JONES DAY

COMMENTARY

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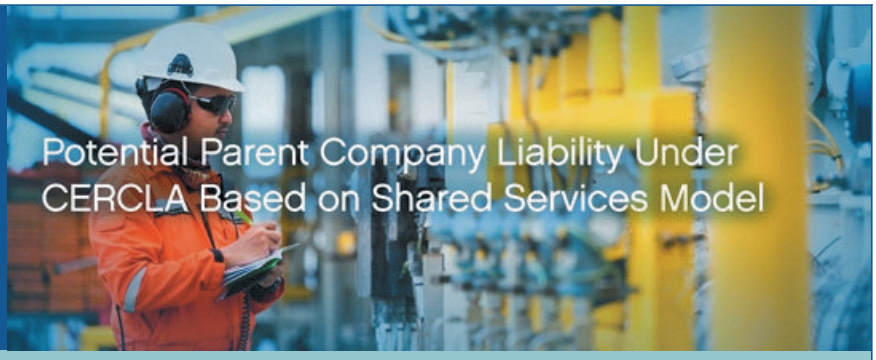

Potential Parent Company Liability Under CERCLA Based on Shared Services Model

IN SHORT

The Situation: At least one court since *Bestfoods* has held that an organizational model whereby a parent company provides shared or centralized services to subsidiaries can result in direct liability for the parent company under CERCLA.

The Result: Parent companies may face direct liability under CERCLA depending on the structure of their shared services models.

Looking Ahead: Companies may want to consider how the structure of their shared services practices may impact their potential CERCLA liability.

When the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") was first being enforced after its enactment in 1980, there was some confusion about its impact on existing principles of corporate law and whether, or in what circumstances, a parent company could be held liable under CERCLA for environmental contamination attributable to its subsidiaries.

The United States Supreme Court clarified this issue in 1998, giving parent companies comfort that CERCLA did not displace the existing body of corporate law. *United States v. Bestfoods*, 524 U.S. 51 (1998). The Court held that a parent company could not be held liable for its subsidiary's actions under CERCLA unless the corporate veil could be pierced under applicable corporate law principles. The Court further held, however, that a parent company could be directly liable as an operator under CERCLA if the parent itself was involved in operating the facility at issue, in particular with regard to decisions about disposal of hazardous waste or compliance with environmental regulations. But the Court specified that accepted norms of parental oversight, such as supervision of finance and capital budget decisions, and articulation of general policies and procedures, were insufficient to give rise to direct parental liability under CERCLA.

> In the years since *Bestfoods* was decided, at least one court has held that corporate shared services models—whereby a parent provides environmental services to all of its subsidiaries—could lead to direct liability for parent companies as operators under CERCLA.

In the years since *Bestfoods* was decided, at least one court has held that corporate shared services models—whereby a parent provides environmental services to all of its subsidiaries—could lead to direct liability for parent companies. In a recent case, a federal district court found a parent company directly liable as an operator under CERCLA where an environmental health and safety manager of the parent served as the project manager of the site at issue under a shared services organizational model. *Union Pac. R.R. Co. v. Oglebay Norton Minerals, Inc.*, No. 3:17-cv-00047-PRM (W.D. Tex. 2018). The court rejected the parent company's argument that it was not directly liable under *Bestfoods* because its actions were taken on behalf of and for the benefit of the subsidiary. The court noted that the employees addressing remedial issues were solely employees of the parent company, and there was no evidence that the subsidiary (no longer actively operating at the site and insolvent since the end of 2001) had input or decision-making authority with respect to the actions being undertaken at the site. The court found the fact that the parent company allocated expenses for the site to the subsidiary on the parent company's balance sheet insufficient because the work was paid for by the parent company with no expectation of reimbursement from the subsidiary.

The court also rejected the parent company's argument that it could not be directly liable under CERCLA because it only became involved at the facility to take remedial action with regard to environmental concerns. The court found that there was no need for the parent company to have been involved in the former main operations of the site, as *Bestfoods* simply requires a parent to be involved in operations related to pollution, such as decisions about compliance with environmental regulations. The court further found that the parent company was an operator at the time of disposal because it abandoned slag piles at the facility. The court therefore granted the plaintiff's motion for partial summary judgment on the issue of whether the parent company was an operator at the time of disposal.

While it is unclear whether other courts will follow similar lines of reasoning in determining whether a parent company is directly liable under CERCLA based on an organizational model whereby it provides

shared or centralized services to subsidiaries, it is worthwhile for companies to consider how the structure of their shared services practices may impact their potential CERCLA liability.

THREE KEY TAKEAWAYS

1. The Supreme Court's holding in *Bestfoods* recognized that parent companies could have directly liability under CERCLA as operators.
2. Environmental remediation services provided by a parent company to a subsidiary under a shared or centralized services organizational model could subject a parent company to direct liability under CERCLA.
3. Companies may want to structure their shared services organizational models in a careful way so as to minimize potential direct liability under CERCLA.


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