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Environmental Law -- Officers' Liability Examined; A Trend Toward Broad Liability Continues

From The National Law Journal, pp. 25-31 , November 22, 1993

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Senior Corporate officers now are subject to a broader range of liability under federal environmental statutes than ever before.

Corporate officers - employees above the management level, who typically own an equity share in a corporation[1]- are being held liable for civil and criminal violations, as are directors and others in senior management positions. This is occurring even in cases in which lower-level employees committed the acts leading to liability. But a number of issues remain unresolved, including the personal liability of corporate officers and the liability of inadvertent violators.

Unpredictable Climate

An unpredictable judicial climate has contributed to the trend toward broader liability for environmental violations.[2] Courts have applied varying standards, with little consistency, to cases involving the individual liability of corporate officers. This has created vague rules of law concerning liability.[3]

Recent cases indicate that there are distinctions in liability among different levels of employees within corporations. Corporate officers and field-level personnel can be held liable for violations by their corporations in both civil and criminal proceedings.[4] But it is difficult to predict precisely what the apportionment of liability will be among the corporation itself, individual corporate officers and management-level personnel.

CERCLA, the Comprehensive Environmental Response, Compensation and Liability Act of 1980[5] - which was amended by SARA, the Superfund Amendments and Re-authorization Act of 1986[6] was enacted "to provide the federal government with the means to effectively control the spread of hazardous materials from inactive and abandoned waste disposal sites." In addition, it was designed "to affix the ultimate cost of cleaning up these disposal sites to the parties responsible for the contamination."[7] But in addition to questions about CERCLA's strict-liability provisions for owners of polluting facilities, other significant liability issues remain unresolved.

The personal liability of corporate officers and the liability of inadvertent violators are two issues that have become particularly prominent during the past five years. This is largely because the policy goal of protecting the general health and welfare of the public has led to renewed efforts to hold as many parties as possible

accountable for environmental offenses. Thus, the stakes in environmental enforcement litigation, whether civil or criminal have never been higher.

Inadvertent or Deliberate?

An important concept in this area of the civil law is the distinction between the treatment of defendants whose environmental violations are inadvertent and those whose violations are deliberate.

During the past decade, regulatory officials at the Environmental Protection Agency and the Department of Justice have brought enforcement proceedings with increased vigor against corporate polluters.[8] The courts generally have supported this stepped-up level of prosecution.[9] In cleanup cases the courts now are more likely to impose punitive damages in addition to liability for cleanup costs.[10]

The EPA apparently has decided that the threat of prison may be the only effective deterrent for individuals within corporations and that monetary sanctions have not been effective in deterring environmental violations. This "enforcement-first"[11] policy, which began in earnest about five years ago reflects the EPA's more vigorous approach to environmental protection. This policy bears significant consequences for all potentially responsible parties up and down the corporate ladder.

In the 1992 case of *U.S. v. Carolina Transformer Co.*,[12] a civil action under CERCLA,[13] the 4th U.S. Circuit Court of Appeals held that a corporation, its successor and two corporate officers were liable for cleanup costs totaling almost $1 million and punitive damages for three times the cleanup costs incurred.

Carolina Transformer's conduct was in no sense deliberate, and the punitive damages arose out of the defendants' refusal to comply with an administrative order issued by the EPA pursuant to Sec. 106 of CERCLA.[14] Had the defendants addressed the pollution problem when it first arose, which was several years before they received the EPA's administrative order, the damages would have been substantially less.

Carolina Transformer salvaged and repaired used electrical transformers. During this process, dielectric fluid, which contains carcinogenic PCB's leaked into the soil at the company's site near Fayetteville, N.C. The ability of the company to foresee the violations in this case is questionable because the violations were not immediately discoverable.

In 1984, the EPA issued an administrative order requiring the cleanup of the site, but the corporation ignored this order. As a result of the defendants' failure to respond, the EPA aggressively pursued the individuals and their corporations. Consistent with prior judicial interpretations of CERCLA, the 4th Circuit held that liability may be imposed regardless of whether the harm was foreseeable.

The success of the EPA in this endeavor, as well as in other cases like it across the country, should be of concern to corporate executives whose companies are faced with cleanup order from the EPA.[15] Carolina Transformer's punishment for inadvertent violations demonstrates the difficulty corporations and their officers have when trying to avoid environmental liability and the severe consequences of failing to comply with administrative orders.

Successor Liability

Successor liability was a central issues in the *Carolina Transformer* case. Although it is permitted under CERCLA, a case-by-case analysis is required to justify successor liability.[16] The 4th Circuit considered whether Dewey Strother, one of the founders of Carolina Transformer and the sole stockholder in the company after 1962, was the party responsible for the contamination of the original site.

Mr. Strother was Carolina Transformer's president from 1962 until 1981 and was chairman of its board of directors from 1977 through 1981. The successor corporation, FayTranCo, was incorporated in 1979 by Mr. Strother's son, Kenneth. The younger Mr. Strother was a member of FayTranCo's board of directors, owned half its stock and was its president from 1979 until 1988.

Dewey and Kenneth Strother were held jointly and severally liable as individuals and in their corporate capacities. Their personal liability as corporate officers was hardly an issue in the decision as a result of their overt non-compliance. But several important legal principles concerning the personal liability in the *Carolina Transformer* decision.

First, the Strothers were held personally liable as "operators" of the polluting facility, despite the fact that they were not actively involved in the operation of the business. The court held that "operator liability" may be imposed regardless of whether the defendant "exercised actual control [over a facility] so long as the authority to control the facility was present."[17]

The court discussed Carolina Transfoemer's early attempts to remedy the PCB problems inherent in their business. But it viewed the eventual transfer of the operations from the contaminated Carolina Transformer site to the site owned by FayTranCo as an irresponsible attempt to escape liability.[18]

The *Carolina Transformer* decision suggests that the Strothers did not consider seriously the implications of their environmental problems, which came to a head when the EPA issued its administrative order in 1984. And after the transfer, Carolina Transformer sent notices to its customers informing them of the company's "name change." These facts made it easy for the court to impose successor liability.[19]

Carolina Transformer shows that corporations need to incorporate environmental-law considerations into their risk assessments and decision making.

Corporate officials who plead ignorance of environmental risks are likely to face substantial civil and criminal sanctions. The risks should be apparent not only to owners of polluting facilities but also to a broad range of parties that may become involved in the operation and maintenance of those facilities.

'Operators and Transporters'

In the 1992 case of *Kaiser Aluminum v. Catellus Development Corp.*,[20] the city of Richmond, Calif., sued a prior landowner under CERCLA for the costs the city incurred in removing .

The prior owner, Catellus, filed a third-party complaint against an excavator it had employed on the property, seeking contribution costs under CERCLA. The excavator had displaced contaminated soil from one part of

the property to other, previously uncontaminated parts of the property, thus expanding the scope of the cleanup required.

Citina g 1992 4th Circuit case, *Nurad inc. v. William E. Hooper & Sons Co.*,[21] the 9th Circuit defined the term "disposal" under the statute to mean any sort of movement of hazardous material. Thus, the excavator's dispersal of hazardous soil was sufficient to establish operator liability under CERCLA Sec. 107(2).

The 9th Circuit found that Catellus stated a sufficient claim against the excavator under Sec. 9607 (a) (4) as a transporter of hazardous substances to disposal or treatment facilities.[22]

The court's definitions of both these terms - "operator" and "transporter" - are extremely broad. But they are consistent with the remedial intent of CERCLA and the EPA's enforcement first policy.

The excavator's inadvertent liability should give pause to all corporations in analogous circumstances because the scope of liability under CERCLA appears to be ever-widening.[23] The scope of liability for individual corporate officers for environmental violations continues to widen as well.

Corporate decisions often are more cumulative than immediate, and courts are beginning to emphasize the importance of this cumulative impact in corporate decision-making.

Corporate officers who previously may have been counseled to avoid direct control or participation in decisions about the disposal or treatment of hazardous waste no longer may be insulated from liability if they have the capacity to control corporate conduct. Because corporate officers almost always have such authority, they must be aware that the prospect of being held liable for violating environmental laws is great, and they should act accordingly.

The costs of non-compliance are enormous in these matters, and courts now read the "owner" and "operator" provisions of CERCLA very broadly.[24] Virtually any type of active involvement with polluting substances involving the risk of operator liability, and owners will be held strictly liable regardless of how passive or benign their involvement. This makes a property purchase an inevitably risky endeavor, requiring careful preparation and due diligence.

As noted previously, there is a distinction in civil law among the different levels of liability for corporate officer and employees. But the issue in civil liability cases under CERCLA is economic: Higher-level corporate officers have deeper pockets, and thus are generally subject to greater liability than, for example, field personnel. The search for deep pockets is ever present in civil liability cases under CERCLA.[25]

The individual liability of corporate officers often is predicated on the facts of each case and the individual's involvement in the processes that led to the violations. But beyond that, a corporation may be held liable under CERCLA for the acts of an individual employee who may be assigned exclusive culpability and yet not joined in the action.[26]

Criminal Prosecutions

The government takes a different approach in criminal prosecutions, in which lower-level employees are much more likely to be the target.[27]

Under CERCLA, culpability is not necessary to impose civil liability. When assessing liability, courts will follow the trail of culpable actors, but they will not hesitate to extend the inquiry to include actors who inadvertently caused or exacerbated violations, or actors who maintained passive ownership interests in the

violating property.[28] The distinction between inadvertent and deliberate violations has become closely related to the distinction between civil and criminal cases.

CERCLA and the Federal Sentencing Guidelines give organizations clear incentives to take an active role in preventing pollution and to act early when an environmental problem is discovered. CERCLA has been construed broadly, and it is therefore unlikely that implicated parties will escape liability. As punitive damages and sometimes even jail terms are meted out for non-compliance with EPA cleanup orders, early compliance efforts may be a far safer strategy than previously thought.

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ENDNOTES

(1) See, e.g. U.S. v. Walsh, 783 F. Supp, 546 (W.D. Wash. 1991), aff'd 1993 U.S. App. Lexis 27712 (9th Cir. 1993). This was the first case in which an upper-level employee with no ownership interest in the corporation was held personally liable for response costs. The court, however, only assessed a penalty of $3,500 when it discovered that the defendant had no assets.

(2) See, e.g. U.S. v. Fleet Factors Corp., 821 F. Supp. 707 (S.D. Ga. 1993).

(3) Discussions of the different standards are provided in Robertshaw Controls Co. v. Watts Regulator Co., 807 F. Supp. 144 (D. Maine 1992) and Kelley ex rel. Michigan Natural Resources Comm'n v. Tiscornla, 827 F. Supp 1315 (W. D. Mich. 1993); the Kelley decision distinguishes four standards, but the standards are not mutually exclusive. See also Oswald and Schipani, "CERCLA and the 'Erosion' of Traditional Corporate Law Doctrine," 86 Nw. U.L. Rev. 259 (1992).

(4) In civil cases, see, e.g., New York v. Shore Realty Corp., 759 F. 2d 1032 (2d Cir. 1985), and New York v. SCA Serv. Inc. 785 F. Supp. 271 (S.D.N.Y. 1992). In criminal cases, see, e.g., U.S. v. N.E. Pharmaceutical & Chem. Co., 810 F. 2d. 726 (8th Cir. 1986), cert denied, 484 U.S. 848 (1987); and U.S. v. Dean, 969 F. 2d. 187 (6th Cir. 1992).

(5) 42 U.S.C. 9601 et seq.

(6) Pub. L. 99-499, 100, Stat. 1613 (1986).

(7) Kaiser Alumionum & Chem. Corp. v. Catellus Dev. Corpl, 976 F.2d 1338, 1340 (9th Cior. 1992).

(8) This is clearly illustrated in the EPA's Enforcement Accomplishments Report: FY 1992. For example, there has been an increase of approximately 200 percent in the number of civil judicial referrals made by the EPA to the Department of Justice from 1982 to 1992. In addition, the number of criminal prosecutions of corporate managers rose from 11 in 1982 to 99 in 1992.

(9) Civil judicial penalties arising from EPA actions rose more than 8000 percent in the 10 year period from 1982 to 1992. EPA Enforcement Accomplishments Report: FY 1992. The deference shown by the judiciary toward the EPA also is illustrated by the decisions themselves: "The EPA is the federal agency charged with much of the enforcement of CERCLA. As such, the EPA's positions on enforcement of the statute are entitled to deference by this court." City of Phoenix v. Garbage Serv. Co., 1993 U.S. Dist. Lexis 5970 at 17 n. 6 (D. Ariz. 1993).

(10) See, e.g., U.S. v. LeCarreaux, 1992 U.S. Dist. Lexis 9365 (D. N.J. 1992).

(11) This general philosophy is the essence of the EPA's enforcement-first efforts. A range of factors played a role in the adoption of this philosophy-most prominent, the financial instability of the depleted Superfund resources caused by the government's inability to get reimbursed for a large number of cleanups it had undertaken. The idea that many companies were looking upon environmental fines as mere operating expenses was also a major factor. See, e.g., Jehl "EPA: to Put Cleanup Burden on Industry," L.A. Times, June 15, 1989, at 17.

(12) 978 F. 2d 832 (4th Cir. 1992)

(13) 42 U.S.C. 9601 et. Seq.

(14) Carolina Transformer, 978 F. 2d at 834.

(15) See, e.g., All Regions Chem. Labs Inc. v. U.S. EPA; 932 F.2d 73 (1st Cir. 1991) (an administrative law judge could base a penalty on what might have happened in the absence of responses by others, rather than what did happen, in assessing the penalty on a chemical plant for the failure to notify the national response center immediately after fires caused the release of some 180,000 pounds of chlorine.

(16) Carolina Transformer, 978 F.2d at 837.

(17) Id. at 836-837; puoting Nurad Inc. v. Hooper & Sons Co., 966 F. 2d 837, 842 (4th Cir. 1992), cert. Denied sb nom. Mummaw v. Nurad Inc., 113 S. Ct. 377 (1992).

(18) Carolina Transformer; 978 F.2d at 841.

(19) Id.

(20) 976 F.2d 1338 (9th Cir. 1992).

(21) 966 F.2d 837 (4th Cir. 1992(("the trigger to liability under [Sec.] 9507 (2) is ownership or operation at the time of disposal, not culpability or responsibility for the contamination").

(22) Kaiser Aluminum, 976 F2d at 1341-1343/

(23) See, e.g., McCarroll, "Contractors Get Caught in the Snare of CERCLA Liability," NYLJ, June 7, 1993, at 9.

(24) See, e.g. City of Phoenix v. Garbage Serv. Co., 816 F. Supp. 564 (D. Ariz. 1993) and City of Phoenix v. Garbage Serv. Co, 1993 U.S. Dist. 5970 (in the first case, a bank that held title to a condemned landfill, operating as a trustee of this decedent owner, was held liable as an owner, despite being cleared of operator liability; in the second case, the court rejected the bank's motion to limit its liability to the assets held in trust because the bank had exercised control over the landfill continuously after obtaining title to it as a trustee).

(25) Civil cases against culpable employees are exceptionally rare, and successor liability is a prominent question. In numerous civil CERCLA cases across the country. This indicates the EPA's desire to pursue defendants able to pay response costs. See, e.g., U.S. v. Chrysler Corp., 1990 U.S. Dist. Lexis 11506 (D. Del. 1990).

(26) The primary purpose of the EPA's adoption of the enforcement-first policy was centered on this issue: obtaining remedial costs from PRP's at a greater frequency and whenever possible. For a CERCLA case in which a corporation was held liable for the culpable conduct of a single employee, see Environmental Trsp. Sys. V. ENSCO Inc., 969, F.2d 503 (7th Cir. 1992).

(27) See, e.g., U.S. v. Carr, 860 F.2d 1550 (2d Cir. 1989).

(28) Kaiser Aluminum, 976 F.2d 1338. See also Nurad Inc., 966 F.2d 837, cert. Denied sub norm. Mumaw v. Nurad Inc., 113 S. Ct. 377 (1992).