Exhibit 5

1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE NORTHERN DISTRICT OF OKLAHOMA

3

4 STATE OF OKLAHOMA, ex rel,)
5 W.A. DREW EDMONDSON, in his)
capacity as ATTORNEY GENERAL)
6 OF THE STATE OF OKLAHOMA,)
et al.)
7)
Plaintiffs,)
8)
V.) No. 05-CV-329-GKF-PJC
9)
)
10 TYSON FOODS, INC., et al.,)
)
11 Defendants.)

12

13 REPORTER'S TRANSCRIPT OF PROCEEDINGS

14 HAD ON SEPTEMBER 4, 2009

15 PRETRIAL CONFERENCE

16

17 BEFORE THE HONORABLE GREGORY K. FRIZZELL, Judge

18

19 APPEARANCES:

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427B.

THE COURT: But not even the facts, as I read it and maybe I'm reading it incorrectly and either one of you can correct me, but as I read it this doesn't go as far as the plaintiffs want to go.

MR. JORGENSEN: Exactly. Exactly. And yet even then, even if you took just the dicta here, they still want to go one more step, not to the subcontractor who is working for the contractor, but to somebody who has no contractual relationship even with the contractor much less the principal. That's the point of this motion. Someone who we know not --

THE COURT: Their focus is foreseeability, a tort concept as opposed to contractual privity.

MR. JORGENSEN: That's exactly right. And foreseeability, this was a point that I made poorly before, but I'm going to try to make it more clearly here. Foreseeability is not an unbounded theory of liability in the law, that one is liable for anything that might be foreseeable. Foreseeability is a test that gets applied to various theories. One of those theories is there's a general rule that the principal is not liable for what an independent contractor does, but 427B says in that relationship then if it's foreseeable that the independent contractor will cause a nuisance, if it's necessary that he would cause a nuisance, in that context the test of foreseeability might reach that, but it's not just generally

unbounded foreseeability.

Another context which is much more close to Mr. Baker's argument -- this is the argument he's really making to you is the gun argument. The gun argument theory is as a matter of product liability, a theory not even asserted in this case. You might make a product that wherever that product goes and whoever uses it, whether they've got a relationship with you or not, you're liable because it's foreseeable that that product might cause harm. That's a product liability.

THE COURT: Which typically only applies to inherently dangerous products.

MR. JORGENSEN: Exactly right. And even then it's hotly disputed in the gun cases and others, but it has no application here and that's the theory that's been urged at the podium on you.

Finally, Your Honor, two points. I didn't mean -- I'm sorry, did you have a question? I cut you off.

THE COURT: No, sir.

MR. JORGENSEN: Mr. Baker said to you -- and I apologize if I'm mischaracterizing this because it's been sometime since he said it, but something along the lines of it doesn't matter because this evidence is going to come in under RCRA anyway. That's not true. RCRA is not a jury issue, it's for the Court. Nothing in RCRA is for the jury. So RCRA as a theory is not a reason to let this evidence in.

a disputed fact and I think at trial we will be able to show that the word "transfer" in the records that he's referring to is undefined and is very amorphous.

THE COURT: Well his point wasn't so much as to the percentage but that some amount that is sold. I mean his point is the dividing line is that which is purchased or bartered is no longer within the ambit of 427B.

MR. BAKER: And I understand that point. And that's going to be a very important point in a few minutes in my argument because it shows that they know that poultry waste is being transferred to third persons to handle the disposition of it, the integrators know that. And that gets into my next point which is the key is foreseeability. We have to come back to foreseeability. Reason to know that something that's going to happen from the work. What is foreseeable by the integrators from the contract work with the growers is A, that massive amounts of poultry waste are going to be generated, the waste has to be gotten rid of, the waste is land applied in a concentrated area, and that land applied poultry waste will result in a nuisance or trespass. You can't manipulate the operation of 427B by simply having, adding intermediaries. The focus is always going to come back to foreseeability.

THE COURT: Well, but his argument as I understand it, their argument, the defendants, is that 427B although it -- I think you're right, it turns on foreseeability, it has limits.

1 It's not a theory of strict liability where foreseeability
2 extends out as far as that unreasonably dangerous or inherently
3 dangerous product may go in the marketplace, but only so far as
4 one employs an independent contractor and that once that
5 product is sold then 427B doesn't apply. The most clear
6 example would be in the event, let's say, Tyson while it was
7 operating these farms up until 2004; correct?
8 MR. GEORGE: Correct.
9 THE COURT: Directly sold product to some third party.
10 In your view would 427B apply there?
11 MR. BAKER: It very well could, because here's the
12 situation. They have generated massive amounts of poultry
13 waste, they know it has to be disposed of and by entering into
14 that contract where they know it's going to be land applied in
15 a manner that's gong to cause a nuisance, that's foreseeable,
16 that's where 427B comes in.
17 THE COURT: Well, but 427B is bounded by the language
18 thereof. It says -- it's not just a rule of foreseeability.
19 It says, "one who employs an independent contractor to do work
20 which the employer knows or has reason to know to be likely to
21 involve a trespass," et cetera.
22 So although your foreseeability argument obviously, by
23 witness of the fact that I'm trying to wrestle with it, has
24 some real weight. 427B is not an unlimited foreseeability
25 argument, but one bounded by the language "one who employs an

1 independent contractor." I mean, it would appear that if in
2 2004 Tyson, operating a farm, sold from that farm poultry
3 litter to a third party which could be taken outside the IRW --
4 as you suggest, likely very likely applied within the IRW but
5 perhaps somebody is in pelletizing experiment and somebody is
6 doing experiments trying to develop methane, small methane
7 production. Isn't 427B foreseeability constrained by the
8 language, "one who employees an independent contractor"?
9 MR. BAKER: No. If we can go to the next slide, the
10 comment to 427B, and I think this will address the question
11 Your Honor has. "It is not however" -- and I'm reading from
12 the underlined portion. "It is not, however, necessary to the
13 application of the rule that the trespass or nuisance be
14 directed or authorized, or that it shall necessarily follow
15 from the work. It is sufficient that the employer has reason
16 to recognize" -- reason to recognize -- "that in the ordinary
17 course of doing the work in the usual -- in the usual or
18 prescribed manner, the trespass or nuisance is likely to
19 result." We just heard Mr. Jorgensen say that it's usual for
20 it to be transferred. They know -- if we can establish that
21 the integrators know that the usual course is that this poultry
22 waste is being transferred, it fits squarely within comment b
23 which in turn is incorporated or is used as an interpretive
24 tool for 427B itself.
25 THE COURT: Well, except that comment b uses the term

contractor and employer. It doesn't by its terms cover the situation where the product is sold or traded.

MR. BAKER: But if I know, if I know I've created a massive waste problem, a waste management problem and I know that it has to be handled some way, one way is to land apply it on my own land, but my STP is too high so I can't do that. Another way is to give it to a friend. Another way is to contract and have it moved to someone down the road. All of those situations are foreseeable and they are the usual manner that it's handled. And if we can show that at trial, then I believe we are entitled to affix liability.

THE COURT: Isn't that argument one for the application of the concept of strict liability as opposed to 427B.

MR. BAKER: No, because it is foreseeability, Your Honor.

THE COURT: I'm having difficulty with unbounded foreseeability. I mean it seems to me that 427B does establish some bounds and can only apply within the construct of an independent contractor relationship. In other words, what I'm finding it hard to understand is how could Tyson be liable under 427B in the event that it sold poultry litter to someone in 2004 under the theory of 427B?

MR. BAKER: Because the work is growing the poultry, it's generating the waste and the foreseeable consequence of

that it has to be disposed of in some way, shape or form through themselves, through a trade, through a barter, through a transfer of some sort, and that's the usual manner.

THE COURT: I understand the general argument of foreseeability, but the comment b talks about a contractor and an employer. In a case where someone sells the product there is no contractor and there is no employer.

MR. BAKER: And as Mr. Bullock points out to me, it would be -- that's a subcontractor situation similar to as Mr. Jorgensen described, if a grower contracts with an applicator to apply the poultry waste on his land, that's in the foreseeable chain that he was saying could be appropriate, and likewise this is no different. It Tyson knows and they are contracting with a person, the employer would be integrator, has reason to recognize that in the ordinary course of doing the work the person that to whom they have contracted with to truck the poultry waste out, if they have reason to know that that's going to cause a trespass or nuisance, liability sticks.

THE COURT: But in the case of an independent contractor, that's a very different type of relationship. I'm paying the independent contractor to get rid of the stuff. In the case of selling this stuff to a third party as in my hypothetical, he's paying me for the stuff.

MR. BULLOCK: It seems to me that we're talking two different things here. And 427B probably doesn't apply where

1 Tyson is arranging directly for the disposal of its waste. Now
2 whether they are taking money to get -- they've got some junk
3 hauler that's going to take the waste out and is willing to pay
4 you for it, or whatever, but where you get into 427B, the issue
5 in this case has not been are the companies responsible for the
6 wastes that they themselves generate at their own farms. The
7 issue that this is focusing on is the issue of the
8 responsibility of the companies for what happens on the back
9 end of the growers farm. Traditionally these companies have
10 created the grower situation or used the grower's situation to
11 say hands-off, we're not liable. What 427B focuses on, it
12 seems to me, is that when they establish that relationship,
13 they know that -- and that's the focus of 427B, is that's the
14 subcontractor, the grower. They establish this subcontracting
15 relationship knowing that, foreseeing. This isn't a distant
16 foreseeing, this is what all of these knowledge documents that
17 we've fought over all day are about is that by virtue of the
18 business that they're hiring this person to do, they know
19 what's going to happen. They know that rivers are going to get
20 polluted. Now there may be some intervening actors who come
21 along and participate in what Tyson knows is going to happen as
22 a result of their contract, subcontract with this grower. And
23 so --
24 THE COURT: All right, but what I'm wrestling with
25 here is we're dealing within the construct and limitations of

1 the 427B theory. To the extent that you concede that Tyson
2 would not be liable under 427B for the situation where it's the
3 operator and it sells directly to a third party, although I
4 will agree with you that it is foreseeable that that poultry
5 litter will be applied within a limited range, in this case
6 where you have a million acre watershed. But if you concede
7 that, then why would the subcontractor selling the poultry
8 litter be any different?
9 MR. BULLOCK: Well, I am not conceding.
10 THE COURT: Well, that's what I suspected your answer
11 would be.
12 MR. BULLOCK: No, no, no. Truly, Judge, Tyson is
13 going to be liable for the pollution coming out of their
14 factory farm.
15 THE COURT: Okay. So you're saying in this situation
16 where Tyson in 2004 sold the poultry litter to a third party
17 they are liable. That's a theory of strict liability --
18 MR. BULLOCK: No.
19 THE COURT: -- that's not a 427B theory.
20 MR. BULLOCK: Well, no, they know. They know they are
21 creating pollution by doing this. It's an intentional tort, it
22 is not a question of strict liability.
23 THE COURT: But we're limited right now Mr. Bullock to
24 427B. Okay. We're within in the construct of 427B. In the
25 case of Tyson selling in 2004 there is no independent

1 contractor. They are selling -- I agree with you for purposes
2 of argument here, that's why I'm trying to wrestle with this,
3 that there is some foreseeability that that poultry litter, at
4 least part of it, is going to be land applied within a certain
5 geographic area, but under 427B, there not being an independent
6 contractor, the whole concept of 427B being a legal construct
7 involving independent contractors, it doesn't apply. And if it
8 doesn't apply to a direct sale from Tyson as operator, why
9 should it apply to the case where there is a sale from the
10 independent contractor to a third party.
11 MR. BULLOCK: Well, first of all, of course, if we
12 don't have a subcontractor then 427B doesn't apply. Okay. I
13 mean by its terms. I can't win that argument that 427B
14 applies, gives you liability where there's no subcontractor.
15 THE COURT: So in my 2004 example there is no
16 subcontractor.
17 MR. BULLOCK: Okay. But that doesn't mean that Tyson
18 isn't liable under that situation for the way that it is
19 arranging to handle its waste. That becomes --
20 THE COURT: For that particular load you're saying
21 that they're not liable -- or they're still liable under
22 427B --
23 MR. BULLOCK: No.
24 THE COURT: -- even if there's not an independent
25 contractor?

MR. BULLOCK: No, sir, they couldn't be liable for it if there's not an independent contractor.

THE COURT: Okay. But we're limited right now, Mr. Bullock, to 427B. Okay that's the argument before the Court. Your other theories are set aside for the moment. Okay. But under 427B which I'm trying wrestle with right now --

MR. BULLOCK: I appreciate that.

THE COURT: -- you are conceding, as I understand, that the situation where it's sold directly by Tyson as operator in 2004 would not give rise to a 427B situation. If that's the case, then why would the sale by one of the alleged agents here to a third party, why would that give rise to a 427B situation?

MR. BULLOCK: Okay. This is the way that I see it. We go back to your Tyson operating its own place and it gives its waste away, no contractor relationship. In fact, there's a Cobb-Vantress where they operate their grandparent facility that's exactly this situation. They produce all this waste, and what the testimony is, they give it away.

THE COURT: All right.

MR. BULLOCK: Okay. Now Cobb-Vantress knows the consequences of producing all of that waste and not arranging for the safe disposal of it. Okay. So they are liable directly, it's not a matter of an independent contractor situation.

THE COURT: But not under 427B.

MR. BULLOCK: But not under 427B, because we don't have a independent contractor. They are doing directly. What 427B was designed for is situations exactly like this. Somebody is engaged in a business or wants to be engaged in a business that they know involves horrendous risk, in this case to the environment. So how do you cut that off? How do they prevent from being Cobb-Vantress giving away their waste? Ah, I'll get an independent contractor and then whatever happens to the waste, I've cut off my liability for it. And so that's what it cuts through that ability to hire an independent contractor and thereby do something that otherwise they would be directly responsible for.

THE COURT: And I agree. And Mr. Jorgensen is saying we're not deciding here -- he's not trying to exclude the application of 427B to the growers as independent contractors. But what he's saying and what I'm focusing on is the sale or giving away of product from the independent contractors to third parties. If you agree with me that the 2004 situation doesn't give rise to 427 liability, why would the sale or giving away by the independent contractors, which is still a live bomb in this case and a legitimate theory. I'm not -- Mr. Jorgensen doesn't dispute it, I don't dispute it, because I agree with Mr. Baker's foreseeability argument in that regard. I'm talking about the third parties to whom the independent

contractors sell. Why doesn't the same rule you conceded to me with regard to the sale or giving away by Tyson as operator, apply to the sale or giving away by the independent contractor to third parties?

MR. BULLOCK: Because of the language in the comment that Mr. Baker looked to.

THE COURT: But once again, as I tried to point out to Mr. Baker, that involves contractors and employers. When that independent contractor is selling or giving away, that relationship between the independent contractor and the third party is not one of contractor/employee.

MR. BULLOCK: Well, the usual way they dispose of this waste, what these companies know is going to happen to the waste when they --

THE COURT: I totally agree, but that doesn't implicate 427B, does it?

MR. BULLOCK: Well, it says that the companies can't -- what this is proposing is that if the companies can build a contractor upon contractor pyramid they escape.

THE COURT: Well, I agree it raises questions of safe harbor. But you and I are lawyers and we've got to work within the construct of the law. And that's why I'm trying to wrestle with this because I fully understand your concern here. But to the extent, in my simpleminded way, to the extent if you will concede with me that the 2004 situation doesn't give rise to

427B liability, then the relationship between the independent contractor selling or giving away poultry litter to third parties doesn't raise 427 liability either. It may rise liabilities on a different theory of strict liability which has not been raised in this case, but it doesn't raise 427B liability.

MR. BULLOCK: This is the way that it seems to me to work, is if I decide to locate a concentration of dirty coal plants and I hire a contractor and I know what's going to happen to the waste from that, even though that contractor may find a use for some of that ash that's being produced, and he may be having it carried out the back door and making some money off of it. I know of all of the risks of ash pollution coming out of that plant and I'm not going to be able to cap my responsibility for that because I know of those risks and I should take the precautions. What 427B is telling the tortfeasor is that when you're doing something where you know there's a risk you need to take precautions to avoid that risk.

THE COURT: It's a good general cornfield equity argument. I understand what you're saying, but right now we're focused on 427B and it requires an independent contractor situation.

MR. BULLOCK: Well, only as to where -- it goes -- the first level is to what you hired the person to do and the risks that you can foresee from that. The fact that that independent

1 contractor may end up -- there may be all sorts of
2 intermediaries between that and the risk, that you know is, in
3 this case know is inevitable, isn't going protect you.
4 THE COURT: But what you're arguing essentially is
5 that once you've hired an independent contractor that it's
6 strict liability from there on.
7 MR. BULLOCK: The -- where the liability comes, and
8 we've talked about this, is the scope of that foreseeability.
9 And, yeah, there's a test of reasonableness in all
10 foreseeability, but if you know the risk is horrendous
11 ecological damage from this, this thing that you're hiring the
12 guy to do, you're not going to be able to escape liability by
13 saying, but there were other intermediaries before this nuclear
14 waste came to a resting place.
15 THE COURT: Well, nuclear waste is clearly a hazardous
16 substance.
17 MR. BULLOCK: Well, but or these phosphates come to a
18 resting place.
19 THE COURT: Well, I mean if phosphate is a hazardous
20 substance like nuclear waste. We don't have that theory here,
21 do we?
22 MR. BULLOCK: Well, that's one of the dangers of
23 standing on your feet and talking. So forget that, let's go
24 back. No, but I don't know of any other way to say it. It
25 is -- in Mrs. Palsgraf the question was foreseeability and the

1 fact that there were intermediary actors in that didn't
2 protect, even though they were independent, much less had some
3 contracting relationship, even though there were
4 intermediaries, the original tortfeasor still bore the
5 responsibility for what was foreseeable. 427B is just saying
6 the subcontracting relationship isn't going to cut off that
7 foreseeability. That's about as clear as I think I can make it
8 so I'm going to turn it back over to Baker that I gave an elbow
9 to and let him see if he can help.
10 THE COURT: Thank you. Mr. Baker.
11 MR. BAKER: All I can do is repeat the obvious, and
12 the obvious is the foreseeability argument. And so whatever
13 your action is, if it's foreseeable consequence of the growing
14 of poultry and you know the growing of poultry going to do
15 that, generate all of that waste, you've got to handle it, you
16 know it's going to be land applied, that's a foreseeable
17 consequence, you're response for that causal chain.
18 Just a few other points on that. And there are,
19 there's -- and I have to agree with Your Honor, there's
20 different -- if you look at it from one angle the foreseeability
21 chain is -- again foreseeability is a question of fact, but
22 once you get to that issue of do I know it's going to be land
23 applied, however, be it through a sale, a transfer or a gift or
24 what have you that is foreseeable and we will put on that -- we
25 are charged with putting on that evidence and if we can meet

that challenge, I believe that liability does affix.

A couple of other things that were raised in Mr. Jorgensen's argument. He tries to suggest that our complaint is only concerned with poultry growers or the integrators themselves and their land application of poultry waste. That's simply misreading of our complaint. The whole focus of our complaint is the responsible management of poultry waste and that the defendants are responsible for that. He read you one isolated paragraph out of that complaint. I direct Your Honor's attention, if you're going to rule on this basis, to look at paragraphs 54 and 56 and the whole 48. Many of those sections --

THE COURT: I don't have the second amended complaint in front of me. You say paragraph what?

MR. BAKER: I could read you a snippet or two.

MR. JORGENSEN: Your Honor, I'll give you my copy.

THE COURT: Thank you. What are those paragraphs?

MR. BAKER: Let's start with paragraph 54.

THE COURT: All right.

MR. BAKER: And again, the focus of our complaint is, is that the knowledge that this is foreseeable. "Each of the poultry integrator defendants has long known that poultry waste is in enormous contributor to the phosphorus and other pollution in IRW. Nevertheless each of the poultry integrator defendants continues to allow large amounts of its respective

1 poultry wastes to be improperly stored and applied on lands
2 within the IRW each year, hereinafter, the poultry waste
3 disposal practices."
4 And that's key phrase that's used throughout our
5 complaint, it's this concept that they know what's happening to
6 their poultry waste, it's being land applied, it's running off.
7 If you look at 56.
8 "Each of the poultry integrator defendants has long
9 known that such poultry waste disposal" -- that's the land
10 application, it's not specific to just contract growers -- "has
11 known that such poultry waste disposal practices presents the
12 threat that constituents of poultry waste will run off and be
13 released into and from the land to which poultry waste is
14 applied, thereby potentially adversely impacting the IRW,
15 including the biota, lands, water and sediments therein, and
16 that such practices have, in fact, resulted in constituents of
17 poultry waste running off and being released into and from the
18 land to which the poultry waste is applied, thereby adversely
19 impacting the IRW, including the biota, lands and waters and
20 sediments therein."
21 All this goes to the fact that what we are concerned
22 about is the defendants properly handling the poultry wastes
23 that they are creating and contracting with the growers.
24 That's a foreseeable result of their contractual relationship
25 to raise birds. So to say that the fact that we didn't use the

1 third persons, the word third persons in our complaint is sort
2 of misleading I would suggest to Your Honor.
3 THE COURT: Well of course their response would
4 necessarily be third persons clearly aren't covered under 427B,
5 I mean to the extent that we're arguing the 427B motion. We
6 don't have a straight negligence cause of action; right?
7 MR. BAKER: And obviously this is in the fact section
8 of our complaint so it also goes to our other theories of
9 liability including RCRA contributor liability.
10 THE COURT: Yes, well, that's aside because I'm really
11 concerned about the jury case. RCRA, that's a different
12 matter. Anything else?
13 MR. BAKER: Another point is that there was mention
14 that the State land applies poultry waste. A little bit of
15 context here. If you look through their motion for summary
16 judgment papers they cite two instances of the State land
17 applying poultry waste. One is they cite to our request -- our
18 responses to requests to admit where the State admits that it
19 has land applied poultry wastes on experimental and educational
20 farms or lands for the purpose of learning about poultry waste
21 and educating people about it.
22 The second is they cite to a deposition transcript
23 from Ed Fite when in the mid '80s, I believe he said, it might
24 be the late 80s, but sometime in the 1980s he took a pickup
25 truck full of poultry waste and put it in the flower beds in

1 front of the Scenic River's Commission. Those are the two
2 instances they cite. So I don't want Your Honor to be under
3 the misimpression the State of Oklahoma is out there applying
4 poultry waste on a regular basis. The State does not promote
5 the land application of poultry waste in the IRW, we covered
6 that in our brief the whole purpose of these marketplaces and
7 things is to get the poultry waste transferred out of the IRW.
8 And finally, just to wrap up, Your Honor, I would
9 encourage Your Honor to go back and look at the City of Tulsa
10 opinion in there. Judge Eagan's analysis, I think, is correct.
11 It is a foreseeability analysis and it all springs from the
12 massive generation of poultry waste that follows the raising of
13 chickens and something has to be done with it. It's land
14 applied. We all know it's land applied, it's running off and
15 that's the foreseeable nuisance. Thank you, Your Honor.
16 THE COURT: Palsgraf.
17 MR. JORGENSEN: I'll be very quick, Your Honor.
18 THE COURT: Mr. Jorgensen, I know you had some ideas
19 in mind, but respond to the Palsgraf argument.
20 MR. JORGENSEN: Yes, it's my point. Foreseeability in
21 the law is always, always an element of a cause of action, not
22 a cause of action in and of itself, sir. In Palsgraf it was a
23 tort case if you recall, and if I remember right fireworks went
24 off and there was some pretty incredible chain reactions, but
25 the point is you have to prove the elements of tort and

1 foreseeability is one of the elements of tort. What's being
2 thrust on you is the idea that anything that we do, if there's
3 a foreseeable consequence to it, we are liable for that
4 foreseeable consequence. I actually wrote down Mr. Baker's
5 quote. I thought it was breathtaking. Whatever your action is
6 you are responsible for its consequences if they are
7 foreseeable. That is not the law. You have to prove
8 foreseeability within a cause of action. And what are the
9 causes of action in this case? None of them, none of them is
10 strict liability for an inherently dangerous product. That's
11 the one that's the closest here. It also has elements which
12 the plaintiffs could have pled, could have tried to show,
13 although you would never be able to show it, which is why it's
14 not in there, that this product is itself so inherently
15 dangerous that anywhere it goes and in any application it's a
16 problem. And foreseeability is one of the tests for the
17 elements of strict product liability, it's one of the tests for
18 tort, it's one of the tests for 427B, but it's not a cause of
19 action in and of itself. And so foreseeability is not divorced
20 from its context. If I can go to that context.
21 Let's bring up if we can -- can you bring up 427B?
22 And Justice Scalia, if one thing he has accomplished in his
23 life he's taught us that words have meaning. 427B is one who
24 employees an independent contractor to do work. You have to
25 have an employer, you have to have an independent contractor,

and the issue is the work of that independent contractor and in that context then it goes on to use the foreseeability test. It's not an undivorced you're liable for everything that's foreseeable from what you do. I think Mr. Bullock summed up the entire argument here. They couldn't be liable for it -- this is my best job at a quote although I know the court reporter does better than I do, "they couldn't be liable for it if there's not an independent contractor." That's exactly right. I mean our point is that they are trying to take a theory of independent contract law and apply it to everything and that's -- and there is no legal authority for that. Under their theory we would have greater liability for the actions of someone we had never met than we would for our own actions. Under their theory if a grower, who is our independent contractor, sells poultry litter in the marketplace, somebody buys it and somebody sells it and someone else buys it, and this person we've never met applies it in a way that's going to cause a nuisance, we're liable for that. But under your example, if we sell it ourselves we're, you know, we're not liable because 427B doesn't apply. It's nonsensical. 427B is limited to the independent contractor relationship.

And Your Honor, unless you have additional questions?

THE COURT: I do, because we've been focused on 427B.

MR. JORGENSEN: Please.

THE COURT: In terms of contributor liability.

MR. JORGENSEN: Under RCRA?

THE COURT: Under RCRA. The law, and I'm reading plaintiffs' cite, what appears to be legislative history here. The statement quoted to me is that contributor liability is intended to reach more broadly than the common law. Are you saying that once a product is sold or traded that there cannot be RCRA contributor liability?

MR. JORGENSEN: We are saying that, Your Honor. And a good example would perhaps be helpful if in the marketplace you sell bubble gum. You know, what people then do with the bubble gum, maybe they throw it on the sidewalk. But have you contributed to the inappropriate disposal of what is obviously a waste? Are you, the bubble gum manufacturer, liable for the bubble gum under the desks? The easy answer is no.

But let me just say, I wanted to answer your question directly, Your Honor, before I move to what I think is the more important point and that is this is a motion in limine. What we really don't want is for the jury to receive the suggestion that we're liable for the cattlemen, but we would be more than happy to brief and argue, shortly or at length, about RCRA contributing-to liability at a later date.

THE COURT: Yes, and the bubble gum analogy is not close insofar as here we're generating poultry litter within a watershed, you don't have the economic limitations on the distribution of bubble gum that you do with regard to disposal

of poultry litter. So I'm going to decline to grant it in that regard.

And I do think that the defendants are correct with regard to the application of 427B. I think the language of 427B is restricted or restricts the concept of foreseeability to a situation where one employees an independent contractor and doesn't go beyond that, although I very much appreciate plaintiffs' counsels, Mr. Baker's and Mr. Bullock's arguments regarding general foreseeability. I just don't think 427B is the tool to get you that far. So with due respect the motion in limine will be granted in part and denied in part. Now bear in mind that we're still going to brief and decide, as Mr. Jorgensen has stated here, whether or not 427B concepts have application in connection with 2-6-105(A). And we haven't really argued here in the absence of the application of 427B, the 2-6-105 whether or not -- and this is a jury issue, whether or not the plaintiffs could argue that placement -- strike that. That the placement by third persons of poultry litter within the watershed can fall within the strict ambit of 2-6-105. You see, without the application of 427B. And maybe I'm reaching up because I, like Mr. Bullock. I'm trying to think on my feet here --

MR. JORGENSEN: I think I have addressed that.

THE COURT: -- but he does a far better job than I do. But do you see what I'm saying?

MR. JORGENSEN: I do see what you're saying. I think I have addressed that.

THE COURT: We really focused on 427B, we haven't just focused straight or directly on whether or not this type of evidence could be used before the jury without the application of 427B.

MR. JORGENSEN: May I address that, Your Honor?

THE COURT: Yes.

MR. JORGENSEN: May we bring up the statute? Thank you so much. So here is the statute. "It shall be unlawful for any person to cause pollution" -- that's your own activities -- "to the waters of the State or to place or to cause to be placed any wastes in a location where they are likely to cause pollution." So the question then is the defendants assert that this is directed at your own activities, not the activities of an independent contractor. The plaintiffs say, well, it can be an independent contractor because "or cause to be placed," and I see that. "Placed" seems to be you "or cause to be placed" would be your independent contractor.

THE COURT: Correct.

MR. JORGENSEN: So the question is then, if we're all in agreement on that, can you get to someone who is not your contractor, again to the generalized marketplace there? And the only way that the plaintiffs have offered to get there

1 would be importing common law theories into this statute. And
2 we're going to brief that, whether or not you can import common
3 law theories. But even if you could import common law
4 theories, you would then have 427B as your only exception to
5 the line between you and the independent contractor.
6 THE COURT: So that's why you focused on 427B because
7 your argument is the only way they can get there is through
8 427B?
9 MR. JORGENSEN: Exactly. I hope to win and I hope to
10 convince Your Honor in saying common law theories of liability
11 don't come into the statute. That statute, it has its own
12 words, it's own context, it's own legislative history. A brief
13 is forthcoming on that. But let's say I lose that and we get
14 to common law theories again, that your ruling today is the
15 conclusion of that, it's still not -- it's at most the growers,
16 it's not a homeowner who buys poultry litter on the marketplace
17 and uses it on their back 40. Thank you, Your Honor.
18 THE COURT: Mr. Baker.
19 MR. BAKER: Obviously, Your Honor we will be
20 addressing that in our briefing because we believe "cause to be
21 placed" has a far greater reach and we'll address that in our
22 brief.
23 THE COURT: All right. So you're proposing that your
24 briefing go beyond the application of 427B. Are you -- Mr.
25 Jorgensen says the only way you can get there is through 427B.

Are you saying there's another theory by which "cause to be placed" can reach to the actions of third parties?

MR. BAKER: Without -- without even using 427B, yes. We argue that "cause to be placed" is sufficiently broad to encompass all methods of -- by having this arrangement with their contractors and by growing poultry they are causing, it's the foreseeable result, not using 427B principles, it's what's happening as a result of their poultry growing operations.

THE COURT: All right. We'll reserve that, but let's make it clear 427B under this Court's ruling here today doesn't extend to application by third parties, but may well apply to the application by independent contractors under the 427B theory.

MR. BAKER: And is your 427B ruling only as to sales or is it also to just a gift. Because I think a gift or a -- would be a very different situation if you don't -- just say here's some poultry waste, friend, get rid of it for me. I think that would be a very different situation under your ruling than a sale.

THE COURT: Frankly, I had moved on. Boy, these issues just keep -- new issues keep popping up, Mr. Jorgensen.

MR. JORGENSEN: Respectfully, Your Honor, it's not a new issue, it's the same issue. Mr. Bullock's quote, "they couldn't be liable for it if there's not an independent contractor." 427B is about employer and agent -- employer and

independent contractor. In that situation we'll fight about foreseeability, that will come before the jury, but people who do not have a direct contractual relationship with us are out, I respectfully suggest that's your ruling.

THE COURT: Well, I think the answer to that Mr. Baker is directly in line with the dialogue that Mr. Bullock and I had, whether it's a sale or to give away to a third person, if the person is not an independent contractor, then 427B doesn't apply. 427B is constrained by its language. Words have meaning. So that will be the Court's ruling.

Let's move on to the next. And just to make clear for Mr. Overton because if I were him I would have fallen asleep long before now. 2407 is granted in part, denied in part.

THE CLERK: I will have to show in my minute that part of it was reserved for further briefing. Once I do that it will kill the motion.

THE COURT: All right. And it will be reserved as previously stated with regard to the application of 427B, 2-6-105, although that may be really outside the ambit of 2407, but just to try to be clear here.

The next motion is defendant Cal-Maine's Foods motion in limine regarding reference to Benton County Foods docket number 2409.

MR. SANDERS: Thank you, Your Honor. Bob Sanders for the Cal-Maine defendants. We raised this motion simply because

MR. JORGENSEN: Under RCRA?

THE COURT: Under RCRA. The law, and I'm reading plaintiffs' cite, what appears to be legislative history here. The statement quoted to me is that contributor liability is intended to reach more broadly than the common law. Are you saying that once a product is sold or traded that there cannot be RCRA contributor liability?

MR. JORGENSEN: We are saying that, Your Honor. And a good example would perhaps be helpful if in the marketplace you sell bubble gum. You know, what people then do with the bubble gum, maybe they throw it on the sidewalk. But have you contributed to the inappropriate disposal of what is obviously a waste? Are you, the bubble gum manufacturer, liable for the bubble gum under the desks? The easy answer is no.

But let me just say, I wanted to answer your question directly, Your Honor, before I move to what I think is the more important point and that is this is a motion in limine. What we really don't want is for the jury to receive the suggestion that we're liable for the cattlemen, but we would be more than happy to brief and argue, shortly or at length, about RCRA contributing-to liability at a later date.

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