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FEDERAL CIRCUIT COURT SUCCUMBS TO CERCLA'S "BROAD REMEDIAL PURPOSE"

by
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In an effort to expand the reach of liability under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or Superfund), 42 U.S.C. § 9607, in order to bring as many parties as possible to share in the substantial costs associated with investigating and remediating a hazardous waste site, the government, as well as private parties caught in the CERCLA web, have urged federal courts to add categories of potentially responsible parties, such as corporate predecessors, successors, parents, subsidiaries, and directors and officers, to the CERCLA stew, even at the expense of disregarding traditional notions of state corporation and contract law. While state statutory and common law has traditionally defined liability for these corporate entities, CERCLA plaintiffs have urged the courts to give preemptive effect to CERCLA, so as to override state corporation law in defining the types of entities which may be held liable under the statute.

Most recently, the U.S. Court of Appeals for the Second Circuit strayed from traditional notions of corporate law in *Schiavone v. Pearce*, No. 95-7627 (March 14, 1996). This case held that notions of corporate veil-piercing can be disregarded and can be replaced by the federal court's own interpretations of the degree to which CERCLA imposes "operator" liability on corporate parents for the actions of their subsidiaries. Following a line of cases, which hold that CERCLA should be construed "liberally" in order to effectuate "congressional concerns" to cast the CERCLA net as widely as possible, the Second Circuit joined the U.S. Courts of Appeal for the First, Third, Eighth, and Eleventh Circuits in imposing corporate parent liability without regard to state common law principals of corporate insulation, and in some instances directly contrary to those principals. The Second Circuit justified such departure by "the uniqueness of CERCLA's legislative scheme."

The Second Circuit opinion recognized that it conflicted with "weighty concerns" expressed by the U.S. Courts of Appeal for the Fifth and Sixth Circuits, in *Joslyn Mfg. Co. v. T.J. James & Co.*, 893 F.2d 80, 82-83 (5th Circ. 1990), *cert. denied*, 498 U.S. 108 (1991) and *U.S. v. Cordova Chem. Co.*, 59 F.3d 584, 589-591 (6th Cir. 1995), *vacated, rehearing en banc granted*, 1995 WL 617175

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(Oct. 19, 1995). These circuits have declined to depart from longstanding principals of corporate law, noting that neither the statute nor its legislative history "indicate that Congress intended to alter so substantially a basic tenant of corporate law." *Joslyn* at 82. Unpersuaded by these concerns of federalism, however, the Second Circuit panel instead justified its view as "consistent with CERCLA's broad remedial scheme," thus allowing CERCLA to trump state law.

While Congress did not intend for CERCLA to jettison the basic precept of limited liability for shareholders, directors, and officers, an ambiguity in the present statute has invited this result. The invention comes in the form of the notion of "operator" liability under section 107. Because the statute does not presently square the "operator" concept with the corporate law principle of limited liability, courts have encountered an "inevitable difficulty that arises when courts attempt to erect new concepts of corporate liability within the framework of CERCLA in the absence of direction from Congress." *Cordova Chemical Co.* 59 F.3d. at 589-90. One solution would be for Congress to supply a definition for the term, striking the right balance between the statute's remedial purpose and the principles underlying the concept of corporate limited liability. In striking the balance, Congress would have to weigh the harsh nature of the statute's retroactive liability scheme, which frequently leads to the imposition of liability on corporate actors long gone from the scene.

As noted above, CERCLA cases involving not just corporate parent liability, but a wide variety of contexts involving traditional state corporation and contract law, have run into CERCLA's "uniqueness." Indeed, a portion of the Pearce decision itself involves the judicial construction of a contractual indemnification agreement to determine whether the indemnity operated to transfer CERCLA liabilities. The Second Circuit in this context applied New York state law governing the interpretation of indemnification agreements, but appeared to apply such state law as a federal common law rule of decision. *See Olin Corp v. Consolidated Aluminum Corp.*, 5 F.3d 10, 15 (2d Cir. 1993); *Mardan v.CGC Music Ltd.*, 804 F.2d 1454, 1457-60 (9th Cir. 1986). The Seventh Circuit, however, has recently construed an indemnification agreement by a straightforward application of Illinois law without invoking the need for a federal common law rule of decision; *see Gould Inc. v. GNB Battery*, 65 F.3d 615 (7th Cir. 1995) at n. 28, *citing Harley-Davidson Inc. v. Minstar*, 41 F.3d 341, 344 (7th Cir. 1994), *cert. denied*, 115 S.Ct. 1401 (1995) (holding that "there is no question of federal law" in interpreting indemnification agreements.)

Although the Second Circuit in *Pearce* cited the Seventh, as well as the Fourth, Circuits in support of its holding on parent corporation liability, in fact those two circuits' decisions involved only direct personal liability for corporate principals, rather than parent corporate liability *qua* the corporate status as parent. It is clear that the Seventh Circuit does not rely on CERCLA to supplant state law in other corporate law contexts, *see Citizens Electric Corporation v. Bituminous Fire & Marine Ins. Co.*, 68 F.3d 1016 (7th Cir. 1995) (Illinois law governs ability to sue dissolved corporations; no preemption by CERCLA); but district courts in the Third and Eleventh Circuits have held to the contrary; *AM Properties v. GTE Products Corp.*, 844 F. Supp. 610 (D.N.J. 1994); *Chatham Steel Corp. v. Brown*, 858 F. Supp. 1330 (N.D. Fla. 1994). Another area with conflicting decisions is corporate successor liability under CERCLA; *cf. City Management Corp v. U.S. Chemica Co.*, No. 93-1348 (6th Cir. Nov. 10, 1994) (state law governs), with *Atlantic Richfield Co. v. Blosenski*, 847 F. Supp. 1261 (E.D. Pa. 1994) (Uniform Federal rule applicable to alter ego claims against corporate successor).

It is clear that unless (1) Congress limits the scope of the "operator" concept consistent with the long respected notions of the corporate form and taking into account the statute's unforgiving retroactive application or (2) the Supreme Court addresses one or more of these federal-state law conflicts, federal courts outside of the Fifth and Sixth Circuits adjudicating a CERCLA enforcement, private cost recovery, or contribution claim will have fairly broad discretion to fashion an ever expanding federal common law rule on the basis of the fairly amorphous "broad remedial purposes" o the statute.

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