ground, into the drains, it doesn't take anything beyond that I would say. In most circumstances. In the cases that I have seen People who spill it. If you're just a transporter, if you're a motor carrier, but if you spill the stuff, then the person who hired you may not be liable, and the person who you're coming to may not be liable, but because you did it you are. So I would say most courts would say Fed Ex is liable.

The domestic sewage exclusion, I think there are three arguments that we have. The first one is of course what is expressly included within the definition are hazardous substances and that is what this is. So if you have some broad general exclusion of domestic sewage, hazardous substances are absolutely brought back in for purposes of these specific cost recovery statutes sections.

Secondly, the exclusion itself, the broad federal exclusion that is talked about comes with the limitations that exist under federal law. And once you bring in the federal exclusion, the federal exclusion only goes so far. The federal exclusion only applies to the \_\_\_\_\_ and it applies to the record keeping sections, and that's the exclusion that Texas imported. So the only thing they imported was a limited exclusion and it ought to have the exact same limitations in Texas.

And finally I would say, this is a statutory interpretation question in which we are trying to discern the legislature's intent. And I would say it absolutely cannot be the legislature's intent and they would be astonished to learn that when you write this opinion and you say that domestic sewage exclusion applies, the next day all any company has to do is pour its waste down the drain or down the toilet.

BRISTER: Mr. Thomas says no. There are other statutes that take care of that.

HOGAN: What Mr. Thomas said is that there are other statutes that would regulate it, but that there is no remedy. That the state can't come in as a responsible person because it's not disposal, and that the state can't go and get those people to participate, and that no one else who might own that property could ever come back and do anything against that.

O'NEILL: In terms of the arranger status piece, the CA carefully parsed through various things that Street did to determine whether they were enough to establish arranger status. If one of those is enough do all of them need to be addressed in terms of the damages piece that's going back? In other words, if the court were to believe that Corbin's direct disposal down the sink was enough to confer arranger status on Street, do you then need to address whether directing them to pour out the separator water also would be enough, whether the rest would be enough?

HOGAN: I think any one of those. I think it's wrong to take them all apart. I think you're an arranger because of the totality of the circumstances. But any one of those that you want to pick is going to make Street an arranger on the liability side. What that affects is how the apportionment works. How the damages are going to be determined.

O'NEILL: If we were to hold that Street is an arranger based on the vials dumped down the sink, but not an arranger as to the separator water directed to be dumped down the sink, doesn't the TC or the jury need guidance on that piece to determine what sort of damage allocation to make? If we don't need to address them all terrific. But do we need to so the TC will know what to submit to the jury?

HOGAN: I guess there are two ways that the court could handle that. One is to say that it addresses one and finds they are an arranger and leaves the others without comment as to whether it would or would not make them arranger. I think in that circumstance we would probably go back to the TC if it's going to be an issue that's going to come up.

O'NEILL: So the TC is going to have to decide that in submitting the case to the jury?

HOGAN: Right. I mean because it's going to affect questions of volume and the relationship. The two issues that the CA has identified for the jury. Those kinds of questions are going to be important in determining those issues.

HECHT: The industry is a little worried about your argument that PCE may be a solid waste while it is in use. That's the amicus, the \_\_\_\_\_ amicus brief. What's your response to that briefing?

HOGAN: I don't think that the industry has any reason to be worried based on the decision that we're asking the court to make.

HECHT: Do you think PCE is a solid waste while it is in use or not?

HOGAN: No. I don't. I think they are waste.

HECHT: They are afraid that you think that you do.

HOGAN: I don't think our brief leads to that result. I don't think the CA's opinion has led to that result. I think that's going beyond this case.

O'NEILL: On the domestic sewage exclusion, if there were no evidence that the pipes had leaked would it fit the exclusion? Because the way I understand the cases that have been cited is that as long as the leak is upstream from any sort of mixture with domestic sewage, the exclusion doesn't apply.

HOGAN: I think that the federal courts have taken at least two different approaches to the counterpart of this. I think that one side says that - one of the cases suggests that it isn't a question really whether the pipes leak at least on the front end of whether you're an arranger. Whether you have disposed of the substance and there is a release of the toxic, that you don't actually have to prove that. They just say that the domestic sewage exclusion is not intended to meet these types of industrial waste

that are dumped down the toilets or put into the drain.

One of the courts does look at this question because it's a question where there was no doubt but what it leaked before it moved on. What you won't find is going to be a court that has said that that is in and of itself that because it was poured down the toilet - it's industrial waste poured down the toilet, that that meets the domestic sewage exclusion under federal law.

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#### REBUTTAL

THOMAS: It's our position that a test that I know it when I see it just won't do for us in this case or for this state. One of the reasons that you have totality of circumstances in the federal court is because there is no right to a jury trial. Litigants in these types of cases do have a right to a jury trial and we have a right to a jury trial on disputed facts.

If the test is one of control, we say that that is certainly a fact issue. And J. O'Neill that would make arranger status a fact issue, not a question of law. If we're talking about technical services and advice and at what stage does that cross that line...

O'NEILL: Well it's undisputed that Corbin disposed of these vials. That would be a matter of law determination on arranger status wouldn't it?

THOMAS: You're absolutely right to separate the two. Put Corbin aside for just one moment, and go back to the question of technical services and advice. Because I do think that you need to address absolutely each and everyone of these, not only to give us guidance on retrial, but to all litigants. Because if it's a question of technical services and advice, the question and the test that we articulate is when does that cross the line between just being a vendor and providing useful information that you want to encourage manufacturers of these products to provide users. And when does that transition in to control? We think that that would be a fact issue.

O'NEILL: You don't dispute that we could find arranger status as a matter of law as to some of these pieces, just not all?

THOMAS: I think if you're talking about the question of control, there is pieces of evidence that relate to the question of control. They are technical services and advice. My response to your question is no, you cannot find that as a matter of law. On the other hand, we think that you can rule on this as a matter of law, because none of those issues, none of those technical services or advice as a matter of law rise to the level of control in our view. So yes you can decide that in our favor as a matter of law.

If you articulate a test that those may be indicia of control over Pilgrim's solid waste disposal decisions, then that would be a fact issue.

Let me move over to Mr. Corbin because that's completely separate. There will be and there are fact issues on whether Mr. Corbin's conduct is a disposal. If you rule that he had actual possession - did he dispose? We have to look at the statute. Is it solid waste? We have to look at the definition. And to the extent that there is a dispute on sewer pipes leaking, you cannot decide that as a matter of law because there's a dispute and disputed fact question.

BRISTER: Mr. Corbin points out that solid waste does not include domestic sewage, but it does include hazardous substances and PCE falls under the latter. Is that right? So why do we need to know whether it was domestic sewage or not?

THOMAS: Because in the statute it says hazardous solid waste is trash, rubbish and other discarded material. That is the definition. The question needs to be was it discarded material? Then you go on and it says in adding life to that provision it does not include domestic sewage, but it does include hazardous substance, but that are otherwise discarded material and subject to the restrictions in the first sentence of the definition.

O'NEILL: So what if someone flushed hazardous substances, large amounts, into sewer system. Are there other remedial provisions that you claim would take care of that?

THOMAS: First of all, if you follow the court's ruling in Lincoln Properties, if there is a leak the question under the holding in that case is that it doesn't apply, the domestic sewage exclusion doesn't apply. If that's the case there would be a remedy. However, the way the statute is written is that no matter what if it's domestic sewage and goes in the sewer it is not solid waste covered by this act.

O'NEILL: Why wouldn't someone then just flush everything presuming no leaks?

THOMAS: Because they would get busted by the POTW who would say you're putting too much stuff down the drain. Stop it. That's the short answer to that question.

PHILLIPS: There wouldn't be any after the fact monetary damages in that situation? It's just a regulatory order that you have to cease and desist

THOMAS: If you do not fit the definition of solid waste that is correct. There would not be any CERCLA type contribution action under the statute.

OWEN: Because under your theory there wouldn't be contamination?

THOMAS: There wouldn't be solid waste that was disposed of by somebody. So if it's not solid waste and does not fit the definition of solid waste, i.e. it goes into the sewer which is going to be carried on to a POTW it is not solid waste.

OWEN: Without a leak?

THOMAS: Our position is both regulations apply. Now there is one thing I might point out with regard to that is that the EPA has studied this issue since 1984 directive by congress to look at the question of sewer pipe leakage and whether it presents an environmental hazard. They issued a report in 1986 and entered into 2 or 3 years of rule making and ultimately in 1990 came out with a rule that says we're going to keep this exemption in place regardless of the possibility that it may leak, and our regulatory exemption applies from the moment it's put in the drain regardless of the leak.

Now our legislature in Texas has amended this statute numerous times since 1985. In light of all that record by EPA has not changed the definition of solid waste.