Om:Speaker 1 (00:00):

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David Mandelbaum (00:20):

This is David Mandelbaum. We're talking about Superfund allocation with Bill Hengemihle of FTI Consulting, one of the nation's leading Superfund allocators.

David Mandelbaum (00:33):

I want to switch gears a little bit to other kinds of allocation because I think in my experience while Superfund lawyers and Superfund allocators like cost causation as a basis for allocating, I'm not sure that that's the way most people think about it. It's not what costs did you cause, but what costs were your fault?

David Mandelbaum (01:03):

So to give you a simple example, you and I are out driving after we record this and we get into an auto accident. If either one of us had stayed home, there would not have been an auto accident. So each of us caused the harm. But if I'm driving with my eyes closed and you're driving safely, most people would say that I ought to pay all the damage, right? And that's not a cost causation. That's whose fault is it? It's a fault question.

David Mandelbaum (01:36):

And there have been cases out there. The one that's most often cited is the Environmental Transportation System case in the Seventh Circuit, which is the one about a truck carrying a PCB containing transformer flipping on an s-curve because it was driven too fast. And the trucking company got 100% of the allocation, right?

David Mandelbaum (02:02):

How do you, when people make arguments like that, Bill, how do you accommodate that? Because they come up as, someone will argue it should trump, the fault should trump the cost causation.

Bill Hengemihle (02:19):

Oh, at least I'll start the answer this way. In most private allocation proceedings, consensual-based allocation proceedings, the individual parties are not more disproportionately at fault than others because most parties at a Superfund site were doing historically the right thing. They were following then existing decades-old conventional practices for disposing of waste in landfills or at facilities before environmental regulations made the scene in the 1970s and 80s.

Bill Hengemihle (02:56):

So for the most part, in an allocation proceeding you don't have parties who acted negligent or out of some type of accepted norm around appropriate conduct with the then existing standards of care and regulatory regime. So fault doesn't really crop in too much in private allocation proceedings. But sometimes it does. And I can tell you that as a neutral allocator, there's not a chance I'm going to get

parties to agree that some were more at fault than others. That's just going to be polarizing, is not going to get parties to agree.

Bill Hengemihle (03:34):

However, in the shuttle diplomacy process, where the neutral allocator's working with individual parties privately, it could be very common for the neutral to say, "Party X, you're a little bit different than the others. You sent to waste at a site when it wasn't the conventional practice and you didn't follow the regulations. You're a little bit different, and there's a chance that the court would find you at fault, put some type of premium on your allocation if you litigated. So I really think in this settlement context, you ought to take a little bit more to get this case to the finish line because of the litigation risk you would face, party X, if we litigated and a judge, not your neutral allocator, but a judge is going to put a kicker on your allocation because of fault."

Bill Hengemihle (04:22):

As a practical matter, David, that's usually the way it sorts out in terms of factoring in fault in an allocation. Go ahead.

David Mandelbaum (04:29):

I think that that, but what you're saying sort of highlights one of the lawyering choices in those kinds of matters where if you think there's a fault issue, a court may give that a more complete hearing than a consensual allocation process because the consensual allocation process has difficulty dealing with it for the very reason you said. You can't get a party to agree that it was a bad guy.

Bill Hengemihle (05:05):

Right.

David Mandelbaum (05:06):

So even if there's a little kicker that that party agrees to accept to extinguish litigation risk, it really isn't the full premium or the full alternative that you might get in litigation. So there may be parties who will say, "No, no, I'm not going to... Hengemihle's a great guy. We love him to pieces, but his process can't get me what I need because my big argument is going to get short shrift." And that's a tension we all have often I think.

Bill Hengemihle (05:43):

I think you're right.

David Mandelbaum (05:44):

A similar package of allocation factors that doesn't fit neatly into cost causation are what I often call transactional fairness. The simplest is a contract which reallocates a liability from one party to another, and that itself may be disputed. But there are other kinds of factors, or other kinds of situations where one party, a court may believe that one party has what at one point has been called a moral duty to worry about contamination on its property, even though it wasn't responsible for it. That was a discussion of a landlord, right? The landlord had some moral duty. Or it's unfair that somebody who owns property is going to end up with a cleanup funded by others which will increase the value of the property that it owns. Those kinds of things.

David Mandelbaum (06:46):

Those kinds of transactional fairness arguments, how do you deal with them? I mean, the old, old, old one is caveat emptor, right? The Smith Land case where they're 20 foot high piles of asbestos-containing material that nobody looked at. The court says caveat emptor isn't a defense to liability. But really? Do you get to walk away from that? Does that really just go to the new owner?

Bill Hengemihle (07:15):

Right. Well, an approach I would take on something like that where a transactional contract was employed pertaining as an indemnity agreement perhaps between two parties to the allocation, David, what I typically do for something like that would be to consider asking the parties to have me hire a contracts expert who can give me an expert legal opinion on the enforceability of contractual provisions between two parties in a given jurisdiction or venue. And I'll use that expert's opinion on probability.

Bill Hengemihle (07:53):

Suppose the expert says, "You know, Bill, it's a 50/50 shot that PRP A would be able to enforce the contract against PRP B." 50/50 that B really should receive the liability for A based upon contractual terms in a buy- and-sell agreement. What I would then do is use that 50% probability discounting factor to reduce party's A share by 50% and transfer that 50% reduction to Party B. And that transfer would be added to party B's allocation independent of the contract.

Bill Hengemihle (08:28):

That'd be one way of trying to approach it in a private allocation process is to use some type of probability discount on a trial outcome to get this question resolved in more of an ADR consensual allocation process.

David Mandelbaum (08:44):

Right. And I think that that again creates the same tension as we had with fault, which is...

Bill Hengemihle (08:50):

Yeah.

David Mandelbaum (08:50):

... if you think the court's going to take it seriously, treat a contract very strictly, then you're better off in court. And as much as we like the consensual allocation, it's too stuck with cost causation to suit your purposes if your best argument is something else.

David Mandelbaum (09:13):

The last thing I want to touch on today is adjustments. And the principal adjustment people run into is cooperation, which is one of the Gore factors that we talked about last time we spoke. Cooperation tends to refer not to sort of how cooperative were you with regulators at the time you were causing pollution, but how cooperative have you been with the government effort to clean up this site? Did you provide access? Have you signed cleanup agreements? Those kinds of things. How do you deal with that allocation factor?

Bill Hengemihle (09:57):

By looking at the fact pattern in the case is being allocated to fact patterns in adjudicated cases where a non-cooperation penalty's been applied and applying that same type of adjudicated factor to the case under review. I think I mentioned earlier when we were talking the Consolidation Coal case, is 20 years old, but it was one of the first to put a multiplier of two on a non-cooperating party share. Party's fair share was 3%. It was made 6% by the court because of that party's failure to cooperate with the PRPs and EPA and studying and remediating a site.

Bill Hengemihle (10:36):

David, I might do the same thing in an allocation proceeding with regard to all the non-cooperating, sometimes called recalcitrant PRPs, is put a 2.0 multiplier on their otherwise fair shares. Generally speaking, most parties to an allocation proceeding are cooperative with EPA. That's why they're looking to allocate their costs. They're cooperating with the EPA and need to allocate their costs.

Bill Hengemihle (11:02):

So I would say that cooperation doesn't really come up as an allocation factor among and between allocation process participants, but it is a factor to make sure that recalcitrance is not rewarded and the parties who are last to participate don't get better terms, in fact they get worse terms than those who did participate. That's my practice around that.

David Mandelbaum (11:25):

Yeah. Two litigation points on that. One is, remember if you give somebody a bump, you're giving somebody else an exactly reciprocal cut because all the shares have to come up to 100%. So a factor of two can be very large if the underlying shares are large. Also, it can turn out to be very small if somebody has, already has a very large share. It doesn't make much difference than it or anybody else.

David Mandelbaum (11:59):

There is a dispute that we ought to highlight before we wrap up about how you think about cooperation. And that comes up when someone has spent a lot of money to do preliminary parts of the cleanup, a study or a removal action, and will say, "Oh, look, I've spent this many dollars. I'm more cooperative than all you other people." There is a response, which is, "Well, yeah, sure. But your share was much bigger than the amount that you spent. So you were the 75% party and you only spent 30% of the cost we all spent together on that. You're not more cooperative than all of us. You're less cooperative."

David Mandelbaum (12:48):

So there is a dispute I think brewing in every cooperation case unless somebody says zero or 100% on past cost as to whether you measure it by number of dollars, type of settlement agreement under which they did work, or the relationship between the dollars they spent and their fair share of that particular task. But those are mostly litigation issues, not consensual allocation issues I think.

David Mandelbaum (13:20):

Well, this has been very interesting and I think we're sort of at the time. And I enjoyed this, Bill. Is there anything else you want to add?

Bill Hengemihle (13:29):

Likewise, I enjoyed the dialogue and the discussion. So thanks for inviting me again for another episode on this topic, David.

David Mandelbaum (13:36):

Join us soon on another episode of the E2 Podcast.