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From: Gordon, David L. (ENRD)
Sent: Thur 12/1/2016 4:55:15 PM
Subject: Maxus: Alter Ego Case Law

Alex,

I am emailing to follow up on our discussion regarding alter ego liability and your request for a list of cases that we believe are relevant. Below I first list decisions that have applied federal common law in adjudicating indirect liability claims in CERCLA cases or that have some bearing on this topic. I then list decisions holding that alter ego liability makes the parent or shareholder liable for the full debts of the pierced corporation and that liability should not be capped by the amounts siphoned. I've included my own notes on these cases. This is not intended to be a legal argument or the position of the United States. This list is also not intended to be an exhaustive list of relevant case law. We are available to discuss alter ego liability.

David

Federal Common Law for Indirect CERCLA Liability

- *United States v. General Battery Corp., Inc.*, 423 F.3d 294, 298, 301 (3d Cir. 2005). In a decision affirming successor liability under CERCLA federal common law, the Third Circuit states "'[G]iven the federal interest in uniformity in application of CERCLA, it is federal common law, and not state law, which governs' matters of *indirect* CERCLA liability." (quoting *Lansford-Coaldale Water Auth. v. Tonolli Corp.*, 4 F.3d 1209, 1225 (3d Cir. 1993)) (emphasis added). The Third Circuit further explains, "CERCLA is a federal liability statute, applicable nationwide to those responsible for hazardous-waste contamination. Liability under the statute is a matter of federal law." Thus, in the Third Circuit, it is reasonable to conclude that federal common law should also be applied to veil piercing issues in CERCLA cases.
- *Pearson v. Component Technology Corporation*, 247 F.3d 471 (3rd Cir. 2001). In this case, the Third Circuit considered whether the prerequisites for parent/subsidiary liability in the Worker Adjustment and Retraining Notification Act (*WARN*) context had been met in an action by former employees of the subsidiary. The Third Circuit gave a brief overview of the various corporate veil piercing tests (i.e., the "traditional" test; the "integrated enterprise" test; and "direct liability"). *Id.* at 484-87. In this case, however, the Third Circuit noted that the Department of Labor had previously promulgated a regulation "setting forth relevant factors for courts to use when considering whether to impose

WARN Act liability on a parent corporation." *Id.* at 477 (citing 20 C.F.R. 639.3(a)(2)). The court held that, in the WARN context, the appropriate test for parent liability was the multi-factored test issued by the Department of Labor rather than reach the question of state versus federal law. Although the court ultimately held that "the consideration of evidence that might otherwise fall outside of the listed factors in order to conduct such an inquiry [into parent liability]" should be allowed, this holding was based on the Department of Labor's specific instructions on analyzing a claim under the WARN act. *Id.* at 490-91. In providing an overview of veil piercing law, the Third Circuit explained, "Courts have held veil-piercing to be appropriate 'when the court must prevent fraud, illegality, or injustice, *or when recognition of the corporate entity would defeat public policy* or shield someone from liability for a crime, *Zubik v. Zubik*, 384 F.2d 267, 272 (3d Cir. 1967), or when 'the parent so dominated the subsidiary that it had no separate existence.'" 247 F.3d 484. (second citation omitted) (emphasis added). Thus, the public policy objectives, such as CERCLA's objectives, must be considered when analyzing alter ego.

- *Lansford-Coaldale Water Auth. v. Tonolli Corp.*, 4 F.3d 1209, 1225 (3d Cir. 1993). The Third Circuit reviewed a district court opinion that found the parent corporation was neither an owner nor operator under CERCLA. The Third Circuit affirmed on owner liability and remanded on operator liability. The Third Circuit explained, "It is well-established that under CERCLA a corporation may be held liable as the owner of another corporation when the attendant circumstances warrant piercing the corporate veil. In addition, given the federal interest in uniformity in the application of CERCLA, it is federal common law, and not state law, which governs when corporate veil-piercing is justified under CERCLA." (citations omitted). For owner liability, the Third Circuit's analysis employed veil piercing factors, "[T]he record establishes that corporate formalities were adhered to, that the two corporations entered transactions on an arm's length basis, and that [the subsidiary] was not undercapitalized." (For operator liability, the 1998 *Bestfoods* decision now provides the standard. *United States v. Bestfoods* 524 U.S. 51, 63–64 (1998).)

- *United States v. Bestfoods* 524 U.S. 51, 55, 63–64, 68 (1998) *Bestfoods* is the seminal case holding that a "parent that actively participated in, and exercised control over, the operations of a facility itself may be held directly liable in its own right as an operator of a facility" under CERCLA 107(a). The Supreme Court also acknowledges that a parent can have derivative liability as an owner or operator if veil piercing criteria are satisfied, but the decision expressly does not reach the question as to whether state law or federal common law applies. For direct operator liability, the Supreme Court elaborates, "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 hazardous waste, or decisions about compliance with environmental regulations." In clarifing the difference between direct and derivative liability, the Supreme Court states, "'The question

is not whether the parent operates the subsidiary, but rather whether it operates the facility, and that operation is evidenced by participation in the activities of the facility, not the subsidiary. Control of the subsidiary, if extensive enough, gives rise to indirect liability under piercing doctrine, not direct liability under the statutory language.'" And, "'Activities that involve the facility but which are consistent with the parent's investor status, such as monitoring of the subsidiary's performance, supervision of the subsidiary's finance and capital budget decisions, and articulation of general policies and procedures, should not give rise to direct liability.'" (citations omitted). The Supreme Court remanded for further findings related to the role of an agent of the parent, who had no official position at the subsidiary, in managing environmental matters at the facility.

- *United States v. Golden Acres, Inc.*, 702 F. Supp. 1097 (D. Del. 1998). In determining whether federal common law or Delaware state law applied in an action by HUD to pierce the corporate veil, the District Court in Delaware held in favor of federal common law. The Third Circuit, relying on the Supreme Court's analysis in *Kimbell Foods*, 440 U.S. 715 (1979), stated that "federal law controls the government's rights under federal *nationwide* lending programs." *Id.* at 1102. The court further stated that "where the Government has sought to recover a deficiency . . . federal law is the source of the Government's rights and remedies." *Id.* Ultimately, the court generalized that when "federal law governs the Government's rights and remedies . . . federal law must be applied to determine whether the default judgment can be enforced against [an alter ego of the defunct corporation]." *Id.* Using the federal standard, the court also determined that it would apply federal common law, and not state commercial law, to its corporate veil piercing analysis. Relying on *Kimbell Foods* and *United States v. Pisani*, 646 F.2d 83 (3d Cir. 1981), the court concluded that a "federal alter ego standard must govern" the court's analysis of liability "in order to ensure the promotion of the federal objectives of the [National Housing Act] and uniform enforcement of HUD-held loan agreements." *Id.* at 1104.

- *United States v. Kayser-Roth Corp.*, 724 F. Supp. 15, 24–25 (D.R.I. 1989). In this pre-*Bestfoods* decision regarding TCE contamination in drinking water wells caused by a textile facility, the District of Rhode Island addressed direct operator liability and liability based on piercing the corporate veil. The court ruled, "[A] uniform federal rule of decision should be applied in CERCLA cases involving *alter ego* liability." 724 F. Supp. at 20. And, that CERCLA's intent must be considered, "Upon analysis of the factors relevant to piercing [textile corporation's] veil, and mindful of the liberal construction CERCLA must be afforded so as not to frustrate probable legislative intent, the Court concludes that [parent] is an owner for CERCLA's purposes." 724 F. Supp. at 23. The First Circuit is quoted, "'[F]ederal courts will look closely at the purpose of the federal statute to determine whether the statute places importance on the corporate form . . . an inquiry that usually gives less respect to the corporate form than does the strict common law of alter ego.'" *Id.* (quoting *Alman v. Danin*, 801 F.2d 1, 3 (1st Cir. 1986). Further, the Court discusses the cleanup objectives of CERCLA and states "CERCLA's provisions should

thus be viewed expansively, so as not to frustrate these 'beneficial legislative purposes." *Id.* (citations omitted). The United States' total response costs were awarded.

- *United States v. Union Corp.*, 259 F. Supp. 2d. 356, 389 (E.D. Pa. 2003) In this lengthy decision regarding CERCLA liability for a transformer/scrapyard site in Philadelphia, the Court found that the parent was liable as the alter ego of the subsidiary. The Court recognized that for a CERCLA matter "the counters of alter ego liability in this context are determined by federal common law." 259 F. Supp. 2d at 388. The Court lists the applicable veil piercing factors, and states there must be an element of "injustice or fundamental unfairness," which can be satisfied by a combination of the listed factors. There was *significant* transferring of assets from the subsidiary to the parent, but the amount related to this siphoning was not used to cap alter ego liability. The court also states, "Where the conduct of a dominant corporation is deliberate, 'with the specific intent to escape liability for a specific tort of class of torts," corporate veil piercing is justified.'" 259 F. Supp. 2d at 390. (citation omitted). The parent's actions were held to be a deliberate attempt to avoid environmental liability. The court explained, "Because it would defeat the ends of justice under these circumstances to permit [the parent] to avoid this financial responsibility, the court finds that [the subsidiary] was the alter ego of [the parent] and piercing the corporate veil is justified." *Id.*

<u>No Cap on Alter Ego Liability</u>

- *Swift & Co. Packers v. Compania Colombiana Del* Caribe*, S.A.*. 339 U.S. 684, 689 n.4 (1950). In this 1950 case dealing with admiralty jurisdiction, the Supreme Court noted that an alter ego finding "would render the issue of fraudulent transfer irrelevant" because the alter ego theory would allow corporate assets to be attached.

- *Atateks Foreign Trade, Ltd. v. Private Label Sourcing, LLC*, 402 F. App'x 623, 627 (2d Cir 2010). In this case involving a suit by foreign garment manufacturer against purchasing agents, the Second Circuit affirmed an alter ego finding that related companies were jointly and severally liable to plaintiff. New York law applied. The facts supported several veil piercing factors including siphoning. The Second Circuit rejected the defendants' attempt to cap liability based on the amounts siphoned. "[Defendants'] argument confuses the fraudulent transfer statute, which the district court correctly recognized generally limits recovery to the particular property that was fraudulently transferred, … and piercing the corporate veil, which permits plaintiffs to hold those behind the corporation liable 'for some underlying corporate obligation.'" (citations omitted). The Second Circuit goes on to explain that having found related companies jointly and severally liable, the court need not

reach the defendants appeal related to the amount of funds fraudulently transferred.

- *Flame S.A. v. Freight Bulk Pte. Ltd.*, 807 F.3d 572, 591 (4th Cir. 2015). In this admiralty fraudulent conveyance and alter ego case, the Fourth Circuit affirmed a finding of alter ego. Factors included siphoning of funds, failing to observe corporate formalities and maintain records, dominating corporate officer that controls multiple entities, and sharing ownership and employees. The Fourth Circuit expressly rejected an argument that liability should be capped at a total of $3.28 million in fraudulent transfers. The Fourth Circuit explained that even if defendant was correct that fraudulent transfer liability should have been limited, alter ego liability made defendant liable for plaintiff's entire judgment of approximately $60 million. It should be noted that liability was capped at $8.3 million, which was the value of an attached vessel in dispute.

- *Bucyrus-Erie Co. v. Gen. Prods.*, 643 F.2d 413, 421 (6th Cir. 1981) In this case involving the sale of construction equipment and claims that the president/shareholder was the alter ego of defendant corporation, the Sixth Circuit held that jury instructions related to alter ego, fraud, and conversion were not erroneous. The Sixth Circuit explained, "Equity will not permit the individual to escape in part the consequences of his election to treat the corporation as an alter ego. The individual is thus treated as having assumed the position of the corporation and held liable to the full extent of its obligation." The decision further stated that the shareholder would have to pay interest at the corporate rate, and not at the rate limited by the state's usury laws applicable to individuals. The court applied Ohio alter ego law.

- *Brandon v. Anesthesia & Pain Mgmt. Assocs., Ltd.*, 419 F.3d 594, 597-598 (7th Cir. 2005). This Seventh Circuit Posner decision applying Illinois law addressed a retaliatory discharge case by a physician against his employer. After obtaining a judgement, plaintiff brought a supplemental proceeding alleging fraudulent transfers against the employer's shareholders. Years later Plaintiff brought a second supplemental proceeding alleging alter ego against the shareholders. In ruling for the plaintiff on alter ego, the Seventh Circuit clarifies that the alter ego theory allows plaintiff "to collect his entire judgment out of the personal assets of the [shareholders]." 419 F.3d at 597. The Seventh Circuit explained that "money [the shareholders] made, and assets they acquired, long after the verdict will be used to satisfy the judgment debt." 419 F.3d at 597. This decision clarifies that alter ego liability, as opposed to liability for fraudulent transfers, is not capped.

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