

RECENT COURT DECISIONS

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Liability under environmental laws is a growing concern among risk managers and insurers. Of particular concern is the application of strict liability for clean up costs and damages found under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). Under CERCLA, liability extends to those who create the pollution or allow it to escape and to those who own or operate the property on which hazardous waste is found. Because the response costs and damages may substantially exceed the value of the property, governments and private claimants have sought to expand the potential defendants. Based on these attempts, the courts have decided several recent cases applying various theories to define owners and operators within the scope of the statute.

The Statutory Basis

Section 9607 of Title 42 of the United States Code provides that CERCLA liability attaches to four classes of persons with some limits. A current owner or operator of a facility and a person who owned or operated the facility at the time a hazardous waste was disposed of is liable for clean up costs and damages. Additionally, any one who contracted for disposal of hazardous waste, and any transporter for which there is a release or threatened release may be liable. In section 9601(20), an owner or operator is defined tautologically as any person owning or operating a facility. The definition, however, excludes a person who holds the property as a security interest and does not participate in the management of the facility. Finally, section 9601(21) broadly defines a person as any individual, other private legal entity, or public legal entity such as the federal government. Thus, the reach of the law is extensive without any attempt at expansion by litigants seeking additional sources to pay for clean up costs.

Current Owners

In the search to define liability under CERCLA, one of the early questions presented to the courts was whether all current owners and operators were responsible for hazardous waste problems or only those that caused a

problem. In *Tanglewood East Homeowners v. Charles-Thomas, Inc.*, the Fifth Circuit continued a line of decisions that conclude that any current owner is liable for clean up costs unless a statutory exception applies. In this case, the facility was contaminated by a prior owner who ran a wood treating process. A lender that had taken an interest in the property sought to be dismissed on the theory that only the company that deposited the waste was liable. The court refused to adopt that approach by noting that the statute did not limit the liability of current owners in any way. In contrast, prior owners or operators were liable only if a discharge occurred during their ownership.

The theory that any current owner is liable extended to a landlord whose tenants cause the hazardous waste discharge. In *United States v. Monsanto Co.*, the Fourth Circuit Court of Appeals found that a landlord leasing a warehouse used as a waste storage facility was liable for clean up costs as the owner or operator of the facility. Thus, current ownership of a facility carries with it the potential for significant liability.

Corporate Owners

Other cases have focused on examining who is the owner or operator. Some of the more common recent claims have been asserted against parent corporations, lenders, and successor corporations. Most of the cases turn on the issue of control to direct the management of the facility that causing the pollution problem.

In *United States v. Nicolet*, the United States successfully charged a parent corporation for clean up costs. Through its ownership of the subsidiary's shares, the parent corporation allegedly controlled the actions of the subsidiary. As a result of that control, the court permitted a claim to go forward against the parent.

Likewise, a lender that exerts control over management activities may be liable. In *United States v. Fleet Factors Corp.*, the court adopted a theory that a lender which exerted the authority to modify the owner's management so as to affect its waste disposal activities could be liable under CERCLA. In contrast, the Ninth Circuit in *In re Bergsoe Metal Corp.* found that a port authority that provided revenue bonds and took a security interest in a lead recovery facility was not an owner under the statutory exception. The port authority sold land to the facility owner and then took it back as security for the issuance of revenue bonds to build the facility. The rent it received from the facility under a subsequent lease was principal and interest on the bonds now held by a bank. The court found that the authority did not participate in the management of the facility and never exercised any of the rights contained in the revenue bonds. As a result, it was not an owner or operator under CERCLA since its ownership interest was merely for purposes of security and it did not participate in the management of the facility.

Successor liability is a little more difficult to determine. Typically, corporate law treats mergers and consolidations differently from asset purchases. In a merger or consolidation, the claims against a former company transfer with

the remaining or new company. On the other hand, the claims against a company that is selling its assets stay with the seller in most cases. The rule concerning asset purchases, however, is subject to four exceptions. In *Louisiana-Pacific v. ASARCO*, the Ninth Circuit found that an asset purchaser could be liable if it agreed to assume liability, the sale operated as a merger, the buyer operating the business was a continuation of the seller, or the sale was a fraudulent attempt to avoid liability. Several cases point out the interplay of these rules.

In *Smith Land v. Celotex*, a purchaser sought contribution for clean up costs from a successor corporation of the polluter which was a prior owner. The court held the successor liable on the theory that the claims followed it under corporate law. Further it found that the result was consistent with the remedial purposed of CERCLA to assign the cost on the parties that caused the problem.

In *In re Acushnet River and New Bedford Harbor Proceedings*, the court came to the same result even though the transfer of interests of the former company was through a sale of assets. The buyer against whom liability was asserted had purchased the assets of the polluter with stock, and the seller company was dissolved. The purchasing company then continued the former business on the same site. In addition, the same management, personnel, and assets were used, and the purchasing company assumed the ordinary business obligations of the seller to continue the business. The court concluded that the sale operated as a merger and refused to bar the claim against the purchasing company.

Likewise, a Washington district court in *United States v. Western Processing*, refused to grant a defendant summary judgment, finding that it may be liable under a theory that it was a continuation of the former polluting company. Boeing, one of the original defendants in a suit, sought some of the response costs from Bayside. Bayside had purchased the assets of LIDCO, a liquid waste transporter. LIDCO then was dissolved. In refusing to grant Bayside's motion for summary judgment based on the fact that it had only purchased assets, the court found that there was other evidence that supported a theory that Bayside was a continuation of LIDCO. Among the factors that the court stressed were the use of a former LIDCO employee, the retention of the LIDCO site and logo, and overlapping employment.

Individual Liability

In addition to corporate liability, individuals may also be liable as owners and operators under CERCLA. In a seminal case, the Second Circuit Court of Appeals in *New York v. Shore Realty Corp.* concluded that an officer and stockholder could be liable due to his control of the company. Likewise, the Eighth Circuit concluded that a plant supervisor could be liable as an operator.

Two recent cases at the district court level suggest some of the problems that emerge with the broad definition. In *United States v. McGraw Edison Co.*,

the defendant was a forty-nine percent shareholder who unsuccessfully argued that he lacked control because of his minority ownership. The court held that he could be liable if he participated in the management as permitted under the operating agreement of the company or as a corporate officer. Because both issues raised matters requiring a factual determination the court refused to grant the shareholder's motion for summary judgment. In a more unusual case, a trial court suggested that the individual shareholders of a dissolved corporation may be held liable for clean up costs on the theory that any proceeds from the dissolution are held in trust for the former company's creditors.

On the other hand, a federal court in Louisiana refused to ignore the corporate form and charge a parent corporation or its officers absent a showing that the corporate veil of the subsidiary corporation should be pierced. In *Joslyn Corp. v. T.L. James and Co.*, the court found no basis in CERCLA to disregard basic rules of corporation law. The court stated that the plaintiff must show that the parent or the individual used its control of the corporation to cause the harm to pierce the corporate veil. The control itself must amount to total domination such that the business conduct of the subsidiary is inseparable from the parent's. Among the factors to establish that control the court noted common ownership, common officers or directors, consolidated departments and financial statements, common financing, insufficient capitalization of the subsidiary, and failure to observe corporate formalities. In this case, the court found sufficient separation to prevent piercing the corporate veil.

In summary, corporate and individual liability continues as a source of environmental law development. Those who own a facility as well as parent corporations, lending institutions, successors, and asset purchasers face the potentially staggering liability imposed by CERCLA. Likewise, the circle of individuals may include current and former operators as well as those in a position to manage the release of hazardous substances.

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