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Environmental Law Alert

Diaz Intermediates A Case Study on CERCLA "Operator" Liability for Corporate Officers

On August 18, 2009, U.S. District Magistrate Judge H. Kenneth Schroeder, Jr., of the Western District of New York issued a Report, Recommendation and Order in matter entitled *Anchor v. Diaz Intermediates Corporation* (O4-CV-300S (Sr)) which will be of interest to anyone concerned about the possibility of the imposition of civil environmental liability on corporate officers arising out of their acts on behalf of a corporation.

This case arises out of the 2002 accidental discharge to air of a chemical called chlorofluorophenal from the Diaz Chemical Corporation ("Diaz") facility in Holley, New York. Plaintiffs sought to hold Theodore ("Ted") Jenney and Clifton ("Clif") Jenney each personally liable as "operators" under CERCLA in connection with this unpermitted discharge. Both defendants moved for summary judgment.

Section 107(a) of CERCLA imposes liability for the cost of environmental remediation upon, among others, an "operator" of a facility. 42 USC §9607(a). An operator is defined in pertinent part as "any person … operating" a facility. 42 USC §9601(20)(a). Recognizing the tautology of this definition, the United States Supreme Court has explained that an "operator" is

> someone who directs the workings of, manages, or conducts the affairs of a facility. To sharpen the definition for purposes of CERCLA's concern with environmental contamination, an operator must manage, direct or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of the hazardous waste, or decisions about compliance and environmental regulations.

United States v. Bestfoods, 524 U.S. 51, 66-67 (1998).

Magistrate Schroeder determined that although the imposition of operator liability does not require a finding that the defendant directly participated in the day-to-day activities of the site, the operator must be actively involved in decisions regarding disposal of hazardous substances or environmental compliance on a frequent, regular or ongoing basis.

Although the statutory definition of operator explicitly excludes "a person who, without participating in the management of a … facility, holds indicia of ownership primarily to protect the security interest in the … facility," Magistrate Schroeder found that, "by implication," "an owning stockholder who manages the corporation … is liable as an 'owner or operator'" (citing *State of New York v. Shore Realty Corp.*, 759 F.2d 1032, 1052 (2d Cir. 1985)). The critical question, according to the Magistrate, is "whether, in degree or detail, actions directed to the facility by the facility corporation or corporate officers are eccentric under accepted norms of oversight." *See, Bestfoods*, 524 U.S. at 72.

After discussing a number of cases which had applied this test, the Court went on to consider Ted and Clif Jenney's motions for summary judgment.

<u>Ted Jenney</u>

The Court found that there was a question of fact with regard to Ted's status as an operator of the Diaz facility and denied his motion for summary judgment. Ted maintained an office at the Diaz facility and reported to the Diaz facility on a daily basis. The Diaz plant manager reported directly to Ted and Ted testified at his deposition that "[d]ay-to-day, week-to-week decisions were made between the plant manager, myself, and possibly Clif."

Others testified that Ted was the "go-to-guy." Ted agreed that he was "available for people to talk to" if they "had a question on a day-to-day basis." He also admitted that he was involved in reviewing processes at the facility to determine "if there were ways we could improve them." Moreover, Ted was actively involved in the production of the chemical which had caused the environmental concerns at issue in the lawsuit.

The vice-president of research and development at Diaz testified that he spoke to Ted "frequently" and reported directly to him about the development of the manufacturing process for chlorofluorophenol. He understood that Ted was involved in making the decisions regarding the process for purifying the chemical and had determined that the chemical

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could be maintained as a liquid.

Based on all of the above, the Court found that Ted's consistent presence and pervasive participation in the daily operations of the facility, particularly with regard to the production of the chlorofluorophenol, raised a question of fact as to his status as an operator of the facility. Ted's summary judgment was denied.

Clif Jenney

While the above reasoning may or may not be consistent with the reasoning in *Shore Realty* and other landmark Second Circuit precedents, the Court's treatment of Clif is arguably more problematic. Clif maintained throughout his depositions that he did not actively participate in or exercise control over the operations and environmental compliance at the Diaz facility. He argued that his responsibilities were "administrative" in nature and that he lacked the education or training to be involved in decisions about the production and handling of chemical products. He stated that he did not supervise any of the persons involved in the chemical production processes, including the chemical operators, production foreman, plant managers, maintenance and engineering manager, vice president of research and development, lead operator or assistant lead operator.

Notwithstanding the above, the Court found that there was a question of fact as to whether Clif was also an operator of the facility because he received and signed correspondence with the New York State Attorney General's office regarding past fugitive emissions at the Diaz facility, participated in meetings with the DEC regarding a consent order for remediation of the facility after its inclusion on the New York State Registry of Inactive Hazardous Disposal Sites, signed a letter to the facility's neighbors following the release of the chlorofluorophenal, and signed the letter to the DEC requesting approval of Diaz's Voluntary Clean-up Program application following that release.

One should note that several of these activities determined by the Court to be germane to the question of Clif's possible liability as an "operator" occurred after the release at issue in the litigation.

The Court found that although there was no evidence that Clif was specifically involved in the chlorofluorophenol production process, Ted had testified at his deposition that day-to-day, week-to-week decisions, about what type of equipment to install or utilize or what production processes to run were made between himself, the plant manager "and possibly Clif." Ted also testified that he, Clif, and the plant manager sat in close proximity to each other and spoke "often."

The Court found that these facts were enough to raise a question of fact as to Clif's possible status as an operator of the facility and also denied Clif's motion for summary judgment.

While one can appreciate the Court's reluctance to dismiss claims against corporate officers facing possible "operator liability" in light of the applicable legal standards for summary judgment, many corporate officers and their attorneys may be surprised to learn that (a) acts undertaken by an officer after a release of chemicals or (b) general supervision of plant processes (which, arguably, inevitably include environmental issues periodically) may be sufficient to impose individual CERCLA "operator" liability on a corporate officer.

Damon Morey will be watching this case closely as it proceeds to review by District Judge William Skretny and possibly beyond. In the meantime, corporations would do well to review their chain of command and authority and to reconsider the environmental liability exposure of their corporate officers.

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