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SPRINGBOARD

LEGAL TRENDS AND ANALYSIS

THE PITFALLS OF EMAIL COMMUNICATION AND ELECTRONIC DATA: DO'S AND DONT'S FOR LITIGANTS

By Daniel Riesel and Elizabeth A. Read

The doctrine of "spoliation" of materials subject to discovery in litigation means that a company's failure to preserve relevant electronic data, including emails and computer files, from the moment of perceiving possible litigation, may result in the eventual loss of a lawsuit. This dangerous and emerging doctrine presents challenges for busy institutions that process large amounts of electronic material on a daily basis. Despite the mass of written advice circulated since the lead case involving Laura Zubulake's discrimination suit against UBS Warburg, and the $29 million verdict in Ms. Zubulake's favor, the most difficult questions remain. The critical ones are at what point is the need for preservation triggered (i.e., when is litigation reasonably foreseeable) and what materials need to be preserved. **CONT'D page 1**

EPA ANNOUNCES RULE DEFINING "ALL APPROPRIATE INQUIRY" THAT IS REQUIRED TO ASSERT CERCLA'S INNOCENT LANDOWNER DEFENSE

By Steven C. Russo and Megan R. Ludwig

On November 1, 2005, the Environmental Protection Agency ("EPA") published its final rule prescribing standards and practices for "all appropriate inquiries" as required by the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"). The regulation, which will become effective on November 1, 2006, will become the standard practice for performing due diligence upon acquisition of contaminated commercial property. In announcing the rule, EPA Administrator Stephen J. Johnson noted, "[b]y making risk management less of a guessing game and more of a science, we are expanding the number of problem properties that will be transformed back into community assets."

Under CERCLA, persons may be held strictly liable for cleaning up hazardous substances at properties they either own or operate or owned or operated in the past. However, Section 101(35)(B) of CERCLA provides a so-called "innocent landowner" defense for individuals and businesses who "did not know and had no reason to know" prior to purchasing the property that hazardous substances were disposed of on, in or at the property. **CONT'D page 4**

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Absent the quick and effective imposition of a "litigation hold" at the point litigation becomes "reasonably anticipated," even full compliance with established document/retention policies may not provide an excuse for the destruction of relevant information. Unfortunately, lawyers are often clueless about the complex and fragile nature of their clients' electronic storage systems and do not master that knowledge until it is too late.

Complexities of "Electronic Discovery"

Now that correspondence and file management is increasingly handled in electronic form, a large part of the discoverable material in many lawsuits can be electronic. It is well established that electronic material, including, most prevalently, emails and computer files, is subject to discovery on an equal basis with paper documents, both in the federal context and in New York State (and presumably in most other states as well).[1] However, discovery of electronic materials is often more complicated than paper discovery for several reasons. First, unlike paper documents that, once discarded, are gone forever, material deleted from active presence on a computer hard drive or network may often have been saved on back-up tapes (used for disaster recovery) or may be recoverable in some form from a computer itself. Second, some companies set up their computer systems to automatically delete material, either from active use or from back-up tapes, after a certain time period due to the high volume of stored data that can easily accumulate. Third, unlike paper documents which are more or less fixed in form, electronic documents can easily be altered, either deliberately or inadvertently. Merely copying or opening electronic files has the potential to alter the data stored within them.

Sanctions for Failure to Disclose

The time to become concerned about electronic data retention occurs well before a party is served with a discovery demand and in many cases well before an action is commenced. Indeed, litigation is often preceded by a detailed "preservation letter" from a prospective plaintiff directing the soon-to-be defendant to preserve electronic data. Parties to litigation can incur severe sanctions for spoliation - as grave as a default judgment in their adversary's favor - if they fail to retain electronic material relevant to the litigation once such litigation becomes foreseeable, whether the deletion of the material occurs as a deliberate act or not. In order to avoid these pitfalls, both counsel and client need to be fully familiar with the client's data storage systems and must ensure that no discoverable material is lost.

The failure to preserve such electronic data could be fatal to a party's prosecution or defense of litigation. Federal Rule of Civil Procedure 37(d) allows a court, upon the motion of a party, to impose sanctions upon any party that fails to disclose relevant information in response to a discovery request. These sanctions can include awarding attorneys' fees to the party requesting disclosure, prohibiting the non-disclosing party from pursuing certain claims or defenses, making factual findings, dismissing an action or issuing a default judgment, or informing the jury of the nondisclosure and instructing the jury that it may make an adverse inference against the non-disclosing party.[2]

Zubulake and the Obligation to Preserve

One impetus for imposing such sanctions is known as "spoliation," or "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."[3] The seminal case involving spoliation of evidence and associated sanctions in the context of electronic discovery involved a sexual discrimination and retaliation claim brought by equities salesperson Laura Zubulake against her former employer, UBS Warburg, which resulted in a series of decisions by Judge Scheindlin of the Southern District of New York on discovery matters.[4] This case illustrates many of the mistakes that a party or potential party to litigation can make in the electronic data context with serious consequences to its position in litigation.

1. See Zubulake v. UBS Warburg LLC ("Zubulake I"), 217 F.R.D. 309, 316-17 (S.D.N.Y. 2003); Lipco Electrical Corp. v. ASG Consulting Corp., 2004 WL 1949062 (Nassau Cty. Sup. Ct. 2004).
2. E*Trade Securities LLC v. Deutsche Bank AG ("E*Trade Securities"), 2005 WL 2140807, *3 (D. Minn. 2005).
3. Zubulake v. UBS Warburg LLC ("Zubulake IV"), 220 F.R.D. 212, 216 (S.D.N.Y. 2003).
4. See, e.g., Zubulake I, supra; Zubulake v. UBS Warburg LLC ("Zubulake III"), 216 F.R.D. 212 (S.D.N.Y. 2003); Zubulake IV, 220 F.R.D. 212 (S.D.N.Y. 2003); Zubulake v. UBS Warburg LLC ("Zubulake V"), 2004 WL 1620866 (S.D.N.Y. 2004).
5. 220 F.R.D. at 218.
6. Id. at 217.

Zubulake alleged (correctly, as it turned out) that many relevant emails between her co-workers and supervisors had been deleted from "active" memory, and sought restoration of back-up tapes maintained by UBS for the purpose of recovery of material in the case of disaster. The data on the tapes was restored to a searchable form pursuant to an order of the court providing for sharing of the costs, which exceeded $100,000, and the plaintiff was provided with relevant emails from UBS. It then became apparent that some of the back-up tapes from the relevant time period had been inadvertently recycled, or taped over, prior to the time they should have been according the UBS's three-year retention policy. It also became evident, later in the course of discovery, that even after being advised by counsel to retain all emails concerning Zubulake, some of the "key players" at UBS had continued to delete relevant material from active memory. Some of this was lost altogether, either because it had been saved on the missing back-up tapes or because the back-up system did not cumulatively save new emails, but rather took a "snapshot" of the entire network's contents at the end of each day, week, and month; thus, an email that was received and deleted on the same day would not be on any back-up tape.

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.

The court's holding in Zubulake IV imposes affirmative obligations on parties and potential parties to litigation to preserve electronic material that may be relevant to an instituted litigation, or even one that has not been commenced but is deemed reasonably foreseeable. The court summarized these obligations as follows:

> 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.
>
> However, ... [i]f a company can identify where particular employee documents are stored on backup tapes, then the tapes storing the documents of key players to the existing or threatened litigation should be preserved if the information contained on those tapes is not otherwise available. This exception applies to all backup tapes.[5]

Judge Scheindlin found the preservation obligation to attach for UBS when Zubulake's coworkers and superiors became aware that she might sue, as reflected in email correspondence between them.[6] This was several months before she filed a claim with the Equal Employment Opportunity Commission. Thus, in order to avoid sanctions, it is important for companies to recognize when litigation is possible and to institute data preservation as early as possible thereafter.

The Zubulake court recognized that it would be overly burdensome to require companies to continue to preserve all backup tapes that would normally not be used except in the case of a disaster, and which would be recycled after a certain interval pursuant to company policy. However, it imposed a duty to maintain such tapes if those containing potentially relevant material can be segregated from others. In addition, the ultimate result in the Zubulake case indicates that it might be prudent to attempt to preserve potentially relevant back-up material even when not easily segregated, and even where employees have been duly instructed to retain relevant documents in active memory.

Adverse Inference Instructions and Beyond

In Zubulake IV, the court ordered UBS to absorb the costs of further depositions in the matter to allow the plaintiff to discover matter relating to emails inadvertently destroyed on the back-up tapes. After that further discovery, it became apparent that even after UBS's counsel had placed a "litigation hold" on all emails concerning Zubulake, several of the so-called "key players" continued to delete emails. This discovery led the court to find that the spoliation had been willful and to instruct the jury in the case that it could infer from the destruction of the emails that they would have been favorable to Zubulake's position.[7] The jury ultimately awarded Zubulake $29 million in damages, including $20 million in punitive damages, one of the largest awards to a single plaintiff in a discrimination suit on record. This outcome demonstrates that even a litigation hold will not always prevent a company's individual employees from deleting material they might believe adverse to their own interests. Thus companies and their counsel have an interest in making sure material is preserved in a way unalterable by individuals, whether on backup tapes or through some other method.

A similar issue of employee alteration arose in a case involving Telxon Corporation's action against PriceWaterhouseCoopers ("PWC") for accounting malpractice and other claims after alleged errors in financial statements audited by PWC for Telxon resulted in claims against Telxon for securities violations.[8] In that case, Telxon spent over a year seeking disclosure of PWC's electronic databases containing the documentation of these audits, but PWC consistently insisted that it had provided everything in hard copy. It later became apparent that there were different versions of some documents on PWC's server, in archive form and on a laptop computer, only one version of which had been produced; that some hard copies of documents did not portray all of the modifications that had occurred in their preparation; and that not all documents had been preserved in a "read-only format" after the institution of the underlying litigation, allowing alteration by employees. Ultimately, PWC did agree to give Telxon access to its databases, but at that point the litigation against PWC had already been in progress for several years.

The court found that PWC's behavior clearly indicated willfulness or bad faith and caused severe prejudice to Telxon.[9] Due to the duration of the discovery dispute to date and the length of time it had taken PWC to acknowledge the existence of certain materials that would in all likelihood lead to further depositions, the court imposed the rather extraordinary sanction of a default judgment against PWC. This decision was also informed by the fact that certain materials were "vulnerable to undetectable alteration while the Telxon litigation was pending."[10] While this appears to be an extreme case, it is important to note that many of the errors made by PWC seemed to stem from the failure of those employees handling the document production to undertake proper investigations, and the company's failure to ensure true preservation of electronic materials.

Proposed Federal Rules Amendments

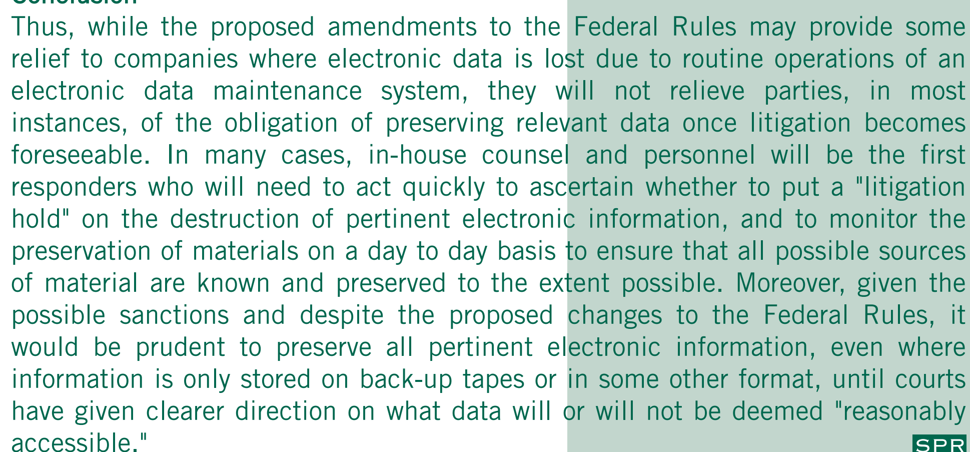
The quandaries posed by electronic discovery have been considered at length by the drafters of the Federal Rules and, in September, the Judicial Conference approved amendments to the rules of discovery which create a new category of discoverable material known as "electronically stored information." If accepted by the Supreme Court and not objected to by Congress, the amendments will take effect on December 1, 2006. These amendments would provide for inclusion of directions for disclosure of electronically stored material in scheduling orders and for discussion of methods of preservation and the form of disclosure at pre-trial conferences. They also provide that a party need not produce electronically stored information that is not reasonably accessible because of undue burden or cost. According to the report of the Committee on Rules of Practice and Procedure to the Judicial Conference, this could include deleted information, information kept on a back-up tape system for disaster recovery purposes and legacy data remaining

7. Zubulake V, 2004 WL 1620866 at *12-13. Another recent case in which a court imposed an "adverse inference instruction" as the result of the defendant's failure to place a litigation hold on employee emails, and its erasure of computer hard drives, was E*Trade Securities, supra. See also MOSAID Technologies Inc. v. Samsung Electronics Co., Ltd., 348 F.Supp.2d 332 (D.N.J. 2004).
8. In re Telxon Corp. Securities Litigation, Hayman v. PriceWaterhouseCoopers, LLP, 2004 WL 3192729 (N. D. Ohio 2004).
9. Id. at *33-34.
10. Id. at *35.
11. Report of Committee on Rules of Practice and Procedure, September 2005, at Rules 31, available at http://www.uscourts.gov/rules/Reports/ST09-2005.pdf (including the proposed amendments).
12. Id. at Rules App. C-85.

from systems no longer in use.[11] This would appear to undercut the earlier holdings in the Zubulake case, in which discovery of the back-up tapes was ordered largely at UBS's expense. However, the burden would be on the responding party to show that the material was not reasonably accessible, and even upon such a showing, the court could order disclosure for good cause.

More directly germane to the issue of spoliation is the proposed amendment to Rule 37, which provides that "[a]bsent exceptional circumstance, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system." The Committee Note to this proposed amendment, however, makes clear that it is not intended to relieve a party of any common-law (i.e., Zubulake) obligation it may have to intervene in a system's programming in order to preserve information that could be relevant to litigation.[12] Thus, the proposed rule does not seem to provide much of a "safe harbor" beyond Zubulake's recognition that businesses cannot be required to preserve all electronic material indefinitely.

Conclusion



Thus, while the proposed amendments to the Federal Rules may provide some relief to companies where electronic data is lost due to routine operations of an electronic data maintenance system, they will not relieve parties, in most instances, of the obligation of preserving relevant data once litigation becomes foreseeable. In many cases, in-house counsel and personnel will be the first responders who will need to act quickly to ascertain whether to put a "litigation hold" on the destruction of pertinent electronic information, and to monitor the preservation of materials on a day to day basis to ensure that all possible sources of material are known and preserved to the extent possible. Moreover, given the possible sanctions and despite the proposed changes to the Federal Rules, it would be prudent to preserve all pertinent electronic information, even where information is only stored on back-up tapes or in some other format, until courts have given clearer direction on what data will or will not be deemed "reasonably accessible." SPR

"EPA ANNOUNCES RULE DEFINING "ALL APPROPRIATE INQUIRY"" CONT'D from cover

In order for property owners to demonstrate they had "no reason to know" these individuals must undertake "all appropriate inquiries" into previous ownership and uses of the property consistent with good commercial or customary practice prior to acquisition.

The Small Business Liability Relief and Revitalization Act (the "Brownfields Law"), signed into law in 2002, amends CERCLA to, among other things, clarify the law's liability provisions. In particular, the Brownfields Law mandates that EPA issue regulations prescribing standards and practices for the purpose of carrying out the requirements of all appropriate inquiries. The Brownfields Law also establishes interim standards for conducting all appropriate inquiries. For properties purchased after May 31, 1997, the interim standards include the procedures of the American Society for Testing and Materials ("ASTM") Standard E1527-00 (entitled "Standard Practice for Environmental Site Assessment: Phase 1 Environmental Site Assessment Process"; parties may also use the newly revised ASTM Standard E1527-05). For properties purchased prior to May 31, 1997, the interim standards require the application of generally accepted good commercial and customary standards and practices and take into account such considerations as specialized knowledge of the property owner, the relationship of the purchase price to the value of the property, commonly known or reasonably ascertainable information, the obviousness of the presence of contamination, and the ability of the property owner to detect the contamination by appropriate inspection.

EPA developed the all appropriate inquiries rule by a negotiated rulemaking process, meaning the agency involved stakeholders in a consensus-based rulemaking effort. After seeking comments on a list of potentially affected parties, the agency assembled a committee composed of representatives of those interests that will be significantly affected by the rule. Included in the committee were representatives of federal, state, local and tribal governments; environmental interest groups; members of the environmental justice community; real estate developers; bankers and lenders; and environmental professionals. The committee held multiple meetings over an eight-month period in 2003, EPA issued its proposed rule in August 2004, and, after considering public comments, EPA developed the final rule which was published in the Federal Register on November 1, 2005.

The regulation will affect individuals and businesses purchasing commercial property or any property that will be used for commercial purposes and who may seek protection from CERCLA liability for releases or threatened releases of hazardous substances.[1] CERCLA, as amended by the Brownfields Law, offers protection from liability to innocent landowners, bone fide prospective purchasers, and contiguous property owners, provided they undertook all appropriate inquiries within the meaning of Section 101(35)(B) prior to obtaining title over the property. Innocent landowners are those persons who did not know and had no reason to know of any contamination at the time they acquired the property and who meet the statutory requirements set out in CERCLA Section 107(b)(3). Bone fide prospective purchasers are persons that acquired the property subsequent to any disposal activities with knowledge of the contamination and who meet requirements of CERCLA Section 101(40). Contiguous property owners are persons who own property that is "contiguous to or otherwise similarly situated with respect to, and that is or may be contaminated by a release or threatened release of hazardous substances" from property owned by someone else. To qualify as a contiguous property owner, a landowner must have no knowledge of the contamination and meet all the criteria set forth in CERCLA Section 107(q)(1)(A). Finally, the Brownfields Law provides funding to persons engaging in remediation of brownfields sites. CERCLA Section (104)(k)(2)(B)(ii) requires that site characterizations or assessments conducted by entities with the use of brownfields grants be conducted in accordance with all appropriate inquiries.

Initially, the rule requires that certain inquiries be performed by a qualified environmental professional. An "Environmental Professional" is defined as "a person who possesses sufficient specific education, training, and experience necessary to exercise professional judgment to develop opinions and conclusions regarding conditions indicative of releases or threatened releases on, at, in or to a property, sufficient to meet the objectives and performance factors" of the rule. The rule requires that such persons hold either: a state or tribal issued certification or license (e.g., a Professional Engineer's or Professional Geologist's license) and three years of relevant full-time work experience; a Baccalaureate degree or higher in science or engineering and five years of relevant full-time work experience; or ten years of relevant full-time work experience. Those individuals who do not meet the minimum criteria may participate in all appropriate inquiries provided they are supervised by a qualified professional.

The new rule establishes standard components to an all appropriate inquiry investigation. The rule requires:

» Interviews with present owners, operators, and occupants;

» Interviews with past owners, operators, occupants, or facility managers of the property; owners or occupants of adjoining properties (if the subject property is abandoned); or employees of current and past occupants of the property, if necessary to achieve the objectives and performance factors of

1. Residential property owners are outside the scope of the regulation, as CERCLA Section 101(35)(B)(v) provides that a title search and facility inspection shall be considered to satisfy the requirements for all appropriate inquiries for such properties.

the rule;
» Reviews of historical sources of information;
» Searches for recorded environmental cleanup liens;
» Reviews of federal, tribal, state, and local government records;
» Visual inspections of the facility and of adjoining properties;
» Assessment of any specialized knowledge or experience on the part of the landowner;
» The relationship of the purchase price to the value of the property, if the property was not contaminated;
» Considerations of commonly known or reasonably ascertainable information about the property; and
» Considerations of the degree of obviousness of the presence or likely presence of contamination at the property, and the ability to detect the contamination by appropriate investigation.

Of the above requirements, many must be conducted by an environmental professional, but certain inquiries must be undertaken by the purchaser or landowner, including searches for environmental cleanup liens (if the information is not otherwise obtained by the environmental professional), assessments of any specialized knowledge or experience on the part of the landowner, an assessment of the purchase price as compared to the fair market value of the property, and an assessment of commonly known or reasonably ascertainable information (if not otherwise assessed by the environmental professional). However, as a practical matter, a purchaser will likely seek a report from an environmental professional that covers all the bases. This rule does allow all appropriate inquiries to include some information contained in previous inquiries, including inquiries conducted by third parties, for the same property. Yet this information must be supplemented by current information particularly with respect to site assessment information collected more than one year prior to acquisition of the property.

The new rule does not include any new reporting or disclosure obligations. The rule does, however, require that the environmental professional document the results of all appropriate inquiries in a written report. This report need not be submitted to the EPA or any other government entity, but merely serves to ensure that any person claiming one of the CERCLA landowner liability protections be able to document that all appropriate inquiries were conducted in compliance with the federal regulations. The rule stresses the importance of identifying data gaps and documenting their significance in terms of the landowner's ability to fulfill the additional statutory requirements after purchasing the property.

Of the above requirements, many must be conducted by an environmental professional, but certain inquiries must be undertaken by the purchaser or landowner, including searches for environmental cleanup liens (if the information is not otherwise obtained by the environmental professional), assessments of any specialized knowledge or experience on the part of the landowner, an assessment of the purchase price as compared to the fair market value of the property, and an assessment of commonly known or reasonably ascertainable information (if not otherwise assessed by the environmental professional).

The new standard established by the all appropriate inquiries rule represents a change from the existing ASTM standard. Both the new rule and the ASTM standard require the purchaser or landowner to hire a qualified environmental professional to conduct the bulk of the all appropriate inquiries investigation. However, the new rule specifies a minimum level of education and/or experience for environmental professionals and requires that they place a statement at the end of the written report declaring that he or she meets the specific qualification to perform all appropriate inquiries, and that the inquiry has been performed in conformance with the requirements of the rule. The ASTM standard simply requires the environmental professional to include a statement in the report as to his or her qualifications. Most of the comments submitted to the EPA on its proposed rule focused on the standards applicable to environmental professionals.

In addition, the new rule directs the environmental professional to interview past owners and operators of the property (or adjoining landowners if the property is abandoned) if necessary to achieve the objectives and performance factors of the rule. The ASTM standard merely requires the environmental professional to interview present owners and operators. The rule also poses more extensive requirements for visual inspections of adjoining properties, review of government records, searches of environmental cleanup liens, and explanation of significant differences in purchase price and fair market value. Finally, the new rule specifies that the written report must acknowledge data gaps and comment on their significance, a requirement absent from the ASTM standard. Because of these additional requirements, the rule will most likely translate into increased costs to the regulated community.

Until the regulation becomes effective on November 1, 2006, both the standards and practices included in the final regulation and the current interim standards established by Congress for all appropriate inquiries (ASTM E1527-00) will satisfy the statutory requirements for the conduct of all appropriate inquiries. SPR

SECOND CIRCUIT CLEARS THE WAY FOR SUPERFUND PRPS TO BRING DIRECT COST RECOVERY ACTIONS UNDER CERCLA

Last year we reported on the ground breaking ruling by the United States Supreme Court in Cooper Industries, Inc. v. Aviall Services, Inc. ("Aviall").[1] In Aviall the Supreme Court rejected the settled law in nearly every federal circuit when it held that under the federal Superfund law ("CERCLA") a party strictly liable under Section 107(a) of the statute, known in CERCLA parlance as a potentially responsible party or "PRP," cannot use CERCLA section 113(f)(1) to seek cleanup cost contribution from other PRPs unless that PRP first has been sued by the government. Until Aviall, section 113(f)(1) contribution actions had routinely been brought by PRPs who were at risk of, but had not yet been subjected to, government-initiated cost recovery actions.

At the time Aviall was decided, nearly every federal circuit, including New York's Second Circuit, had held that a PRP could not bring a direct 107(a) CERCLA action against another PRP, but rather was limited to a contribution action under section 113(f). Thus, post-Aviall, there was a legitimate concern that a PRP who had not been subject to a government enforcement action, or resolved its liability for a response action by entering into an administrative or judicially-approved settlement with the state or federal government, would be precluded from recovering costs it had incurred in cleaning up hazardous waste sites. The concern was especially acute for PRPs who had entered into state voluntary cleanup programs, such as New York's Brownfield Cleanup Program. We predicted courts might construe Aviall as precluding such parties from bringing contribution actions under section 113(f) of CERCLA, thus discouraging would-be participants in those voluntary programs.

In a recent decision, Consolidated Edison Company of New York, Inc. v. UGI Utilities,[2] Inc., the Second Circuit confirmed that parties who entered voluntary cleanup agreements were precluded under Aviall from bringing contribution actions because such agreements did not constitute "an administrative or judicially approved settlement" under section 113(f)(3)(B) of CERCLA. However, the court found that such parties were not without recourse under CERCLA, holding that PRPs who did not have a contribution action under section 113(f)(1) per Aviall could seek to recover response costs in a direct action under section 107(a). Where the Supreme Court in Aviall had declined to address whether CERCLA

1. 543 U.S. 157, 125 S. Ct. 577 (2004).
2. 423 F.3d 90 (2d Cir. 2005).
3. Id. at 99 (quoting 42 U.S.C. § 9607(a)(4)(B).
4. Id. at 100.
5. Id.
6. 156 F.3d 416 (2d Cir. 1998).

encompassed that right, the Second Circuit relied on the plain language of section 107(a) which "makes parties liable for the government's remedial and removal costs and for 'any other necessary costs of response incurred by any other person consistent with the national contingency plan.'"[3] The panel also recognized that they "would be impermissibly discouraging voluntary cleanup were we to read section 107(a) to preclude parties that, if sued, would be held liable under section 107(a) from recovering necessary response costs."[4] The court further observed, accurately we believe, that to hold otherwise would be to create an "economic disincentive" where "parties would likely wait until they are sued to commence cleaning up any site for which they are not exclusively responsible because of their inability to be reimbursed for cleanup expenditures in the absence of a suit."[5]

The Second Circuit found that its current decision did not require it to revisit its prior holding in Bedford Affiliates v. Sills ("Bedford Affiliates"),[6] in which it held that a PRP could not pursue both a section 107(a) action and an action for contribution under section 113(f). The court distinguished Bedford Affiliates from the instant case because, unlike Con Ed, which had entered into a voluntary cleanup agreement, the plaintiff in Bedford Affiliates had performed its cleanup pursuant to two consent orders with the New York State Department of Environmental Conservation. While the panel's rationale is not altogether clear, the salient difference for the court between the two cases appears to be that the plaintiff in Bedford Affiliates was entitled to seek contribution under section 113(f) and thus should not be permitted to circumvent the limitations on such actions, such as a shorter statute of limitations and the ability to recover for only a defendant's equitable share of the contamination, by bringing a direct action under section 107(a).

The major importance of UGI Utilities, if the Supreme Court lets it stand, is that notwithstanding Aviall, voluntary cleanup program participants can still use CERCLA to recover their cleanup costs from other responsible parties. While it remains to be seen whether other circuits, and, ultimately, the U.S. Supreme Court, will agree with this result, the Second Circuit's decision has certainly given a significant boost to the growing movement towards voluntary cleanups. SPR

SPR NEWS

DEC RELEASES DRAFT BROWNFIELD CLEANUP PROGRAM REGULATIONS

The New York State Department of Environmental Conservation has issued a draft of its long-awaited Brownfield Cleanup Program Regulations (Draft BCP Regulations). These draft regulations are part of the Department's complete overhaul of its Part 375 Hazardous Waste Regulations and reflect the Department's goal of harmonizing the terminology, investigation and remedy selection methodology, and cleanup standards utilized under its Hazardous Waste Cleanup Program, Brownfield Cleanup Program (BCP) and Environmental Restoration Program. These regulations provide new BCP eligibility requirements, set forth procedural requirements for Site investigation and remediation, and introduce significant new complexities in determining the applicable soil cleanup standards. Most importantly, when finalized, these regulations will establish firm standards to determine "how clean is clean" at virtually every soil remediation site in New York State.

The BCP allows the Department to reject a Brownfield Cleanup Program application, even if the real property meets the statutory and regulatory definition of a "brownfield site", if the Department determines that the "public interest would not be served by granting such request". The Draft BCP Regulations would give the Department broad authority in making this determination, as they

specifically provide that the Department will "not [be] limited to" the statutory criteria set forth in ECL § 27-1407.8. This would presumably allow the Department to consider criteria such as the relative financial costs to the developer of remediating the contamination as compared to potential tax credits, or the relative burden on the fiscal resources of the State.

The Draft BCP Regulations also include additional criteria to be considered in determining the eligibility of the proposed BCP site itself. The draft regulations generally applicable to all of the Department's hazardous waste programs include a new definition of "historic fill material", and the Draft BCP Regulations require the Department to consider only contamination from an on-site source in determining whether a site is eligible for the BCP.

Among other procedural requirements, the Draft BCP Regulations incorporate much of the "guidance" that was previously found in the Department's DER-10 Manual for Investigating and Remediating a Hazardous Substance Site, and may thus remove some of the previous flexibility afforded in determining the means and methods of preparing work plans and reports. The Department, under the new regulations, will also be preparing a list of "presumptive remedies", the implementation of which at a BCP site may, in certain circumstances, reduce some of the procedural burdens the new regulations otherwise impose. When an engineering or institutional control is being used a part of a remedy-presumptive or otherwise-the regulations now give the Department the right to require the remedial party to post "financial assurance" to contain, mitigate, and remediate any impact resulting from a failure of such engineering or institutional control. This financial assurance may take several forms-including, for the first time, environmental insurance products-but requires the remedial party to employ services such as those provided by an independent insurance professional to certify that such a policy will meet the State's requirements.

The Draft BCP Regulations also codify New York's first-ever official soil cleanup standards. The BCP designates four cleanup "tracks", based on the ultimate use of the Site: Track 1 Unrestricted Use (i.e., a use that does not rely on any long-term institutional or engineering controls as part of the selected remedy); Track 2 Restricted Residential Use; Track 3 Restricted Commercial Use; and Track 4 Restricted Industrial Use. The draft soil cleanup standards are "use based" and range widely, depending on the track under which the cleanup will be undertaken, with the most stringent standards applied to Track 1 cleanups. Even the Restricted Use standards vary widely if ecological resources or groundwater have been impacted by on-site sources, and such impacts are not being addressed through engineering controls, such as groundwater treatment systems.

Importantly, the new soil cleanup standards are, in some instances, less restrictive then those set forth in the Department's Technical and Assistance Guidance Manual (TAGM) # 4046, which have long been used by the Department as the benchmark for determining "how clean is clean" in New York State. For many heavy metals and PAHs-which are typical contaminants in urban fill in New York City and throughout the metropolitan region-even the most stringent Unrestricted Use health-based cleanup standards are more lenient than the Recommended Soil Cleanup Objectives set forth in TAGM. However, whether a certain soil cleanup standard applies to a particular site or use now involves a complex analysis of zoning and land use, as well as the site's geology, hydrology and ecology and the remedial measures to be implemented. Properly packaged, these standards may provide owners or potential buyers of BCP sites significant new leverage in establishing site-specific cleanup goals.

On the other hand, in recognition of the new emphasis on vapor intrusion, the draft Part 375 regulations would govern the contamination of indoor air. Accordingly, contaminants released into homes, buildings and other structures will now be expressly governed by the new Part 375 regulations. The draft soil cleanup standards also reflect the State's emphasis on indoor air quality: the cleanup standards for Volatile Organic Compounds (VOCs) have been strengthened from TAGM levels-in some

cases very substantially-for Unrestricted Use sites. At the same time, following the BCP's focus on "use based" cleanups, the draft soil cleanup standards for VOCs are in many instances much less stringent for restricted use sites-especially for commercial and industrial uses, and even for residential uses at sites where groundwater is not impacted or is being directly addressed through engineering controls.

Keep in mind that this is the first draft of these regulations released for public review and comment and that several public hearings will be held over the upcoming months to solicit comments and additional information. Thus, these regulations-including the cleanup standards-could change dramatically before a final set is adopted. We will be watching closely and keep you informed. SPR

APPELLATE COURT OKAYS CLOSURE OF EXIT RAMP NECESSARY FOR RIVERSIDE SOUTH PROJECT

SPR won a major decision for its client, Hudson Waterfront Associates, the developer of the Riverside South project on the West Side of Manhattan, when the Appellate Division, First Department reversed a decision by the lower court that had enjoined the closure of the northbound West 72nd Street exit ramp from the West Side Highway. The ramp closure was necessary for the developer to construct a connection between the principal road running to the west of the project site and Riverside Drive to the north. The appellate panel concluded that the New York City Department of Transportation had fully complied with SEQRA when it determined that the ramp closure did not require a supplemental Environmental Impact Statement ("EIS") because it would not result in any significant impacts that had not been previously studied in the EIS for the Riverside South Project. The appellate court further found that the 1992 EIS for the project included an analysis of the closure of the 72nd Street exit because the "project" analyzed by the EIS incorporated construction of the Riverside Drive connection and the closure of the exit ramp. Accordingly, the Appellate Division concluded that agency action was "final," for statute of limitations purposes, when the FEIS was certified as complete in 1992, and therefore petitioners' challenge to the analysis of the ramp closure brought in 2004 was time barred by the four month limitations period applicable under Article 78 of the CPLR. SPR attorneys David Paget, Steven C. Russo and Jennifer Coghlan represented Hudson Waterfront Associates in the action. SPR

DRAFT ENVIRONMENTAL IMPACT STATEMENT ISSUED FOR PROPOSED YANKEE STADIUM

On September 29, 2005, the New York City Department of Parks and Recreation ("NYCDPR") issued the draft environmental impact statement for the proposed Yankee Stadium project. The proposed project would involve the construction of a new Yankee Stadium one block north of its current location in the Bronx, the creation of approximately 27 acres of recreational parkland to replace park facilities being displaced by the proposed stadium and create the establishment of a new waterfront park with ball fields along the Harlem River, and the construction of four new parking garages to serve the new stadium. The proposed project is now making its way through New York City's Uniform Land Use Review Procedure. A final environmental impact statement is anticipated to be adopted by NYCDPR and the New York City Planning Commission in February of next year, with the new Yankee Stadium project to be completed for opening day 2009. The New York Yankees are being represented with respect to the environmental review process for the proposed project by David Paget and Kate Sinding. SPR

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