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Lower Courts Taste Bestfoods
Lieutenant Colonel David Howlett

In its Bestfoods case, the Supreme Court addressed whether a parent company can be held liable as an operator for clean up of sites owned by a subsidiary under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). This article will focus on the decisions of two lower federal courts that recently applied Bestfoods to other situations involving derivative liability.

In Bestfoods, the Supreme Court faced the issue of whether a parent corporation can be held liable as either an owner or operator of a hazardous waste site owned by a subsidiary. The court found that CERCLA did not change the general principal of corporate law -- that a parent corporation is not liable for the acts of its subsidiaries merely because of

the control accorded them through stock ownership or by the duplication of officers. The Court found that the parent might be found derivatively liable only if the corporate veil may be pierced under applicable state law. On the other hand, the parent corporation may be held directly liable for its own actions as an operator of the facility; the question is not whether the parent operates the subsidiary, but whether it operates the site. The Supreme Court remanded the case for a determination of whether the parent corporations acted directly as operators.

In *Browning-Ferris Industries of Illinois, Inc. v. Ter Maat*, a district court faced the issue of whether a corporate officer (Mr. Ter Maat) could be held individually liable under CERCLA. First, the court determined that under *Bestfoods*, the only way Ter Mat could be held directly liable would be derivatively in accordance with the Illinois corporate veil-piercing law. The court then examined Mr. Ter Maat's behavior under the Illinois veil-piercing factors. Although some actions supported removal of corporate protection, the court found that the plaintiffs did not meet their substantial burden of showing that a corporation is really a dummy or a sham protecting a dominating personality. Even though Mr. Ter Maat was President of two insolvent companies that were found to be operators of the CERCLA site, he was not held liable personally.

Bestfoods also dealt with "operator" liability under CERCLA. Another recent case concerns the derivative liability of entities that "arrange" for the disposal of hazardous waste.

In *AT&T Global Information Solutions Company v. Union Tank Car Company*, the district court considered whether a parent corporation could be held derivatively liable as a CERCLA arranger. Although there was no case law directly on this point, the court found that it was implicit in *Bestfoods* that a parent can be held derivatively liable as an arranger if the corporate veil can be pierced. The court also found that it is within the intent of CERCLA to impute derivative arranger liability upon a parent corporation if its corporate veil can be pierced and if its subsidiary can be adjudged an arranger. Applying Ohio's

corporate veil-piercing law, the court found the parent company's corporate veil should "be pierced to make certain that the entity who ultimately profited from arranging for the improper disposal of hazardous waste bears some of the burden for its cleanup. Any other decision would be circumventing the broad, expansive, and remedial purposes of CERCLA."

These cases show that attorneys involved in CERCLA cases should look carefully to see if there are any solvent parents lurking behind the dissolved or insolvent "orphan" CERCLA potentially responsible parties. If parents or grandparents are present, attorneys should examine their involvement and observance of corporate formalities carefully. (LTC Howlett/LIT)

Ecological Risk Assessments and Natural Resource Injuries Ms. Kate Barfield and Mr. Scott Farley

Under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), response authorities are required to address both adverse human health and environmental effects caused by a hazardous substance release. CERCLA response authority was delegated to the Department of Defense (DoD) services. This delegation includes a requirement to assess adverse environmental effects or natural resource injuries (NRIs) during the cleanup process. So, in 1996, the Army, Navy and Air Force produced the DoD Tri-Service Procedural Guidelines for Ecological Risk Assessments. Because more attention is being focused how to document adverse environmental effects, this article will examine how Ecological Risk Assessments (ERAs) may be used for this purpose.

Natural Resource Injuries: NRIs are the adverse environmental effects addressed during remediation by the CERCLA remedy. NRIs refer to a measurable adverse change in the chemical or physical quality or viability of a natural resource caused by the release or the threatened release of a hazardous substance. A primary tool for addressing NRIs is the ecological risk assessment. The ERA is used to evaluate the likelihood of ecological problems caused by hazardous substance exposure and is generally prepared by the Army during the Remedial Investigation/Feasibility Study phase of the cleanup process.

ERA Procedure: ERAs should tell the reader which environmental problems should be addressed and why. ERAs typically begin with assessment planning and problem formulation, proceeding to the development of exposure profiles, a characterization of ecological effects and a conceptual model, which provide the basis for risk communication. Here's what this jargon means:

(Assessment Planning: The primary purpose of the ERA is to translate scientific data into meaningful information about the risk of human activities to the environment. This information is then used by the risk manager to make informed decisions about the environment. Assessment planning is the first step towards "problem formulation."

(Problem Formulation: Problem formulation is meant to articulate the purpose behind an assessment. The ERA focuses on things that people care about, such as habitat, watersheds or scenic beauty. So, ERAs typically examine: (1) ecological susceptibility to known or potential stressors (such as specific contaminants); (2) the ecosystem at risk; and (3) the "ecological effects" of exposure. After basic issues have been sketched out, the ERA investigator generates "assessment endpoints" -- the environmental values to be protected. These endpoints are discussed in "conceptual models," which may focus on the relationships among different species, ecosystem functions and how a hazardous substance may be spread by multiple pathways.

(Analysis: Problem formulation is followed by the ERA's "analysis" phase. After evaluating the relevant data, an ERA investigator develops a "characterization of exposure" and a "characterization of ecological effects." The investigator then examines which contaminants are present, from what origin, and at what quantity. Specifically, s/he looks at how the contaminant moves through the environment, determining how it comes into contact with the species at risk and assessing how long that contact lasts. Often, this means delving into the unknown. For example, contaminants can be transported via many pathways. Likewise, a researcher may know of the human health effects of a contaminant, but no studies may exist on animals or habitat. So, the ERA must take the existing knowledge of a contaminant's impacts and project them onto selected species or habitat. Adding to the complexity, researchers should also consider latent effects -- impacts over the life-cycle process -- and cumulative effects, including breaks in the food cycle. Based on this data and analysis, the ERA investigator may develop an "exposure profile,"

a "characterization of ecological effects" and a "conceptual model." These documents show which species are at risk and the circumstances that cause risks to increase or decline. The analysis will also show the ways in which contaminants can cause a chain reaction, impacting the target species, related species and their habitat.

(Risk Characterization: At this stage, the ERA investigator characterizes the proposed risk to the environment to explain how exposure to a contaminant or related "stressor" could affect a species or habitat ("receptor"). The study tends to focus on vulnerable periods in the lifecycle, such as nesting times, to determine when a subject is at particular risk. This risk is often projected outward to involve many species -- particularly when the food chain is disrupted. Risks may also occur over time. For example, population reductions may occur years after exposure and may affect numerous species. In approaching risk, the ERA writer must come to grips with uncertainties at various levels. All of the resulting data -- including assumptions and conjectures -- should be added up. The appropriate conclusions will then be incorporated into an "exposure-response risk model."

(Risk Communication: Next, the risk assessment results are compiled into an "ecological risk summary" for use by the risk manager, and, if applicable, interested parties. It is important to note that risk assessment and risk management are distinct activities. Risk assessments concern a scientific evaluation of whether adverse effects may occur. Risk management involves selecting an action in response to an identified risk. Such identified risks may be based on social, legal, political or economic issues that are outside of the risk assessment's scope.

Back to Natural Resource Injuries: The ERA's data may be used to identify NRIs, while providing a baseline for addressing adverse environmental effects during cleanup. So at the beginning of the ERA process, the ERA investigator should be considering how to define and, possibly, mitigate NRIs. When defining NRIs, DoD Service representatives should talk to their own Army, Navy and Air Force conservation staffs. In addition, they should also speak with natural resource trustees, land managers, and the public to determine what issues they deem important. In particular, communication with federal, state and tribal trustees will help the lead agent meet its CERCLA Section 104 requirement to "coordinate" assessments and investigations.

To request the Tri-Service ERA Guidelines within DoD, contact the Defense Technical Information Center at (800) 225-3842. Requesters outside of DoD should contact the National Technical Information Service at [HYPERLINK http://ntis.gov](http://ntis.gov). Both should ask for publication #ADA322189. (Kate Barfield/RNR).

New DoD Policy for Range Management Lieutenant Colonel Jill Grant

Late last year, the Office of the Under Secretary of Defense for Acquisition and Technology requested that a new draft Department of Defense Instruction (DoDI) be forwarded for staffing among the DoD Services. This proposed DoDI would regulate environmental and explosives safety management of its active and inactive ranges that are owned, leased or operated by DoD, whether located in the United States or overseas.

The DoDI enunciates two purposes: ensuring sustainable use and management of these ranges and protecting all individuals from explosives hazards on these ranges. The DoDI will supersede DoDI 6055.14, Unexploded Ordnance (UXO) Safety on Ranges, while incorporating its explosives safety management principles. Among the DoDI's draft provisions are specific environmental requirements. As proposed, the Services would be required to: (1) assess the environmental impacts of munitions use on ranges, (2) conduct an inventory of their active and inactive ranges, (3) establish range clearance operations to permit sustainable use of their ranges, and (4) incorporate proposed DoDI procedures in local management plans.

The Services are currently drafting comments to the draft DoDI. The final DoDI should be effective no later than this summer. (LTC Grant/CPL)

United States v. Bestfoods, 118 S.Ct. 1876 (1998).

Id. at § 9613. CERCLA § 9613 provides that contribution may be sought from any person who is liable or potentially liable under § 9607. CERCLA § 9607 lists four groups of potentially responsible parties (PRPs). These are:

- (1) the owner and operator of a vessel or a facility,
- (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
- (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and
- (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person ...shall be liable 42 U.S.C. § 9607(a)(1)-(4).

Bestfoods, 118 S.Ct. at 1884.

Id. at 1885-86.

Id. at 1186-87.

Id. at 1890.

13 F.Supp. 2d 756 (W.D. Ill. 1998).

Id. at 765. Prior to Bestfoods, however, the Seventh Circuit held that a corporate officer could be held directly liable as an operator under CERCLA irrespective of state veil-piercing law. *Sidney S. Arst Co. v. Pipefitters Welfare Educ. Fund*, 25 F.3d 417, 420-21 (7th Cir. 1994).

Id. at 765-66.

No. C2-94-876, 1998 U.S. Dist. LEXIS 19316, (S.D. Ohio, Nov. 2, 1998).

Vermont American, the corporation in question, was actually a “grandparent,” since a dissolved subsidiary stood between it and the subsidiary that sent waste to the site.

AT&T Global Information Solutions Company v. Union Tank Car Company, 1998 U.S. Dist LEXIS at *16. The court also cited *U.S. v. Northeastern Pharm. & Chem. Co., Inc.*, 810 F.2d 726, 744 (8th Cir. 1986), cert. denied, 108 S. Ct. 146, 98 L. Ed. 2d 102, 484 U.S. 848 (1987).

AT&T Global Information Solutions Company v. Union Tank Car Company, 1998 U.S. Dist. LEXIS at *16.

Id. at *39.

42 U.S.C. §§ 9601; 9604(a)(1).

DoD’s authority is laid out in 42 U.S.C. §§ 9604; 9620; Exec. Order No. 12,580, 52 Fed. Reg. 2923 (1987).

For an overview of these issues, see, Wentsel, S. Randell, et. seq., *Army, Navy and Air Force, DoD Tri-Service Procedural Guidelines for Ecological Risk Assessments*, vol. 1, at 1-16 (1996). [Hereinafter cited as *Tri-Service ERA Guidelines*].

For example, the Environmental Protection Agency (EPA) is currently revising its guidelines on ERAs. See, *Ecological Risk: EPA Floats First-Ever Draft Ecorisk Management Guidance for Comment*, Superfund Report, Aug. 19, 1998, at 9-15.

43 C.F.R. § 11.14(v). This does not include the concept of natural resource “damages” which focuses on financial compensation for economic losses. See, 43 C.F.R. § 11.14(l).

Tri-Service ERA Guidelines at 17-19.

See generally, 40 C.F.R. § 300.430.

For more information on how the ERA works within the CERCLA context, see *id.* at 6-8.

Id. at 28-29.

Id. at 19-22.

Id. at 22-23.

Id. at 23-24.

Id. at 24-29.

Id. at 18; 31.

Id. at 32-47.

Adding to the complexity, fact-gathering may involve surrogates. For example, if a rare bird is at risk, a researcher may examine the effect of exposure on a similar bird.

Id. at 46-47.

Id. at 47-53; specific methods discussed at 53-77.

Id. at 90-96. For examples of “conceptual models,” see, *id.* at Appendix A, A1-A43.

For information on how to characterize ecological effects, see *id.* at 53-77.

For a discussion of “stressors,” see, *id.* at 19-22.

Id. at 78-101.

The *Tri-Service ERA Guidelines* provide specific ideas on how to deal with uncertainties. See, *id.* at 92-96.

Id. at 85-96.

Id. at 96-97.

Id. at 78-80; 100-101.

For a definition of the term “public trustees of natural resources,” see, 42 U.S.C. § 9607(f)(2).

42 U.S.C. § 9604(b)(2).

The proposed policy was originally drafted by the Range Management and Use Subcommittee of the Operational and Environmental Executive Steering Committee for Munitions.