CERCLA Liability

Courts Look at Responsibilities of Envtl. Response Action Contractors

By Richard M. Kuntz

TWO RECENT cases appear to be the first to consider the liability of environmental response action contractors under both CERCLA and the common law. The decisions will be of interest to counsel for potentially responsible parties performing a cleanup and for remedial action contractors, as well as consultants providing engineering oversight to the remedial contractor's activities. While other courts have considered the question of the CERCLA liability of a general contractor not specifically engaged for the purposes of site remediation, these cases appear to be the first to consider the question of the CERCLA or common law liability of hazardous waste site response action contractors.

The first case, *Ganton Technologies Inc. v Quadion Corp.*, 834 F. Supp. 1018 (N.D. Ill. 1993), involved claims under CERCLA and strict liability in tort brought by the primary defendant, Quadion Corp., which had hired one firm to clean up PCB contamination at a site and a second firm to oversee the cleanup contractor's activities. The court dismissed the strict liability claims, finding that the cleanup of PCBs from an industrial site is not an "abnormally dangerous" activity warranting the application of strict liability.

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Focus on Activity, Not Pollutant

While other courts have held that the release of hazardous substances, such as PCBs, into the environment from ongoing manufacturing processes or disposal activities gives rise to strict liability in tort, available as personal-injury or property-damage claims to those exposed to the hazardous substances, the *Quadion* court focused not on the nature of the PCBs themselves, but on the activity at issue. Remediation of a hazardous waste site, which the court called a "valuable and essential social function," was, because of this social utility, not in itself an abnormally dangerous activity.

With respect to the CERCLA claims, however, the court held that both response-action and oversight contractors could indeed fall within the CERCLA liability-fixing categories of "operator" or "transporter." The district court distinguished the only ruling by the U.S. Court of Appeals for the Seventh Circuit relating to contractor liability under CERCLA, *Edward Hines Lumber Co. v. Vulcan Materials Co.*, 861 F.2d 155 (1988), which held that CERCLA "does not fix liability on slipshod architects, clumsy engineers or poor construction contractors," by pointing out that the contractor in *Hines* was essentially a design contractor for a manufacturing process, as opposed to the cleanup contractors before the court in *Quadion*. The *Quadion* court also distinguished Northern District of Illinois precedent on the question of whether a hazardous substance could be released or disposed of more than once, holding that these precedents did not deal with pollution cleanup contractors who exacerbated pre-existing contamination.

It is of small comfort to the environmental contracting community that strict liability in tort claims may not be available, since CERCLA claims are in many ways more powerful than strict liability claims. The specter of CERCLA liability may make negotiations more difficult with respect to indemnification and related contractual provisions between PRP groups and their consultants and remedial-action and oversight contractors.

Of more comfort to the contracting community was the ruling in *City of North Miami v. Berger*, 828 F. Supp. 401 (E.D. Va. 1993), which extended the *Hines* holding and refused to impose CERCLA liability on an

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Property Transfers

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in the healthy, fresh, country air of this ideal wooded community." According to Mr. Rosen, the sellers/brokers distributed a fact sheet about the developments regarding their proximity to shopping, transportation, etc.

"Here, the developer and broker chose to utilize the environment beyond the boundary lines of the developments to sell or enhance the saleability [sic] of the homes," the court said. "Having elected to use the off-site environment to induce sales, the seller and broker were obligated to disclose the existence of a landfill which could have a substantial negative impact upon the value of the homes and the quality of life in the area."

"Having put the location into issue, it made [the builders' and brokers'] conduct more egregious," Mr. Rosen said, adding, "If you speak, you cannot say a half-truth."

New Jersey appears to be the first jurisdiction to apply to builders and brokers the duty to disclose off-site environmental conditions. The court noted that California, Connecticut and New York also have imposed on builders and brokers a duty to disclose off-site conditions that might impact the value or desirability of the property listed for sale, but none of the cases it cited involved off-site environmental conditions. ▨ — *Leslie Nicholson*

Scientific, Technological Testimony

Role Seen for Court-Appointed Experts in Wake of *Daubert*

By D. Alan Rudlin

IN THE WAKE OF the U.S. Supreme Court's decision last year that federal trial judges should be exercising an active role as "gatekeepers" against suspect scientific and technological expert opinion testimony, the American Association for the Advancement of Science (AAAS) has begun designing a demonstration project involving the use of Rule 706 court-appointed experts. Meanwhile, the Federal Judicial Center is preparing a reference manual on scientific/technical evidence for federal judges that is expected to be released late this year.

In *Daubert v. Merrell Dow Pharmaceuticals*, 92-102, the court threw out a 70-year-old test for the admissibility of scientific evidence. Under that test, the *Frye* rule, scientific evidence that had "general acceptance" in the scientific community could be admitted. In most cases, that meant that the science had to have been subjected to peer review. Now, judges themselves are required to be the arbiters, using the Federal Rules of Evidence to determine which scientific testimony should be admitted as credible and which should be barred.

Chief Justice William Rehnquist, in his dissent in *Daubert*, expressed doubts about how well-equipped district court judges are to perform this gatekeeping role. Anticipating this problem, the majority opinion in *Daubert* proposed that judges consider appointing a neutral and independent expert, pursuant to Federal Rule of Evidence 706, to assist them. Until now, Rule 706 experts have been used infrequently by the courts.

At a meeting last November — co-sponsored by the joint AAAS/American Bar Association National Conference of Lawyers and Scientists; the Carnegie Commission on Science, Technology and the Government; and the Federal Judicial Center — participants proposed the following broad roles for a Rule 706 independent expert:

- **Expert as Witness.** The expert could be used to assist the court before trial in evaluating scientific arguments supporting and opposing motions to dismiss or for summary judgment, as well as in handling evidentiary motions in limine. The expert could also testify at the trial itself, subject to cross-examination by both sides.
- **Expert as Advisor.** The expert could supply scientific information on the area or issue in dispute, serving as an educator, either to the judge or jury, regarding some of the basic scientific and technological concepts involved in the case, including the preparation of charts, glossaries, tables, etc. The expert could also advise the court in taking judicial notice of various scientific and technological facts.
- **Expert as Damage Evaluator.** The expert could serve as facilitator to the court, or to the parties, in settlement negotiations. The expert could also assist the court in its granting of various types of equitable relief, such as injunctions and medical monitoring orders.

The conference established a steering committee to create a national coordinating mechanism to assist in identifying suitable 706 experts, and AAAS has assumed the role of creating a demonstration project to determine how the concept might work.

Meanwhile, the Federal Judicial

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Contractor Liability

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engineering firm that designed a landfill and provided ongoing consultation concerning its operation. The *Berger* court held that this contractor did not fall within the ambit of the CERCLA "operator" provision, but not because, consistent with *Quadion*, the contractor was not a "cleanup contractor"; rather , the *Berger* court announced a test as to whether the engineering firm had the "authority to control" the hazardous substances in question. The *Berger* court felt that imposing CERCLA liability on an engineering firm, such as the one before it, would run the risk of extending operator liability to any firms providing advice related to the operation of the waste site. By contrast, *Berger* did impose CERCLA operator liability on a construction contractor at the site, based on that contractor's actual movement of contaminated media.

It is not clear whether *Berger* and *Quadion* can be reconciled, although future courts may find it critical that the contractors in *Quadion* were hired to clean up what practitioners have referred to as a closed, "uncontrolled" hazardous-waste site, while the *Berger* contractors were involved in the operation of an ongoing waste disposal facility, which only later provided the basis for a CERCLA action. ▨

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