

SPRINGBOARD

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LEGAL TRENDS AND ANALYSIS

MANAGING ENVIRONMENTAL CRISES IN COOPERATIVES AND CONDOMINIUMS

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Owners of units in cooperatives ("co-ops") and condominiums ("condos") - as well as the professionals who manage them - may believe that they will never need to know how to manage potential or actual environmental problems. They should think again. Whether it is mold, lead paint hazards, electromagnetic fields or some other hazardous contaminant, co-ops and condos are often faced with environmental problems. Moreover, those problems can arise unexpectedly and often need to be addressed quickly. This article explores some of the unique problems that co-ops and condos may face when attempting to address contamination problems, and provides some tips for environmental crisis management.

Dealing with Residents and the Board of Directors

For attorneys, one of the most challenging aspects of guiding co-ops and condos through an environmental crisis is dealing with the volunteer, resident Board of Directors. While some Board members may be knowledgeable and sophisticated, many Board members are not used to addressing issues that can have large financial ramifications and raise serious liability risks. Often internal divisions within the Board are exacerbated when the building faces a potentially costly environmental cleanup. It is, therefore, critical that the attorney and the Board understand the lines of communication and the rules for authorizing action. Certain decisions - such as spending large amounts of money on a cleanup - are clearly matters for the entire Board.

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MANAGING ENVIRONMENTAL CRISES IN COOPERATIVES AND CONDOMINIUMS *(continued)*

Other day-to-day issues should be delegated to the property manager, a single Board member, or a small Board committee to ensure that decisions can be reached quickly and with minimal confusion. One of the first things an attorney advising a Board confronted with an environmental problem should do is to address these governance issues by advising the Board ensure that such a clear and definite delegation has been accomplished. Besides minimizing time lag and miscommunication, it also can lessen the time the special environmental counsel and other consultants spend managing disagreements within the Board.

Assembling The Consultant Team

It is critical that a proper consultant team be assembled quickly to both address the potentially hazardous condition, and to ensure that a detailed record is made of the efforts undertaken to address the problem. This team should be under the auspices of counsel to maximize the degree of confidentiality that is accorded under the attorney-client privilege, work product doctrine and self evaluative privilege. Often, the Board or its attorney may wish to retain one consultant to investigate the problem and monitor the cleanup, and another to perform the actual remediation. The purpose of this is to have an independent entity document the actual work undertaken. Although the consultant charged with investigating and monitoring the cleanup may be able to subcontract the actual remediation work from another firm, an attorney or property manager may want to get additional bids if time permits.

Building A Record

Even if no litigation threat is imminent, an attorney can play a critical role in coordinating the consultant team, and communicating with the Board of Directors, as well as regulators, if necessary. The attorney must also ensure that all members of the consultant team create the proper record of all actions taken. The first goal, of course, is to identify whether a problem exists and, if it does, to remediate it. Another critical issue is to lessen future liability risk and maintain property values. That is best done by creating an exhaustive record of the measures undertaken to identify the problem and, hopefully, to completely eliminate it.

Consider an example. A building suspects the existence of mold growth. The first goal of the consultant team will be to investigate whether a problem exists by searching for water intrusion or moist conditions, as well as actual mold growth. If mold is detected, the condition then needs to be fully delineated and effectively remediated. A final remediation report should be issued describing the actions taken, and explaining how such actions were in accordance with the latest Environmental Protection Agency ("EPA") and local Department of Health guidelines. In the event that litigation is subsequently commenced against the co-op or condo, that report (and any field notes, etc.) can be used to establish that the Board's actions reflected a reasonable standard of care under the circumstances.

When undertaking a cleanup, the potential for cost recovery should also be considered. If the hazardous condition has been caused by another potentially liable party, a record must also be established to show that the costs incurred were reasonable. For example, if possible, two to three bids from remediation contractors should be received. Thought should be given to the number of initial samples that are taken to establish the hazardous condition and the need for remediation. On the one hand, it documents the conditions, but it may also establish liability. Thus, in some circumstances it may be prudent to just eliminate the condition without testing.

Communicating With Residents

The need for prompt and regular communications with owners and residents cannot be overstated. A co-op or condo is a community of owners and residents, and that community can easily become divided when people are kept in the dark about what

is happening with an ongoing investigation or cleanup. Notices should clearly and concisely explain the actions the Board is taking and the reasons for such actions. The Board and/or Managing Agent should follow up those notices with regular meetings where owners and residents can ask questions of the legal and environmental consulting team, as well as the Board of Directors. Effective communication will not always eliminate lawsuits down the road, but it certainly can reduce the potential for such actions.

EVEN IF NO LITIGATION THREAT IS IMMINENT, AN ATTORNEY CAN PLAY A CRITICAL ROLE IN COORDINATING THE CONSULTANT TEAM, AND COMMUNICATING WITH THE BOARD OF DIRECTORS, AS WELL AS REGULATORS, IF NECESSARY. THE ATTORNEY MUST ALSO ENSURE THAT ALL MEMBERS OF THE CONSULTANT TEAM CREATE THE PROPER RECORD OF ALL ACTIONS TAKEN.

Communicating With Regulators

In many cases an environmental investigation and cleanup will involve a government regulator. For "indoor" problems, where the issue relates to the potential threat to building residents, that regulator will likely be the local or State Department of Health. If the problem involves a petroleum discharge, or some other contaminant impacting soil and/or groundwater outside of the

building, the New York State Department of Environmental Conservation ("NYSDEC") will likely be involved. In fact, New York State law requires that a person responsible for causing a petroleum discharge immediately notify NYSDEC within two hours of learning of the release.¹

For indoor air issues, or other instances where the contaminant has not entered the outdoor "environment," there are usually no specific notice requirements. However, it may be often advantageous to involve the local or State health department. In the end, residents will want to be assured that conditions in their apartments are safe, and an investigation and cleanup performed with oversight by government regulators can assist in providing such assurances. In instances in which there is no clear controlling environmental standard, it is critical to ascertain the views of health officials regarding what the agency believes to be the appropriate cleanup standards. Unless patently unreasonable or without foundation, a cleanup that achieves the standards sought by the regulators should be sufficient to alleviate the concerns of building residents, and will provide additional support for the reasonableness of the Board's actions.

Paying For The Cleanup - Insurance Issues

For a residential building facing a major environmental remediation, the costs can add up quickly and tax a building's capital reserve fund. Issues will inevitably arise about whether the co-op or condo has insurance coverage. Even when coverage may be unclear, Boards and property managers should quickly place their insurers on notice of the claim. Any action taken should be communicated to the carrier. Thus, any proposals for work should be provided prior to undertaking such work. The insured should also extend invitations to witness conditions or the cleanup work. These actions will eliminate common bases upon which carriers often refuse to provide reimbursement.

In many cases, the insurance coverage issues may differ depending on the environmental problem. For example, releases of contaminants to the environment, such as a petroleum discharge from an underground storage tank into soil or groundwater, will often be excluded from a property damage policy by the so-called "pollution exclusion." However, inquiry should be made into the potential age of the spill. Older discharges may be covered by earlier policies that do not have pollution exclusions, or have exclusions that are not as broad as the ones currently in use.

Insurers often try to avoid coverage based on the standard form pollution exclusion for environmental conditions, such as lead paint or lead dust, that do not leave the building. The practitioner should be aware, however, that New York courts have repeatedly held that the standard form pollution exclusion does not preclude coverage in such

situations.² For example, in *Continental Casualty Co. v. Rapid American Corp.*,³ an insurer denied coverage for an underlying negligence claim brought against the insured, alleging personal injury due to exposure to asbestos. The insurer, among other arguments presented, asserted that the absolute pollution exclusion precluded coverage because the injury arose from a discharge of the pollutant into the atmosphere. The New York Court of Appeals rejected the argument, finding that the language used in the exclusion "support[s] the conclusion that the clause was meant to deal with broadly dispersed environmental pollution."⁴ Because it was not clear that asbestos fibers released within a building were placed into the environment, the Court found that the claim was not clearly excluded.

Similarly, in *Belt Painting v. TIG Insurance Co.*,⁵ the Court of Appeals found that a claim against a subcontractor alleging personal injury from inhalation of paint fumes and solvents during paint stripping activities within a building was not excluded by the total pollution exclusion. The Court found that the exclusion did not unambiguously exclude coverage for injuries caused by inhalation of paint or solvent fumes in an office the insured was painting, because the pollution exclusion at issue did not clearly and unequivocally exclude a personal injury claim "arising from indoor exposure to plaintiff insured's tools of its trade."⁶ This reasoning has been extended by lower appellate courts to apply to first party property damage claims where the discharge is not clearly into the "environment."⁷ While the Court of Appeals has yet to rule squarely on whether the pollution exclusion can ever apply to property damage claims where the contaminant is not released outside of the building into the "environment," there is a strong body of case law suggesting the non-applicability of the exclusion in such cases. Clearly a co-op or condo should not take an initial denial of coverage based on the pollution exclusion as the final word in any instances in which the contamination at issue is contained within the building, rather than in soil, water or air outside the building.

Another critical issue, however, is making sure that any persons working within the building are properly insured, and that the co-op or condo is listed as an additional insured on the contractor's insurance policy. It is critical that a property manager insist upon and confirm that additional insurance coverage is obtained whenever any contractor (and subcontractor) performs work in the building. Being listed as an additional insured on such policies enables the co-op or condo to make a direct claim to that insurer in the event of a loss. Mere receipt of an insurance certificate listing the co-op or condo as a "certificate holder" is not sufficient because that does not give the building the right to make a direct claim against the policy or to challenge a coverage determination. The same vigilance must be exercised with any subcontractors.

How Clean Is Clean?

In cleaning up contamination found in a condo or co-op, you must always bear in mind that you are dealing with homes, including homes that may have particularly sensitive populations, such as young children or the elderly. Thus, in determining how far the remediation must go, standards applicable to the workplace or in an industrial setting may provide little helpful guidance.

Some contaminants, like lead paint, are heavily regulated in the residential setting. EPA has developed threshold lead levels for surface dust in residential dwelling or child-occupied facilities, as well as for bare soil on any real property on which such facilities are located.⁸ In such cases, any cleanup will be performed and wipe samples taken to ensure that the areas within each residential unit are below those standards. In the case of lead paint, there may be local laws, like the recently enacted Local Law 1 of 2004 in New York City which governs activities that have a high likelihood of creating a lead risk in a residential setting. Interestingly, however, even New York City's stringent new lead paint law does not govern work in commercial spaces, even where such spaces are located within residential buildings. In such cases, worker safety standards remain the only rules applicable to activities that could generate airborne lead or lead dust that could present a health hazard.

SOURCES: 'MANAGING ENVIRONMENTAL CRISES IN COOPERATIVES AND CONDOMINIUMS'

1 New York Navigation Law, § 175.

2 See, e.g., *Continental Casualty Co. v. Rapid-American Corp.*, 80 N.Y.2d 640, 593 N.Y.S.2d 966 (1993); *Belt Painting v. TIG Insurance Co.*, 100 N.Y.2d 377, 64 N.Y.S.2d 790 (2003).

3 80 N.Y.2d 640, 593 N.Y.S.2d 966.

4 *Id.* at 654, 593 N.Y.S.2d at 973.

5 100 N.Y.2d 377, 763 N.Y.S.2d 790.

6 *Id.* at 387, 763 N.Y.S.2d at 795.

7 *Vigilant Insurance Co. v. V.I. Technologies, Inc.*, 253 A.D.2d 401, 403, 676 N.Y.S.2d 596 (1st Dept. 1998) (contamination of insured's blood plasma leak caused by internal leak of contaminant not subject to pollution exclusion).

8 40 C.F.R. §§ 745.65 (b)-(c).

9 See EPA's Lead Education and Outreach website at <http://www.epa.gov/lead/leadpbed.htm> (last updated May 13, 2004); New York City Department of Health's Lead Poisoning Prevention Program website at <http://www.nyc.gov/html/doh/html/lead/lead.html> (last updated Apr. 20, 2004).

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MAINTAINING THE VALUE OF THE PROPERTY AT ISSUE SHOULD BE OF PARAMOUNT CONCERN IN ADDRESSING ENVIRONMENTAL CONCERNS. BY MAKING THE MAINTENANCE OF VALUE CENTRAL TO ALL DECISIONS, ALL RELEVANT CONSIDERATIONS ARE ADDRESSED. THIS IS BECAUSE THE VALUE OF A PROPERTY IS A REFLECTION OF WHETHER IT IS SAFE FOR OCCUPANCY (I.E. HABITABILITY), THE RISK OF FUTURE EXPENSES, THE RISK OF FUTURE LITIGATION, AND THE PERCEPTION OF THE PROPERTY IN THE MARKETPLACE.

For other types of contamination in soil or groundwater, there is usually a well-defined cleanup standard that will govern the cleanup. In other instances, especially cases dealing with potential indoor air pollutants such as mold or other hazardous air contaminants, there are often no established regulatory standards defining acceptable ambient air levels within the breathing zone of a residential space. There are often, however, relevant guidance documents that

can help fill in the gap created by the absence of any applicable regulatory standard. For example, in the case of mold, both EPA and the New York City Department of Health have developed guidelines for assessment and remediation of this contaminant.⁹

When it comes to hazardous air contaminants, there may not even be any applicable studies that have evaluated the risk of exposure in a 24-hour residential setting, as opposed to a more conventional 8-hour exposure standard for workers under the Occupational Safety and Health Act. Thus, there may not be any clear guidance on establishing a level that must be achieved for a cleanup to be successful. This may not be critical in cases where the contaminant can be identified and removed so as to return indoor air quality to background levels. In cases where that cannot be achieved, however, it will be critical to work closely with the State and/or local health departments in attempting to identify or develop a standard that will be deemed sufficiently protective of human health.

ENVIRONMENTAL PROBLEMS IN RESIDENTIAL COOPERATIVE OR CONDOMINIUM BUILDINGS, WHILE PRESENTING THEIR OWN UNIQUE SET OF CHALLENGES, ARE FAR FROM INSURMOUNTABLE. IN ADDRESSING THE PROBLEM AND TRYING TO AVOID LAWSUITS, COMMUNICATION IS PARAMOUNT. IT IS CRITICAL TO QUICKLY ASSEMBLE A PROFESSIONAL CONSULTANT TEAM TO MANAGE THE CLEANUP.

Maintaining Value

Maintaining the value of the property at issue should be of paramount concern in addressing environmental concerns. By making the maintenance of value central to all decisions, all relevant considerations are addressed. This is because the value of a property is a reflection of whether it is safe for occupancy (i.e. habitability), the

risk of future expenses, the risk of future litigation, and the perception of the property in the marketplace. Take one recent example. In that case, a condo Board received a consultant opinion that certain units in the building were uninhabitable due to an environmental condition. The units in the entire building became virtually unmarketable because of that opinion. The media then reported on the matter repeatedly, compounding the problem. This resulted in litigation and a significant loss of value until it was shown that the consultant's opinion was without valid basis. The lessons to be learned are that the following are critical: (1) choose competent experts; (2) rectify problems as soon as possible; (3) testing is unnecessary if the condition can be easily eliminated; and (4) maintain confidentiality to the greatest extent possible.

Conclusion

Environmental problems in residential cooperative or condominium buildings, while presenting their own unique set of challenges, are far from insurmountable. In addressing the problem and trying to avoid lawsuits, communication is paramount. It is also critical to quickly assemble a professional consultant team to manage the cleanup. In addition, the management structure and oversight of the consultant team must be established early and be well defined. Often it is helpful to delegate to a Board subcommittee the ability to make day-to-day decisions concerning the ongoing remediation and legal issues, while reserving only the major issues for full Board review. Finally, it is imperative that the Board of Directors keep building residents fully informed as the cleanup progresses and as other issues arise.

SPR

EXPERTS, WITNESSES TELL ALL!

By Daniel Riesel and Jennifer Coghlan

A trial lawyer's exchanges with her testifying expert were thought to be immune from discovery or disclosure at trial under traditional concepts of work product¹ and relevancy. That may be no longer the law. Moreover, the expert witness believed her drafts and unused computer runs were beyond such scrutiny. That may no longer be the case. Two relatively recent developments have changed this perception. The first is the series of authorities interpreting Federal Rule of Civil Procedure 26(a)(2), which directs expert witnesses to reveal in their pretrial reports all of the information considered by them,² and the second is the recognition of the stark fact that the delete button on the ubiquitous computer doesn't truly remove all traces of "deleted" documents.

Accordingly, two issues relating to an expert's disclosure have received considerable attention over the last several years: (i) the erosion of the work product doctrine in the context of lawyer-expert communications, and (ii) the expert proponent's obligation to produce drafts and even computer generated material.

While data relied on by an expert could never escape disclosure merely because it was furnished by counsel, the form of the transmission, or even the absence of reliance thereon, allowed the attorney and her expert to communicate with a considerable degree of freedom. The trial attorney's revelation of her legal opinion or strategy to the expert was thought to be sacrosanct and immune from discovery. This comfort began to shred with the amendment to the Federal Rules of Civil Procedure which provides that:

[Required disclosure of experts] with respect to a witness who is retained or specially employed to provide expert testimony in the case...[shall] be accompanied by a written report prepared and signed by the witness. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefore; the data or other information considered by the witness in forming the opinions.

Fed. R. Civ. P. 26(a)(2)(B) (emphasis supplied). The Advisory Committee Note provides: "[g]iven this obligation of disclosure, litigants should no longer be able to argue that materials furnished to their experts to be used in forming their opinions - whether or not ultimately relied upon by the expert - are privileged or otherwise protected from disclosure when such persons are testifying or being deposed." Courts, however, are split as to whether the Rule 26(a)(2)(B) disclosure requirement extends to ideas and documents which traditionally fall under the attorney's work-product privilege. The Federal Circuit, in Pioneer HI-Bred Intern, Inc. ("Pioneer"), the only circuit to address this issue, read into Rule 26(a)(2)(B) a nearly unqualified disclosure requirement for testifying experts:

The revised rule proceeds on the assumption that fundamental fairness requires disclosure of all information supplied to a testifying expert in connection with his testimony. Indeed, we are quite unable to perceive what interests would be served by permitting counsel to provide core work product to a testifying expert and then to deny discovery of such material to the opposing party.³

Thus, Pioneer goes beyond the disclosure of facts and data and specifically includes "core work product."

Numerous District Courts have similarly interpreted Rule 26(a)(2) to contain a nearly bright-line disclosure requirement. See, e.g., Karn v. Ingersoll Rand ("Karn"), 168 F.R.D. 633, 639 (N.D. Ind. 1996) (all materials reviewed by an expert witness must be disclosed); Weil v. Long Island Savings Bank, 206 F.R.D. 38, 40 (E.D.N.Y. 2001) (attorney comments on drafts of expert report are not subject to the work-product exemption, and must be disclosed under Rule 26(a)(2)); Lugosch v. Congel, 219

F.R.D. 220, 249 (N.D.N.Y. 2003) (ordered disclosure of work papers considered in audit process based on bright line rule that experts must disclose all data and information considered, notwithstanding the presence of work-product consideration); Baum v. Village of Chittenango ("Baum"), 218 F.R.D. 36, 40 (N.D.N.Y. 2003) (ordered production of letters written by attorney to expert containing opinion work product based on bright-line rule of disclosure); Manufacturing Administration and Management Systems, Inc. v. ICT Group, Inc. ("Manufacturing"), 212 F.R.D. 110, 116-118 (E.D.N.Y. 2002) (notes taken by testifying expert during conversations with counsel on legal principles must be disclosed under Rule 26(a)(2)).

The court in Karn definitively stated that the new rule "clearly resolved" the issue, and "mandate[d] disclosure of all materials reviewed by an expert witness."⁴ Courts have furnished attorneys with the "cold comfort" observation that attorneys can retain opinion work-product protection by the simple "decision not to share such material with the expert."⁵

Other district courts, however, have made a distinction between factual material made known to an expert by a lawyer⁶ and traditional "core" opinion work product, leaving intact the protection from discovery afforded to opinion work product by the undue hardship test announced in Upjohn Co. v. United States, 449 U.S. 383, 400-402 (1981). Nexus Products Co. v. CVS New York, Inc. ("Nexus"), 188 F.R.D. 7, 10 (D. Mass. 1999) (court limited disclosure to "factual materials - data and other information...and any exhibits or charts that summarize or support the expert's opinion-whether considered or relied on by an expert."); Estate of Chopper v. R.J. Reynolds Tobacco Co., 195 F.R.D. 648, 651-652 (N.D. Iowa 2000) (attorney opinion work product disclosed to a testifying expert has nearly absolute immunity from discovery);

Krisa v. Equitable Life Assurance Society, 196 F.R.D. 254, 260 (M.D. Pa. 2000) (expert's notes reflecting attorney's mental impressions taken during a phone conversation with attorney are not discoverable). In Haworth v. Herman Miller, Inc.,⁷ the court held Rule 26(a)(2) to mean that factual information considered by an expert, but not "mental impressions, conclusions, opinions or legal theories," must be included in the report.⁸

THIS AUTHORITY, COUPLED WITH THE DOCTRINE OF SPOILIATION, RAISES DIFFICULT PROBLEMS OF NOT ONLY EXPOSING THE ATTORNEY'S WORK PRODUCT, BUT LEAVING THE EXPERT'S COMPUTER-GENERATED MUSINGS EXPOSED. IT IS UNCLEAR WHAT EFFECT THE AMENDED RULES WILL ULTIMATELY HAVE ON THE WORK PRODUCT DOCTRINE. ENVIRONMENTAL LITIGATORS MAY FIND THEMSELVES HAVING TO WEIGH THE BENEFITS OF TESTIFYING EXPERTS AGAINST THE LOSS OF WORK PRODUCT IMMUNITY.

These courts appear reluctant to abandon the traditional judicial framing of work-product immunity because of the ambiguous wording of Rule 26(a) and the advisory committee note. For example, in Magee v. Paul Revere Life Insurance Co.,⁹ the court specifically held that that Rule 26(a)(2) "should not be construed as vitiating the attorney work product privilege, and the laudable policies behind it, in the absence of clear and unambiguous authority under the Federal Rules of Civil Procedure."¹⁰

The bottom line is that trial attorneys should be prepared for a trial court to refuse to grant any work-product protection to communications with a testifying expert, and should instruct a testifying expert to preserve all materials relating to her opinion. If the expert does not preserve such materials, the expert's testimony may not be admissible due to spoliation. "Spoliation is the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation."¹¹

The observation on spoliation leads to the issues raised by the nearly universal use of computers. Communications with experts may be made via e-mail, while reports, drafts, and other documents are likely produced by the expert on a computer. These files, even after the "delete" function is used, are probably not permanently removed from the computer, network, or internet, and most likely, a savvy computer technician would have little trouble recovering the data. All such communications and files,

under a bright-line interpretation of the Rule 26(a)(2) disclosure requirement, would not be protected by the attorney work-product privilege, and thus, would be subject to disclosure. In short, almost any electronic communication or document produced by or sent to an expert can be recovered, and, in many jurisdictions, are not protected by the work product doctrine.¹²

One recent case, Zubulake v. UBS Warburg LLC,¹³ ("Zubulake IV"), highlights the potential pitfalls of electronic discovery, and more importantly, provides some guidance on the duty to preserve electronic data, and the permissible scope and cost of electronic discovery. On the duty to preserve electronic information, the Zubulake IV court held:

once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a "litigation hold" to ensure the preservation of relevant documents. As a general rule, that litigation hold does not apply to inaccessible backup tapes (e.g., those typically maintained solely for the purpose of disaster recovery), which may continue to be recycled on the schedule set forth in the company's policy. On the other hand, if backup tapes are accessible (i.e. actively used for information retrieval), then such tapes would likely be subject to the litigation hold.¹⁴

In Zubulake v. UBS Warburg LLC, ("Zubulake I"),¹⁵ the court discussed the tension between "the broad scope of discovery prescribed in 26(b)(1), Fed.R.Civ.P., with the cost consciousness of Rule 26(b)(2)" when "otherwise discoverable evidence is only available in expensive-to-restore back-up media."¹⁶

The Zubulake I court sets out a seven-factor test (which modifies the eight-factor test adopted by the court in Rowe Entertainment, Inc. v. William Morris Agency, Inc.¹⁷) to balance the varying interests of the cost-shifting approach to electronic discovery: (1) the extent to which the request is specifically tailored to discover relevant information; (2) the availability of such information from other sources; (3) the total cost of production, compared to the amount in controversy; (4) the total cost of production, compared to the resources of each party; (5) the relative ability of each party to control costs and its incentive to do so; (6) the importance of the issues at stake in the litigation; and (7) the relative benefits to the parties in obtaining the information.¹⁸ The purpose of such an inquiry must be to balance the importance of the sought after evidence against the costs of its production.¹⁹

To inform the cost-shifting analysis, the Zubulake I court ordered the responding party to restore a small sample of backup tapes to effectively gauge the marginal utility of the information requested. See also Thomson v. U.S. Dept of Housing and Urban Development, 219 F.R.D. 93, 96-100 (D. Md. 2003); McPeck v. Ashcroft, 202 F.R.D. 31, 34 (D.D.C. 2001) (court ordered DOJ to restore a sample of the requested materials, documenting cost and time spent on retrieval, so as to permit parties to argue why the results and expense do or do not justify a further search). This authority, coupled with the doctrine of spoliation, raises difficult problems of not only exposing the attorney's work product, but leaving the expert's computer-generated musings exposed. It is unclear what effect the Amended Rules will ultimately have on the work product doctrine. Litigators may find themselves having to weigh the benefits of testifying experts against the loss of work product immunity.²⁰

SOURCES: 'EXPERTS, WITNESSES TELL ALL!'

1 In Hickman v. Taylor, 329 U.S. 495 67 S. Ct. 385 (1947), the Supreme Court established the "work product doctrine" which prohibits disclosure of attorneys' mental impressions and opinions, including "interviews, statements, memoranda, correspondence, briefs . . . and countless other tangible and intangible" things attorneys use to design strategy and develop legal theories. *Id.* at 511. Open discovery of this material would hinder effective representation, and "the interests of the clients and the cause of justice would be poorly served" by allowing open discovery. *Id.*

2 The controversy existed before the Rules were amended. The leading case prior to 1993 arguing for work product protection was Bogosian v. Gulf Oil Corp. ("Bogosian"), 738 F.2d 587 (3d Cir. 1984). In Bogosian, petitioners in an antitrust suit were asked to produce documents consisting of thoughts and opinions about legal theories concerning the case. The Court held that disclosure of these documents would inhibit an attorney's ability to think freely and strategize about a case. It held that there was "marginal value" to be gained from disclosing the opinions of counsel that had led to the expert's analysis, and only an extremely strong showing of necessity and unavailability would permit disclosure of this material. This position is supported by a number of other courts.

3 In re Pioneer HI-Bred Intern. Inc. ("Pioneer"), 238 F.3d 1370, 1375 (Fed. Cir. 2001).

4 168 F.R.D. at 639. See also Furniture World, Inc. v. D.A.V. Thrift Stores, Inc., 168 F.R.D. 61 (D.N.M. 1996); United States v. City of Torrence, 163 F.R.D. 590 (C.D. Cal. 1995); Rail Intermodal Specialists v. Gen. Elec. Capital Corp., 738 F.R.D. 218 (N.D. Iowa 1994).

5 Manufacturing, 212 F.R.D. at 116-18; Baum, 218 F.R.D. at 40; Karn, 168 F.R.D. at 639-40.

6 An important distinction to this aspect of the scope of discovery is that no rule prevents discovery of facts furnished by a party to an expert, or of facts furnished by an expert to a party. See In re Brown Co. Securities Litigation ("Brown"), 54 F.R.D. 384 (E.D. La. 1972). The scope of the discovery, however, cannot extend to the deponent's present opinion as an expert or to any opinion concerning current practices. *Id.* at 385. Such facts were discoverable even before the 1970 amendment of Rule 26 which added subdivision (b)(4). See Advisory Committee's Notes to the 1970 Amendments, 48 F.R.D. 487, 503 (1970); see also Marine Petroleum Co. v. Champlin Petroleum Co., 641 F.2d 984 (D.C. Cir. 1979). The court there stated, "[a]s we read Rule 26 (b)(4)(B), factual information, even when acquired in expectation of litigation, is shielded only if discovery is attempted from the expert, and not at all if the effort to obtain it from a party or another sharing it." *Id.* at 169. The scope of the discovery, however, cannot extend to the deponent's present opinion as an expert or to any opinion concerning current practices. Brown, 54 F.R.D. at 385.

7 162 F.R.D. 289 (W.D. Mich. 1995).

8 See also All West Pet Supply v. Hill's Pet Products, 152 F.R.D. 634 (D. Kan. 1993).

9 172 F.R.D. 627 (E.D.N.Y. 1997).

10 *Id.* at 642-643 (emphasis supplied).

11 West v. Goodyear Tire & Rubber Co. ("West"), 167 F.3d 776, 339 (2d Cir. 1999).

12 Data can be stored electronically at just a fraction of the cost of storing documents in a warehouse, and the 21st century promises new innovations that will further deflate the cost of electronic data storage. Many companies have responded by not only shifting their main mechanism of storage from the warehouse to the byte, but also making back-up tapes of their entire network at daily, weekly, and monthly intervals. The sheer quantity of information that can be stored on these tapes is astronomical, and poses some serious questions about the scope of electronic discovery.

13 220 F.R.D. 212 (S.D.N.Y. 2003).

14 *Id.* at 218.

15 217 F.R.D. 309 (S.D.N.Y. 2003).

16 *Id.* at 316.

17 204 F.R.D. 421, 429 (S.D.N.Y. 2002).

18 *Id.* at 322.

19 *Id.* at 322-323.

20 See generally Gregory P. Joseph, Emerging Issues Under the 1993 Amendments to the Federal Civil Rules, Q247 ALI-ABA 65 (May 2, 1996).

FOR THE RECORD

SPR To Assist In Development Of East River Waterfront Plan

The Firm has been retained as environmental and regulatory counsel by the New York City Economic Development Corporation in connection with the City's East River Waterfront Development Study. The Firm will assist in the development of a conceptual plan, and comprehensive regulatory and permitting strategy, for redevelopment and increased access to the waterfront in Lower Manhattan from Battery Park to the East River Park. David Paget, Mark Chertok and Kate Sinding are representing the City in this matter.

SPR Part Of National Environmental Law Network

SPR is a member of the Environmental Law Network ("ELN"), the first environmental law firm network designed to make local representation available nationwide. As an ELN member, our attorneys have access to environmental attorneys nationwide to consult informally on local environmental issues, or by formally engaging ELN member firms on behalf of clients for specific guidance on discrete environmental matters in other jurisdictions. SPR believes that this new network will help the Firm better assist its clients by accessing environmental experts in other jurisdictions throughout the nation where it is appropriate and necessary.

SPR Continues Its String Of Victories In Defending "Fear of Future Injury" Claims

A New York State appeals court affirmed a lower court's dismissal of personal injury claims against SPR client, the Village of Liberty, that sought medical monitoring based on plaintiffs' claimed fear of future injury after they had allegedly been exposed to MTBE-contaminated drinking water. The court, building on precedent that included DiStefano v. Nabisco, another fear of future injury case successfully litigated by SPR lawyers for client Nabisco, held that plaintiffs could not maintain a claim for fear of future injury where they could not show the demonstrable presence of a toxin in their bodies or a toxin-induced disease, and that such harm had been caused by the alleged exposure to contaminated drinking water.

Who's Who of Environmental Lawyers Selects SPR As New York's Leading Firm For Environmental Expertise

SPR continues to receive accolades from independent publications rating attorneys with environmental expertise. The first edition of Who's Who of Environmental Lawyers found SPR to be the leading firm for environmental law in New York. This survey of environmental lawyers, which was the result of six months of independent research incorporating feedback from lawyers, clients and in-house counsel, included three SPR lawyers, more than any other firm in New York. Those attorneys are Mark A. Chertok, David Paget and Daniel Riesel. Chambers USA, another independent rating agency, also ranked SPR as the number 1 law firm in New York for environmental law and litigation.

**** SPR ALERT ****

DEC AMENDS ITS BROWNFIELD ELIGIBILITY CRITERIA

THE NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION HAS JUST PUBLISHED REVISIONS TO ITS DRAFT BROWNFIELD CLEANUP PROGRAM GUIDE ("BCP GUIDE"). THE DRAFT BCP GUIDE WAS FIRST CIRCULATED ON MAY 12, 2004. THESE REVISIONS AMEND THE CRITERIA THAT DEC WILL USE TO DECIDE WHETHER A PROPERTY IS "ELIGIBLE" FOR TREATMENT AS A BROWNFIELD. THESE REVISIONS ARE OF GREAT CONSEQUENCE TO PROPERTY OWNERS AND DEVELOPERS BECAUSE THEY WILL DETERMINE WHETHER A PROPERTY IS ELIGIBLE FOR BOTH THE LIABILITY PROTECTION AND SIGNIFICANT TAX BENEFITS THAT GO ALONG WITH BCP PARTICIPATION.

THE BCP, ECL § 27-1401 ET. SEQ., DEFINES A BROWNFIELD AS "ANY REAL PROPERTY, THE REDEVELOPMENT OR REUSE OF WHICH MAY BE COMPLICATED BY THE PRESENCE OR POTENTIAL PRESENCE OF A HAZARDOUS WASTE, PETROLEUM, POLLUTANT, OR CONTAMINANT." ALTHOUGH THE LEGISLATURE ENACTED THE BCP "TO ENCOURAGE PERSONS TO VOLUNTARILY REMEDIATE BROWNFIELD SITES FOR REUSE AND REDEVELOPMENT," THE BCP HAS COME UNDER ATTACK BECAUSE OF THE PERCEPTION THAT THIS BROAD STATUTORY DEFINITION AMOUNTS TO A TAX CREDIT "GIFT" TO DEVELOPERS. CRITICS HAVE ARGUED THAT A LITERAL APPLICATION OF THIS DEFINITION WOULD ALLOW VIRTUALLY ANY PROPERTY IN AN URBAN AREA SUCH AS NEW YORK CITY, WHICH IS LARGELY BUILT ON CONTAMINATED "URBAN FILL", TO QUALIFY FOR PARTICIPATION IN THE BCP. AS A RESULT, SOME HAVE ARGUED THAT LARGE DEVELOPMENT PROJECTS (WHICH WOULD HAVE OCCURRED WITHOUT REGARD TO THE BCP) COULD POTENTIALLY REAP DISPROPORTIONATELY LARGE "REDEVELOPMENT TAX CREDITS" COMPARED TO THE RELATIVELY MINOR COST OF-AND ENVIRONMENTAL BENEFITS DERIVED FROM-REMEDIATION.

APPARENTLY TAKING ITS CUE FROM THESE DETRACTORS, DEC HAS PROPOSED NEW QUALIFICATION GUIDANCE CRITERIA THAT APPEAR TO BE AIMED AT EXCLUDING FROM THE BCP REDEVELOPMENT PROJECTS ON "URBAN FILL" AND OTHER MODERATELY CONTAMINATED PROPERTIES. THESE CRITERIA FOCUS ON FACTORS SUCH AS WHETHER CONTAMINANTS ARE PRESENT AT LEVELS THAT EXCEED CURRENT DEC GUIDANCE VALUES OR "HISTORIC/BACKGROUND" LEVELS AND WHETHER THEIR REMEDIATION WOULD PREVENT SIGNIFICANT HUMAN EXPOSURE. RESPONDING TO THE "TAX CREDIT WINDFALL" CRITIQUE, DEC WILL NOW ALSO INQUIRE WHETHER "THE ESTIMATED COST OF ANY NECESSARY ENVIRONMENTAL CLEANUP IS LIKELY TO BE DISPROPORTIONATE TO THE VALUE OF THE PROPERTY/PROJECT." IT IS UNCLEAR WHAT STATUTORY SUPPORT EXISTS FOR DEC'S ADDITION TO THE ELIGIBILITY CRITERIA. SPR WILL BE KEEPING A CLOSE WATCH ON THE CONTINUING EVOLUTION AND APPLICATION OF THESE ELIGIBILITY GUIDANCE CRITERIA AS DEC CONTINUES TO REVIEW AND PROCESS BCP APPLICATIONS.

SIVE, PAGET & RIESEL P.C.

has been a pioneer in environmental law for over forty years and continues to be a leader in Environmental Law, Litigation, Development & Land Use, and Municipal Law.

Whether guiding a development project through the government approval process, or trying complex civil and criminal cases, Sive, Paget & Riesel brings an unparalleled depth of experience and insight to its corporate, government and individual clients.

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