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CERCLA Roundup

by Craig A. Slater

I. INTRODUCTION

Until recently, any company ensnared in the liability scheme of the federal Superfund statute, Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), could find it almost impossible to escape significant financial liability for the clean-up of a hazardous waste site. Some new cracks in CERCLA's armor have appeared in the last year. This "CERCLA roundup" is intended to cover these recent cases and other Superfund cases of import, especially those recently issued by the Second Circuit.

II. CONTINUING ALCAN: DIVISIBILITY DEFENSE

The holding in *U.S. v. Alcan Aluminum Corp.*[1] continues to hold out the prospect of being an effective defense shield when defending CERCLA cost recovery actions.

In *Alcan*, the Second Circuit found that, even in the presence of co-mingled waste, Alcan would be allowed to make a factual showing that the harm at the site could reasonably be apportioned among the potentially responsible parties (PRPs), thus avoiding joint and several liability for all remedial costs. Alcan was the only one of multiple PRPs who did not settle with the Environmental Protection Agency (EPA). The government sought to impose joint and several liability on Alcan to recover the difference between its total costs and the amount recovered from the other PRPs through settlement. As a defense, Alcan argued that its waste (mostly water and mineral oil with metal contaminants) did not "cause" or trigger the remediation of the site but, rather, the substances disposed of by other known PRPs (PCB's, benzols, phenols, toluene, etc.) were responsible for or "caused" the need to remediate the site to begin with. Alcan

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Cornell Report Recommends Materials Exchange Programs for New York City

New York City should consider materials exchange programs to help deal with solid waste after the Fresh Kills landfill closes in 2001, according to a report issued April 21 by Cornell University's Waste Management Institute. Materials exchange programs enable businesses and institutions to reuse or recycle materials among themselves. The report was issued by an expert panel to advise NY Wa$teMatch, a materials exchange program designed by the New York City Sanitation Department. *Daily Env't Rep.* (BNA), Apr. 23, 1998, at A-3.

State Will Pay Community $1.385 Million to Settle RCRA Suit Against Incinerator in Low-Income Area

New York State has agreed to pay $1.385 million for environmental education centers to settle a lawsuit against the state that alleged RCRA violations at incinerator in a low-income area of Albany. In 1995, the Natural Resources Defense Council and the Arbor Hill Concerned Citizens Neighborhood Association filed a lawsuit that alleged that the state-operated incineration plant violated RCRA by contaminating nearby soils and buildings with lead and other metals released from the plant. The settlement requires New York to pay $1 million to establish and operate an environmental education and technology center at an Albany middle school near the incinerator. The state will also pay $385,000 to establish the Arbor Hill Environmental Justice Corporation, which will perform environmental and health education, lead testing, and remediation in the city's Arbor Hill section. The U.S. District Court for the Northern District of New York has approved the settlement. *Arbor Hill Concerned Citizens Neighborhood Association v. Delaney*, No. 95-CV-0968 (Mar. 24, 1998). *Daily Env't Rep.* (BNA), Mar. 26, 1998, at A-3.

Marine Borers Damaging New York City Piers

New York City has closed a popular West Side pier after discovering extensive damage caused by marine borers. The marine borers, which have flourished in the cleaner water around the city, burrow into a dock's pilings and eat away at the wood. City inspectors discovered that the borers had dangerously eroded pilings that support Pier 84 at West 44th Street. Last May, a 20-foot section of the India Street Pier in Greenpoint, Brooklyn collapsed because of borer damage. Neighborhood residents have called on the city to perform temporary repairs immediately and to turn Pier 84 into a park. *New York Times*, Apr. 28, 1998.

Court Issues Decision in Latest Battle over Shinnecock Indian Lands

A New York state court has ruled that a half-acre parcel that a Southampton resident bought from a developer two years ago is within the borders of the Shinnecock Indian Reservation. The resident planned to build a house on the land, but tribe members sat down in front of the bulldozer that was clearing the land. The Second Department ruled that the disputed land was with the tribe's borders, which were established in a 1859 handwritten document. Catterson v. Pell, 670 N.Y.S.2d 794 (2d Dept. Apr. 13, 1998). New York Times, Apr. 18, 1998.

UPCOMING EVENTS

September 11-13, 1998

"Conference on the Environment," Ithaca, N.Y. Sponsored by the New York State Association of Environmental Management Councils and New York State Association of Conservation Commissions. Information: Sandy Stein (607) 274-5560.

October 23-25, 1998

"New York State Environmental Law Section Annual Meeting Program: Fall Meeting," Hancock, Mass. Sponsored by the New York State Bar Association. Information: Lis Bataille (518) 463-3200.

WORTH READING

J.C. Berger, "Unclogging Onondaga Lake," *Empire State Report*, May 1998, at 61.

Gregory S. Durell & Robert D. Lizotte, Jr., "PCB Levels at 26 New York City and New Jersey WPCPs That Discharge to the New York/New Jersey Harbor Estuary," *Environmental Science & Technology*, Vol. 32, No. 8 (1998).

Michael B. Gerrard, "Territoriality, Risk Perception, and Counterproductive Legal Structures: The Case of Waste Facility Siting," 27 *Envtl. Law* 1017 (1997).

David J. Krajicek, "Trashing the Garbage Authority [MOSHA]," *Empire State Report*, Apr. 1998, at 61.

Kim A. O'Connell, "Putting Feathers (and Bottles) in Their Caps: Recycled PET Tops Off Two Long Island Landfills," *Waste Age*, Mar. 1998, at 46.

Robert Sullivan, "The Meadowlands: Wilderness Adventures at the Edge of a City" (Scribner 1998).

Marie Winn, "A Wildlife Drama in Central Park" (Pantheon Books 1998).

CERCLA Roundup

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argued, therefore, that the substances which they had sent to the site did not "cause" the incurrence of response costs and that they were not, as a result, responsible for these costs under CERCLA.

The Second Circuit agreed with Alcan's position, holding that if Alcan could prove its contention that its waste did not cause harm at the site or that the harm was capable of reasonable

apportionment between the joint PRPs, Alcan could escape liability under the joint and several liability theory.

The Northern District of New York, following the rationale of the Second Circuit, affirmed that a PRP can escape liability for response costs if it proves that: (1) its waste disposed of at the site, when mixed with other hazardous wastes, did not contribute to the release and the clean-up costs that followed; or (2) it contributed, at most, to only a divisible portion of the harm.[2]

The Northern District noted that while the burden of proof imposed on Alcan by the Court for escaping CERCLA liability introduced the **issue of causation** into the Superfund allocation determination, causation – otherwise irrelevant to liability under CERCLA – was introduced only to permit Alcan to escape payment "where its pollutants did not contribute more than background contamination and also cannot concentrate."[3] The Court declared that Alcan's efforts to "dissect" the emulsion byproduct of its aluminum manufacturing process into components regulated by CERCLA and those not regulated by CERCLA was not consistent with CERCLA's remedial purpose, noting that Alcan must also consider the effect of its emulsions co-mingling with other wastes at the site. Nevertheless, the Court found that Alcan could reduce its liability ". . . to the extent it shows the harm is divisible" and such proof must disclose "the relative toxicity, migratory potential, degree of migration, and synergistic capacities of the hazardous substances at the site . . . ."[4]

However, the Northern District refused to grant summary judgment either for the U.S. or for Alcan because of factual disputes, including disagreement over the composition of the emulsions released at the site.[5]

III. THE DEMISE OF THE PASSIVE DISPOSAL THEORY

The passive disposal theory was devised in an attempt to impose clean-up costs on intermediate titleholders who had nothing to do with the actual dumping of hazardous wastes (which took place prior to their ownership). The holding by the Second Circuit in *ABB Indus. Sys. v. Prime Technology, Inc.*[6] represents the death of the passive disposal theory in CERCLA litigation in the Second Circuit.

Under CERCLA § 9607(a)(2), a prior owner or operator is a responsible party for remedial costs if it controlled the site "at the time of disposal" of the hazardous substance. CERCLA § 9601(29) adopts the definition of "disposal" as meaning any ". . . discharge, deposit, injection, dumping, smelting, leaking, or placing of any . . . hazardous waste into or on any land or water so that such hazardous waste may enter the environment." Using these definitions, the passive disposal theory argues that a present landowner of a contaminated parcel is an "operator" of a facility where hazardous substances are "leaking" simply because these substances passively migrated underground a small distance.

In *ABB Industrial*, ABB Industrial Systems, the present owners of the contaminated property, brought an action under CERCLA against several companies that had previously controlled the property, but that did not actively dump on the property. The primary basis of ABB's claims against prior owners of the property was that the hazardous chemicals which were spilled by a predecessor-in-title continued to gradually spread underground (passively migrate) while the subsequent title owners controlled the property. ABB argued that the previous owners were liable for passive migration, i.e. discharge, under CERCLA.

The Second Circuit rejected this passive migration argument finding that CERCLA does not impose cleanup liability on those who merely controlled a site where chemicals have spread without that person's fault. It noted that (1) the definition of "discharge" under CERCLA did not refer to the gradual spreading of hazardous chemicals already in the ground; (2) that the legislative history to CERCLA 42 U.S.C. § 9607 did not indicate liability for gradual leaching of underground contaminants; and (3) that supporting a passive migration liability theory would render the "innocent owner" defense, which shields landowners from liability, useless. The Court noted that the Third Circuit and Fifth Circuit had also rejected this theory.[7]

IV. THE STATUS OF THE THIRD-PARTY DEFENSE

The third-party defense found under CERCLA § 107(b)(3) is intended to allow a party to escape liability for remedial costs if the party proves that the contamination was caused "solely by" a third-party with no contractual relationship to the defendant. In addition to showing that the contamination was caused solely by a third-party, the defendant must also establish that he exercised due care with respect to hazardous substances concerned, taking into consideration the characteristics of such hazardous substance in light of all relevant facts and circumstances.

The third-party defense has experienced little success in the courts. Those few examples where the defense has carried the day can be more associated with the luck and fortitude of the defendant than with prevailing case law.

A shining exception from the dismal history associated with the third-party defense was the 1996 holding by the Second Circuit in *New York v. Lashins Arcade Company*.[8] In *Lashins*, the Second Circuit affirmed the lower court's dismissal of the State of New York's claims against Lashins Arcade for cleanup and cost recovery damages at a suburban shopping arcade where groundwater at the mall was contaminated with aromatic hydrocarbons, including perchloroethylene and trichloroethylene, contamination caused solely by the former owner's tenants. The Court found that Lashins proved that any contamination was caused by a third-party drycleaners some fifteen years before it purchased the property and that this party was "solely" responsible for the contamination under the third-party defense.

The Second Circuit also ruled that as current owner, Lashins did not fail to exercise "due care" required under the third-party defense merely by failing to exercise due diligence prior to

purchase or by failing to contribute to the government's remedial investigation costs, stating:

> It is counterintuitive to suppose that a defendant is required to pay some or all of those response costs in order to establish . . . [an] affirmative defense . . . thereby rendering the affirmative defense partly or entirely academic. . .[9]

V. PIERCING MORE THAN BODY PARTS

Those who pay out-of-pocket for remedial costs will take all steps necessary to recover those expenditures from responsible corporations, and in doing so, attempt to pierce corporate veils and chase shareholders. Many recent cases have dealt with the piercing of corporate veils and the chasing of shareholders or directors of involved corporations.

A. Successor Liability

The Second Circuit has spoken on the issue of successor liability by adopting the "substantial continuity test," also known as the "continuity of enterprise test," as the appropriate legal test for successor liability under CERCLA.[10] Under this test, "continuity" may be assumed if employees, managerial staff, facilities, products, corporate name(s), operations, etc., are the same before and after the successor corporation took control.

This doctrine was put to use most recently in *State of New York v. Westwood-Squibb Pharmaceutical Co.*[11] in which the federal trial court found a gas distribution company liable for contamination caused by the nearly 75 years of gas manufacturing operations conducted by its predecessor. The court traced almost a century of acquisitions, leases, and "secret agent" transactions to pierce the corporate machinations of a title predecessor to find a *de facto* merger subjecting the successor to CERCLA liability. In *Westwood*, the court found that in a *de facto* merger there is a continuation of the business of the sellers; a continuity of shareholders; a dissolution of the seller; and the purchaser's assumption of seller's liability. In noting these elements, however, the district court held that it should apply the doctrine in a somewhat more flexible manner in order to promote the broad remedial purposes underlying CERCLA.

B. Parent-Subsidiary Liability

Various Circuit Courts, and most recently, the United States Supreme Court, have spoken in the last two years on the issue of parent-subsidiary liability under CERCLA.[12]

The United States Supreme Court, in December 1997, agreed to review the Sixth Circuit's position on parent-subsidiary liability to determine whether a corporation that actively participates in and exercises control over a subsidiary's operations can be held liable as an "operator" under CERCLA if circumstances do not otherwise justify piercing the corporate veil under state law. The *Cordova* appeal involved the review of the Sixth Circuit's determination that a corporate parent cannot be held liable as an "operator" under CERCLA without piercing the corporate veil under traditional state law theories, usually limited to facts showing the use of a subsidiary to perpetuate a fraud or that the subsidiary was a legal fiction.[13]

In June 1998, the United States Supreme Court, in *United States v. Bestfoods,* upheld the Sixth Circuit, holding that when (and only when) the corporate veil may be pierced may a parent corporation be charged with derivative CERCLA liability for its subsidiary's actions in operating a polluting facility.[14] The Court also found that a corporate parent that actively participated in and exercised control over the operations of its subsidiary's facility may be held directly liable in its own right under CERCLA as an operator of the facility. The Court went on to hold that for purposes of CERCLA's concern with environmental contamination, a corporate parent must have managed, directed, or conducted operations specifically related to the leakage or disposal of hazardous waste, or made decisions about compliance with environmental regulations to be considered an operator of its subsidiary under CERCLA.

C. Shareholder Liability

As is true of a corporation found to be the "operator" of a facility, operator liability for an individual shareholder means a finding of direct liability, as opposed to the indirect liability achieved by piercing the corporate veil to reach the shareholder. As with operator liability for parent corporations, courts have looked closely at the individual's authority over the company's operations, and particularly authority to prevent the contamination at the facility. For example, the Second Circuit has found the principal officer and shareholder liable as an operator under CERCLA where a closed corporation purchased contaminated property, but where they did not actually dispose of hazardous substances.[15] The Court found the vital factor to be that the corporate official was "in charge of the operation of the facility in question, and as such is an 'operator' within the meaning of CERCLA."[16]

There are a number of recurring factors in cases from which a standard for individual corporate liability can be identified. For example, courts have looked at the individual's authority over the company's operations, and particularly authority to prevent the contamination at the facility:

- *Shore Realty* and *Donaghey v. Bogle*[17] holding that the shareholder/director was liable because he had the authority to prevent the contamination of the property by his corporation;
- *United States v. Carolina Transformer Co.*[18] holding the shareholder and officer to be liable as both had the right to control operations;
- *Northwestern Mut. Life Ins. Co. v. Atlantic Research Corp.*[19] finding that "operator" liability attached to the person in control of the facility and thus in position to abate or prevent harm;
- *United States of America v. DiBiase Salem Realty Trust*[20] holding the shareholder 50 percent liable based on his sole control over the operation of the property;
- *City of North Miami v. Berger*[21] finding the

shareholders/officers of a landfill facility liable because of authority to control;

- *United States v. Mexico Feed and Seed Co.*[22] holding that the majority shareholder was liable based on his authority to control waste handling practices;
- *Quadion Corp. v. Mache*[23] holding the shareholder liable based on his ability to prevent contamination; and
- *Vermont v. Staco*[24] finding shareholders who were also corporate officers were held to be personally liable for contamination at their facility.

In *Alcon v. Beazer E., Inc.*[25] the Third Circuit held that the fact that shareholders elected 47 members of a wood treatment corporation's board of directors and then allowed them to perform their duties is "entirely consistent" with an investment relationship and insufficient to establish their actual control of treatment facilities for purposes of operator liability under CERCLA. The Court affirmed the "actual control" test articulated in *Lansford-Coaldale Joint Water Auth. v. Tonolli Corp.*[26] which was devised to define "operator" in a way that would affect Congress' intent to "hold a corporation liable for the environmental violations of its subsidiaries and sister corporations, if it is otherwise determined to have operated the facility in question." In this case, a corporation cannot be held liable unless it made the operations decisions or controlled the policy-making of the corporation.

As discussed above, similar to the holding of *U.S. v. Cordova Chemical Co.*,[27] the Sixth Circuit subscribes to a different position on piercing the corporate veil to find a company's shareholders liable under CERCLA. In *Donahey v. Bogle*,[28] the Sixth Circuit held that a shareholder (in this case a sole shareholder) is not liable under CERCLA unless circumstances justify piercing the corporate veil under traditional state law theories. In *Donahey*, defendant Bogle leased to the St. Clair Rubber Company industrial property for the production of rubber products and adhesives. Waste products included sludge which was land disposed on the property. Bogle's brother owned 100% of the stock of St. Clair and was chairman of the board. Discovery showed that he did not personally participate in the day-to-day affairs of the company or in the waste disposal practices resulting in the CERCLA liability, although he had the authority to do so. In 1981, the property was bought by plaintiff Donahey. The Michigan Department of Natural Resources forced Donahey to clean up the mess left behind (including the land disposal area and some previously undiscovered underground storage tanks) by St. Clair and, thus, a lawsuit was born.

The Sixth Circuit held that the same vicarious liability standard that applied between parents and subsidiaries[29] applies to its shareholders, thus finding that a shareholder is *not* liable under CERCLA[30] unless circumstances justify piercing the corporate veil. The Court noted that while Bogle's brother had the authority to control waste disposal practices, he never, in fact, did so. The Court found no circumstances sufficient to justify corporate piercing and found that Bogle's brother was not liable under CERCLA.

After appeal to the United States Supreme Court, *Donahey* was remanded to the lower court on June 15, 1998 to require the taking of evidence on whether the individual owner was truly involved in the polluting activities giving rise to the site cleanup.[31]

VI. FAILURE TO COMPLY WITH NCP CAN DOOM CERCLA COST RECOVERY

The holding in *Public Service Co. of Colorado v. Gates Rubber Co.*,[32] reaffirms that failure to comply substantially with the National Contingency Plan (NCP) under the federal Superfund law will result in the failure of the CERCLA cost recovery action or contribution claim. In *Public Service Co.*, a Colorado utility found that it could not recover the remedial costs associated with cleaning up the former metal salvaging facility because it failed to substantially comply with the NCP. The court's decision reaffirms the importance of characterizing the cleanup as a "remedial action" or a "removal action," and reaffirms the elements necessary to establish NCP compliance.

VII. IN PURSUING COST RECOVERY, A PRP IS STUCK WITH A § 113 CONTRIBUTION CLAIM

A PRP under CERCLA, considered jointly and severally liable for remedial costs, may proceed with a cost recovery action only for contribution under CERCLA § 113(f) and may not proceed with a cost recovery action for contribution under CERCLA § 107(a). Contribution may be sought under CERCLA § 113(f) or under common law theories of recovery which are founded upon principles of equity and natural justice which require that those that are under a common obligation or burden should bear costs in a fair or equitable proportion. Cost recovery under CERCLA § 107, on the other hand, seeks to impose strict statutory liability on all PRPs on a joint and several basis, regardless of equity or fairness among co-obligors. The cases cited below discuss available remedies in this context.

The Third Circuit in *New Castle County v. Halliburton Nus. Corp.*,[33] followed the recent holdings by the First, Fifth, Seventh, Tenth and Eleventh Circuits that only innocent parties may maintain a § 107(a) action. The Court in *New Castle County* found that an action brought by a liable PRP is "by necessity" a contribution action under CERCLA § 113(f). The Fourth Circuit followed suit in April 1998[34] and in the Eastern District of New York, the Second Circuit, followed the majority of Courts in *Town of Oyster Bay v. Occidental Chemical*.[35]

The significance of this determination cannot be understated. A defendant to an action brought by another PRP for cost recovery may, as a result of these decisions, seek apportionment where there is a reasonable basis for determining the contribution of each cause to a sole harm. However, the defendant bears the burden of proving that the harm is divisible and that the damages and costs also are susceptible of some reasonable

apportionment. On the other hand, if a PRP could bring a § 107(a) cost recovery action against other PRPs, it could in theory recoup all of its clean-up costs, regardless of fault.

VIII. CERCLA STATUTE OF LIMITATIONS

A claim under CERCLA § 113(f) is governed by the three-year statute of limitations found at § 113(g)(3). In *New Castle County*[36] the Court found that the three-year statute of limitations applied to contribution claims under CERCLA § 113 accrues upon the awareness of the actual injury, not upon the awareness of a cognizable claim. To start the statute running, it is not necessary that a plaintiff be aware of all the facts necessary to bring a suit nor that a plaintiff has identified every party who may be liable to the complaint, but that it was aware that there were PRPs responsible for conditions at the site. The Third Circuit in *New Castle County* found exceptions to the accrual of the statute of limitations only when (1) the defendant actively misled the plaintiff; (2) the plaintiff in some extraordinary way was prevented from asserting its rights; or (3) the plaintiff timely asserted its rights mistakenly in the wrong forum.

Additionally, a claim for contribution under CERCLA § 113 can nevertheless be characterized as a § 107 "expense" action subject to the six-year statute of limitations in § 113(g)(2) so long as the action brought is the "initial" action to recover expense costs.[37]

IX. MUNICIPALITIES RECEIVE DISPENSATION

On February 10, 1998, EPA established its policy for resolving the potential liability of owners/operators, generators, and transporters at co-disposal municipal solid waste (MSW) sites, establishing a unit-cost formula for contributions by municipal solid waste generators and transporters in a settlement range based upon historical data for municipal owners and operators of co-disposal sites.[38] Co-disposal sites are those that have accepted both municipal waste and other material, such as industrial waste. EPA defines municipal solid waste as solid waste that is generated primarily by households, but that may include some contribution of waste from commercial and industrial sources as well. Co-disposal sites—generally landfills—make up about twenty-five percent of all the sites on the National Priorities List.

EPA's final methodology builds on a 1989 interim policy addressing agency discretion to pursue MSW generators and transporters as parties potentially responsible for cleanup under Superfund. EPA supplemented the 1989 policy by offering settlements to any MSW generators and transporters that wish to resolve their potential liability and obtain contribution protection under CERCLA. The policy does not apply to generators and transporters who generate or transport hazardous waste in addition to municipal solid waste except to the extent that a party can demonstrate the relative amounts of MSW and non-MSW it disposed of at the site and the composition of the non-MSW.

On May 18, 1998, several industry groups sued in the District of Columbia district and circuit courts. to have the policy declared unlawful because it allegedly affords special treatment to municipal waste parties and does not provide a reasonable policy justification for the municipal liability relief provisions.[39]

In the district court case, the plaintiffs filed a motion for partial summary judgment on June 12, 1998. This motion applied specifically to the application of the settlement policy to municipal solid waste generators and transporters. On June 26th, the E.P.A. filed a motion to stay the proceedings seeking more time to evaluate a potential motion to dismiss the case on jurisdictional grounds. On June 30, 1998, plaintiffs filed their opposition to the request for a stay of proceedings.

In the circuit court proceeding, the Court ordered, on May 19, 1998, the filing of documents by both parties by June 18, 1998. On that date, the parties filed a joint motion to extend those deadlines.

X. THE CONCLUDING SAGA OF LOVE CANAL

On May 30, 1997, the Western District of New York issued a decision finding the City of Niagara Falls (City) and Occidental Chemical Company (Occidental) jointly and severally liable for clean-up costs at the Love Canal superfund site. The Court found both the City and Occidental liable under a nuisance theory and rejected the City's claim that it did not create or maintain a public nuisance, the Court pointedly referencing a public entity's obligation to exercise its police powers to protect the public health. The Court also found the City and Occidental jointly and severally liable with Occidental for remedial costs under a CERCLA theory finding the City liable as both a current owner and as a party which owned property during the disposal of hazardous substances.

The Court rejected the City's argument that it should not be liable under CERCLA because it had "involuntarily" acquired the property. Here, the City accepted the property as a deed gift from Occidental. The Court said it may have been a closer call if the City had acquired by eminent domain for a public improvement project, but that is not what occurred.

On April 27, 1998, the parties settled the case, with Occidental agreeing to pay the City $250,000 to settle the remaining claims related to the pollution at the Love Canal Site.[40] The agreement marks the final conclusion to the litigation that began 19 years ago when the federal and state governments sued Occidental's predecessor corporation for cleanup costs.

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[1] United States v. Alcan Aluminum Corp., 990 F.2d 711 (2d Cir. 1993).

[2] United States v. Alcan Aluminum Corp., 1997 U.S. Dist. LEXIS 13396 (N.D.N.Y., Civ. No. 91-1132).

[3] United States v. Alcan Aluminum Corp., 1997 U.S. Dist. LEXIS 13396 at *8.

[4] United States v. Alcan Aluminum Corp., 1997 U.S. Dist. LEXIS 13396 at *12.

[5] United States v. Alcan Aluminum Corp., 1997 U.S. Dist. LEXIS 13396 at *13.

[6] ABB Indus. Sys. v. Prime Technology, Inc., 120 F.3d 351 (2d Cir. 1997).

[7] *See,* United States v. CDMG Realty Co., 96 F.3d 706 (3d Cir. 1996) and Joslyn Mfg. Co. v. Koppers Co., 40 F.3d 750 (5th Cir. 1994).

[8] New York v. Lashins Arcade Company; 91 F.3d 353 (2d Cir. 1996).

[9] New York v. Lashins Arcade Company; 91 F.3d at 361.

[10] Goodrich v. Betkoski, 99 F.3d 505 (2d Cir. 1996).

[11] State of New York v. Westwood-Squibb Pharmaceutical Co. 981 F. Supp. 768 (W.D.N.Y. 1997).

[12] Certain Underwriters at Lloyd's, London v. St. Joe Minerals Corp., 90 F.3d 671 (2d. Cir. 1996); Nurad, Inc. v. William E. Hooper & Sons Co., 966 F.2d 837, 842 (4th Cir. 1992), *cert denied,* Mumaw v. Nurad, Inc., 506 U.S. 940, 121 L. Ed. 2d 288, 113 S. Ct. 377 (1992); United States v. Kayser-Roth Corp., 910 F.2d 24 (1st Cir. 1990), *cert. denied,* 498 U.S. 1084, 112 L. Ed. 2d 1045, 111 S. Ct. 957 (1991).

[13] United States v. Cordova Chem. Co., 113 F.3d 572 (6th Cir. 1996).

[14] United States v. Bestfoods, et al., 1998 U.S. LEXIS 3733, 140 L.Ed. 2d 314, 66 U.S.L.W. 3590, 118 S.Ct. 1206 (1998).

[15] New York v. Shore Realty Corp., 759 F.2d 1032 (2d Cir. 1985).

[16] New York v. Shore Realty Corp., 759 F.2d at 1054.

[17] New York v. Shore Realty, 759 F.2d 1032, 1052 (2d Cir. 1985); Donaghey v. Bogle, 987 F.2d 1250, 1254 (6th Cir. 1993).

[18] United States v. Carolina Transformer Co., 978 F. 2d 832, 836-37 (4th Cir. 1992).

[19] Northwestern Mut. Life Ins. Co. v. Atlantic Research Corp., 847 F. Supp. 389, 397 (E.D.Va. 1994).

[20] United States of America v. DiBiase Salem Realty Trust Civ 91-1128-Ma., 1993 U.S.Dist. LEXIS 20031 (N.D. Mass., 1993).

[21] City of North Miami v. Berger, 828 F. Supp. 401, 410-11 (E.D. Va. 1993).

[22] United States v. Mexico Feed and Seed Co., 764 F. Supp. 565, 571 (E.D. Mo. 1991).

[23] Quadion Corp. v. Mache, 738 F. Supp. 270, 274-75 (N.D. Ill. 1990).

[24] Vermont v. Staco, 684 F. Supp. 822, 832 (D.Vt. 1988).

[25] Alcon v. Beazer E., Inc., 124 F.3d 551 (3d. Cir. 1997).

[26] Lansford-Coaldale Joint Water Auth. v. Tonolli Corp., 4 F.3d 1209, (3d Cir. 1993).

[27] United States v. Cordova Chem. Co., 113 F.3d 572 (6th Cir., 1996). *See also* text accompanying notes 8 to 11 *above.*

[28] Donahey v. Bogle,, 129 F.3rd 838 (6th Cir. 1997).

[29] United States v. Cordova Chem. Co., 113 F.3d 572 (6th Cir., 1996).

[30] 42 U.S.C. § 9607(a)(2).

[31] Donahey v. Livingstone, No, 97-1163US, 1998 WL19226 (Jun. 15, 1998).

[32] Public Service Co. of Colorado v. Gates Rubber Co., 1997 U.S. Dist. Lexis 2142 (D.C. Colo., Civ. No. 96-N-1922, Dec. 16, 1997).

[33] New Castle County v. Halliburton Nus. Corp., 111 F.3d 1116 (3d Cir. 1997).

[34] Pneumo Abez Corp. v. High Point, Thomasville & Denton R.R., 1998 U.S. App. Lexis 8238 (April 29, 1998).

[35] Town of Oyster Bay v. Occidental Chemical, 987 F. Supp. 182 (E.D.N.Y. 1997).

[36] New Castle County, 111 F.3d 1116 (3d Cir. 1997).

[37] Sun Co. v. Browning-Ferris, 124 F.3d 1187 (10th Cir. 1997).

[38] 63 FR 8197-8201.

[39] Chemical Manufacturers Association v. U.S., D.D.C., No. CVO1255LFO, May 18, 1998; CMA v. U.S.E.P.A., No. 98-1243, D.C.Cir., May 18, 1998.

[40] United States v. Occidental Chemical Corp., W.D.N.Y., No. 79 – 990 C, Apr. 27, 1998.

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