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Empaneling the Peers of Polluters: Obtaining a Jury Trial Under the OPA and CERCLA as Explained in United States v. Viking Resources, Inc.

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EMPANELING THE PEERS OF POLLUTERS: OBTAINING A JURY TRIAL UNDER THE OPA AND CERCLA AS EXPLAINED IN *UNITED STATES V. VIKING RESOURCES, INC.*

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I. INTRODUCTION

The law concerning Seventh Amendment rights to a jury trial in statutory environmental damage cases appears to be at a turning point; the district court's decision in *United States v. Viking Resources, Inc.* (hereinafter "*Viking Resources*") is at the forefront of this change. Faced with an "avalanche"[1] of opposing authority, the court in *Viking Resources* meticulously gathered minority decisions and treatise material in a remarkably persuasive and insightful manner. In addressing this issue of first impression, the court departed from precedent and granted the Defendants' request for a jury trial.[2]

II. BACKGROUND

The *Viking Resources* case was brought by the United States Government under the Oil Pollution Act of 1990 (hereinafter the "OPA"),[3] which was enacted primarily in response to the Exxon Valdez disaster.[4] The OPA improved the government's ability to respond to, and prevent, oil spills[5] and also established liability for oil spill incidents.[6]

The court's opinion is replete with references to the similarities between the OPA and the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (hereinafter "CERCLA").[7]

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[1] United States v. Viking Res., Inc., 607 F. Supp. 2d 808, 830 (S.D. Tex. 2009).

[2] *Id.* at 832. The court also articulated holdings on statutory interpretation and preemption issues; these will be given light coverage within this Comment, which is appropriate given their status as additional support for established law.

[3] 33 U.S.C.A. §§ 2701–62 (West, Westlaw through Feb. 16, 2010).

[4] U.S. Environmental Protection Agency, Oil Pollution Act Overview, http://www.epa.gov/emergencies/content/lawsregs/opaover.htm (last visited Jan. 28, 2010).

[5] *Id.*

[6] 33 U.S.C.A. § 2702(a)–(b) (West, Westlaw through Feb. 16, 2010).

[7] 42 U.S.C.A. §§ 9601–75 (West, Westlaw through Feb. 16, 2010). CERCLA's enactment was spurred in part by the Valley of the Drums site in Bullitt County, Kentucky. James Bruggers, *Toxic Legacy Revisited: Valley of the Drums, 30 Years Later*, THE COURIER-JOURNAL, Dec. 14, 2008,

Though decidedly larger in scope than the OPA, CERCLA's modus operandi is strikingly similar.[8] CERCLA, like the OPA, provides the government with the authority to identify responsible parties for hazardous waste sites and to compel them to reimburse the government for its efforts to rectify the disaster.[9] Though extraordinarily similar in form, the scope of each act is mutually exclusive since CERCLA contains a petrochemical exclusion, while the OPA applies only to petrochemicals.[10]

A. Facts

In December of 2004, an oil spill now known as the Highland Bayou Spill occurred in the wetlands outside Galveston, Texas, on a tract of land known as the Maco Stewart Lease. The spill originated from a tank battery[11] whose ownership was disputed in *Viking Resources*.[12] Over the course of two months, the Coast Guard, the Texas General Land Office, the National Oceanic and Atmospheric Administration, the Environmental Protection Agency, and the Texas Railroad Commission, extracted approximately 225 barrels of oil from the surrounding area.[13] Four years after the Highland Bayou spill, federal litigation ensued concerning reimbursement of $650,000 in damages.[14] Viking Resources, Inc. (hereinafter "Viking") was the most recent lessee of the facility.[15] Viking's president, sole owner, officer, and director, was Roger W. Chambers, and both Viking and Chambers were named as Defendants in *Viking Resources*.[16]

B. Procedure

In the subject action, the Government averred under the OPA that Viking and/or Chambers were responsible for the tank battery and therefore strictly liable for the damages resulting from the Highland Bayou Spill.[17]

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http://www.courier-journal.com/article/20081214/NEWS01/81214001&referrer=FRONTPAGECAROUSEL.

[8] U.S. Environmental Protection Agency, CERCLA Overview, http://www.epa.gov/superfund/policy/cercla.htm (last visited Jan. 28, 2010).

[9] 42 U.S.C.A. § 9607(a) (West, Westlaw through Feb. 16, 2010); 33 U.S.C.A. § 2702(a) (West, Westlaw through Feb. 16, 2010).

[10] 33 U.S.C.A. § 2702(a) (West, Westlaw through Feb. 16, 2010); 42 U.S.C.A. § 9601(14)(F) (West, Westlaw through Feb. 16, 2010).

[11] "A tank battery is a grouping of containers used to store liquids" such as oil. *Viking Res. Inc.*, 607 F. Supp. 2d at 813 n.6.

[12] *Id.* at 812–13, 818.

[13] *Id.* at 813.

[14] *Id.* at 812–14. The damages have been, or will be, paid out of the Oil Spill Liability Trust Fund created by 26 U.S.C.A. § 9509 (West, Westlaw through Feb. 16, 2010). *Id.* at 813–14.

[15] *Id.* at 814.

[16] *Id.*

[17] *Viking Res., Inc.*, 607 F. Supp. 2d at 814.

The parties cross-motioned for summary judgment on the issue of liability, which was primarily contingent on determining the responsible party for the tank battery.[18] Viking claimed a right to a jury trial as well as the "affirmative defenses of release, collateral estoppel, and/or res judicata" as a result of an earlier Texas state action.[19]

III. SUBSTANTIVE HOLDINGS OF THE COURT

The parties filed multiple summary judgment motions regarding the assignment of liability under the OPA, which were addressed at length by the court. In brief, the Defendants disavowed ownership of the tank battery[20] and the Government sought a broader interpretation of the term "onshore facility" under the OPA.[21] The Government also asserted that Viking's corporate veil should be pierced so that Roger Chambers could be held derivatively responsible for the Highland Bayou Spill.[22]

The court utilized multiple sources of law in resolving the aforementioned issues. Citing ambiguity in the OPA's definition of "owner," the court turned to state contract law to determine the issue of ownership.[23] In addressing the possibility of Roger Chambers' derivative responsibility, the court looked to CERCLA precedent.[24] After lengthy

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[18] *Id.* at 815–16.

[19] *Id.* at 825–28.

[20] *Id.* at 818.

[21] The OPA states that to be responsible for an onshore facility a party must have owned or operated the facility *itself*, in this case the tank battery. 33 U.S.C.A. § 2701(32)(B) (West, Westlaw through Feb. 16, 2010). The Government, however, argued that the term should be interpreted broadly to include the surrounding area. *Viking Res., Inc.*, 607 F. Supp. 2d at 817. This is a substantially lower burden, since the ownership of the tank battery is in dispute, whereas the ownership of the Maco Stewart lease is not. The court rejected the Government's broad definition, stating that it would undermine Congress's clear intent to make "ownership and operation the touchstones of liability for onshore facilities," instead of loose spatial relationships. *Id.*.

[22] *Viking Res., Inc.*, 607 F. Supp. 2d at 822.

[23] *Id.* at 819–21. The court found that the tank battery was conveyed to Viking as an entity, and not to Roger Chambers as an individual. *Id.* However, a question of material fact still existed because this finding was countered with evidence from Chambers. *Id.* at 824.

[24] *Id.* at 822 n.46. The court noted that piercing the corporate veil under the OPA can be done for "all the same reasons" as under CERCLA; this observation along with several others like it, was nestled amongst numerous citations to CERCLA cases which markedly predominated the scant citation to OPA cases. *Id.*

In keeping with CERCLA precedent, the court used the fifth circuit's *United States v. Jon-T Chems.* factor test for finding reason to pierce via an alter ego theory, which enumerates various factors to be examined when conducting an alter ego analysis. *Id.* at 823 (citing United States v. Jon-T Chemicals, Inc., 768 F.2d 686 (5th Cir. 1985)). In application of the *Jon-T* test, the court considered Chambers's sizable control and ownership of Viking, the undercapitalization of the entity, and the lack of formality in corporate affairs and the commingling of Chambers's personal affairs with those of the company. *Viking Res., Inc.*, 607 F. Supp. 2d at 824. The *Jon-T* precedent should be taken with caution since "[t]here is significant disagreement among courts and commentators over whether, in enforcing CERCLA's indirect liability, courts should borrow state law, or instead apply a federal common law of veil piercing." United States v. Bestfoods, 524 U.S. 51, 63 n.9 (1998); *Viking Res., Inc.*, 607 F. Supp. 2d at 823 n.48.

analysis the court found that there was insufficient evidence provided on each of the issues to warrant granting the summary judgments requested.[25]

IV. PROCEDURAL HOLDINGS OF THE COURT

Viking requested a jury trial in its original answer and the Government subsequently filed a Motion to Strike Jury Demand.[26]

A. Right to a Jury Trial

The determination of a right to a jury trial for removal cost damages as well as natural resource damages under the OPA had never been considered by *any* federal court.[27] The court began with reference to the black letter law:

> A party in a civil case has a right to a trial by jury only if an applicable statute so provides or the Seventh Amendment to the United States Constitution applies and guarantees the right in the particular case.[28] Because "the OPA does not create a statutory right to a trial by jury," Viking and Chambers are entitled to a jury trial only if the Seventh Amendment's limited right to trial by jury applies in this case.[29]

The United States Supreme Court held that the Seventh Amendment not only preserves the right to a jury trial as it existed in 1791 but also applies to statutory claims *if legal rights and remedies* are created and claimed.[30] The well settled two-factor test for determining the existence of the aforementioned legal rights and remedies is found in the pivotal case of *Tull v. United States*.[31] It should be noted that either of the *Tull* factors can trigger a right to a jury trial.[32] First, under *Tull,* the statutory cause of action must be paired with its 1791 counterpart, and a

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[25] *Viking Res., Inc.*, 607 F. Supp. 2d at 814–24.

[26] *Id.* at 828.

[27] *Id.* at 829, 831.

[28] *Id.* at 828 (citing Morgan v. Ameritech, 26 F. Supp. 2d 1087, 1090 (C.D. Ill. 1998); FED R. CIV. P. 38(a)).

[29] *Id.* at 828 (quoting S. Port Marine, LLC v. Gulf Oil, LP, 234 F.3d 58, 62 (1st Cir. 2000)).

[30] Curtis v. Loether, 415 U.S. 189, 193–94 (1974); U.S. CONST. amend. VII.

[31] Tull v. United States, 481 U.S. 412 (1987). It is worth noting that *Tull* itself was an environmental law case, dealing with civil penalties for dumping in wetlands under the Clean Water Act. *Id.*

[32] *See id.* at 421 n.6 (The Court rejected the Government's contention "that both the cause of action and the remedy must be legal in nature before the Seventh Amendment right to jury trial attaches," saying that it is searching for a "single historical analog" and that the nature of the cause of action and the remedy are simply "two important factors" in this search).

determination must be made as to whether it would have been brought in a court of law or equity.[33] Second, and more importantly, according to *Tull* the remedy sought must be classified either as legal damages, which warrant a trial by jury, or equitable damages, which can be determined in the absence of a jury.[34]

In *Viking Resources,* the second factor analysis is complicated because two separate remedies are sought: removal costs[35] and natural resource damages;[36] therefore, the possibility exists that one will be deemed equitable and the other legal.[37] When equitable issues are interspersed with legal ones, every effort must be taken to preserve a jury trial.[38] The court focused primarily on the second factor of *Tull* and whether or not the damages themselves were legal or equitable.[39] The court used the first factor of *Tull,* whether the 1791 action would have been tried in a court of equity or a court of law, to supplement its primary discussion but gave it little coverage overall.[40]

1. Removal Costs

In determining the existence of a right to a jury trial for removal costs under the OPA, the court in *Viking Resources* elegantly walked the fine line between ruling in accordance with established law and recognizing an upcoming change in precedent. Since no court had addressed the issue under the OPA, the court again noted the similarities between the OPA and CERCLA and turned to CERCLA cases containing a removal costs claim.[41] The body of CERCLA precedent is unanimous in finding that removal costs are a form of restitution and therefore equitable.[42] In accordance with this

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[33] *Id.* at 417 (citing Pernell v. Southall Realty, 416 U.S. 363, 378 (1974); Dairy Queen, Inc. v. Wood, 369 U.S. 469, 477 (1962)).

[34] *Id.* at 417–18 (citing Curtis v. Loether, 415 U.S. 189, 196 (1974); Ross v. Bernhard, 396 U.S. 531, 542 (1970)).

[35] 33 U.S.C.A. § 2701(31) (West, Westlaw through Feb. 16, 2010). One must consider "the costs of removal that are incurred after a discharge of oil has occurred or, in any case in which there is a substantial threat of a discharge of oil, the costs to prevent, minimize, or mitigate oil pollution from such an incident." *Id.*

[36] 33 U.S.C.A. § 2702(b)(2)(A) (West, Westlaw through Feb. 16, 2010) (defining natural resource damages as "[d]amages for injury to, destruction of, loss of, or loss of the use of, natural resources, including reasonable costs of assessing the damage."); *see also* 33 U.S.C.A. § 2701(20) (West, Westlaw through Feb. 16, 2010) (defining natural resources as "land, fish, wildlife, biota, air, water, ground water, drinking water supplies . . . controlled by the United States . . . , any State or local government or Indian tribe, or any foreign government").

[37] *Viking Res., Inc.*, 607 F. Supp. 2d at 828–29.

[38] *Id.* at 829 (quoting United States v. Williams, 441 F.2d 637, 644 (5th Cir. 1971)) (explaining that though the discretion of the court to deny trial by jury would be retained, it would be drastically narrowed).

[39] *See id.* at 828–29.

[40] *See id.* at 828–33.

[41] *Id.* at 830.

[42] *Id.* at 829.

"avalanche of authority" and giving due deference to the doctrine of stare decisis, the court held that removal costs are equitable and do not warrant a right to a jury trial.[43]

However, in an incredibly insightful, albeit brief, passage of dicta, the court asserts that the "conventional wisdom" on the subject is inconclusive.[44] Within this passage the court cites three compelling pieces of authority: *Great-West Life & Annuity Insurance Co. v. Knudson,*[45] *United States v. Sunoco, Inc.,*[46] and Dan B. Dobbs' LAW OF REMEDIES.[47] The courts in *Knudson* and *Sunoco* each drew heavily from Dobbs.

In *Knudson,* the United States Supreme Court articulated the distinction between equitable restitution and legal restitution. According to the Court, the characterization of the damages is dependent on the underlying claim, with ownership of the subject property being integral.[48] "In cases in which the plaintiff '*could not* assert title or right to possession of particular property, but in which nevertheless he might be able to show just grounds for recovering money to pay for some benefit the defendant had received from him,' the plaintiff had a right to restitution *at law* through an action derived from the common law writ of assumpsit."[49] The facts of *Viking Resources* tend to satisfy these characteristics. The Government had no right to the property. Also, as the owners of the Maco Stewart lease, Viking and Chambers received a service from the government for which they should pay; support for this contention is found in the OPA itself which provides the theory of liability on which the Government's claim was based.[50]

In *Sunoco,* Judge Brody made the interesting argument that courts which have held removal costs to be *presumptively* equitable, *assumed* this outcome "simply because [they] involved restitution."[51] Brody concluded that damages such as the ones in *Viking Resources*, which are based on unjust enrichment, are actually more similar to a "contract implied in law."[52] The purpose of contracts implied in law, which were developed in English *law courts* as a form of assumpsit,[53] was "to prevent unjust enrichment of the defendant when 'in equity and good conscience,' he

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[43] *Viking Res., Inc.*, 607 F. Supp. 2d at 830.
[44] *Id.* at 830 n.79.
[45] Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204 (2002).
[46] United States v. Sunoco, Inc., 501 F Supp. 2d 641 (E.D.Pa. 2007).
[47] DAN B. DOBBS, LAW OF REMEDIES (2d ed. 1993).
[48] *Knudson*, 534 U.S. at 212.
[49] *Id.* at 213 (quoting DOBBS, *supra* note 48, at § 4.2(1)).
[50] 33 U.S.C.A. § 2702(a) (West, Westlaw through Feb. 16, 2010).
[51] *Sunoco*, 501 F Supp. 2d at 652, 652 n.14 (citing *Knudson*, 534 U.S. at 204).
[52] *Id.* at 649 (citing DOBBS, *supra* note 48, at §§ 4.2(3), 5.2(5)).
[53] *Viking Res. Inc.*, 607 F. Supp. 2d at 830 n.79 (citing DOBBS, *supra* note 48, at § 4.2(3)).

should not be permitted to keep gains he had received."[54]

The *Viking Resources* court also noted that response costs under CERCLA are analogous to repair costs because a private property owner might recover, and therefore resemble, other types of common law damages.[55] In light of the aforementioned authority, the *Viking Resources* court asserted that the courts in the previous CERCLA cases may have neglected to consider "'the fine distinction between restitution at law and restitution at equity,'"[56] and that the nature of removal costs is "open to question."[57]

2. Natural Resource Damages

Echoing its discussion of removal costs, the court looked to CERCLA litigation for instruction on the issue of natural resource damages.[58] One such decision, *United States v. Wade*, summarily held that natural resource damages were equitable in nature because such damages "were 'in the nature of restitution.'"[59] Once again it appeared that the courts adjudicating CERCLA cases viewed the restitutionary nature of damages as absolute proof that they are equitable in nature. However, the *Viking Resources* court recognized that stare decisis presented no bar on holding that natural resource damages were legal in nature, almost immediately drawing attention to yet another CERCLA case, *In re Acushnet River*.

In *Acushnet*, the court held that the diminution of value aspect of natural resource damages was legal in nature because natural resource damages are equivalent to tort damages under trespass theory.[60] Damages of this sort would be litigated in a court of law.[61] However, the holding in *Acushnet* is not as broad as it may appear. The court in *Acushnet* refused to consider restoration and replacement costs as natural resource damages, instead classifying them as removal costs.[62] This narrow definition of natural resource damages, therefore, only includes damages for resources that are "'forever lost'" and for the costs of assessing those damages.[63]

Having determined that at least one facet of the natural resource

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[54] DOBBS, *supra* note 48, at § 4.2(3), § 4.2(3) n.1 (noting that "[t]he reference to 'equity and good conscience' refers to a standard of judgment, not to equity jurisdiction. These cases are indisputably 'law' cases.") (citing Philpott v. Superior Court, 36 P.2d 635, 637 (Cal. 1934)).

[55] *Viking Res., Inc.*, 607 F. Supp. 2d at 830 n.79 (citing DOBBS, *supra* note 48, § 5.2(5)).

[56] *Id.* at 829 n.76 (quoting *Knudson*, 534 U.S. at 214 (2002)).

[57] *Id.* at 830 n.79.

[58] *Id.* at 831.

[59] *Id.* (quoting United States v. Wade, 653 F. Supp. 11, 13 (E.D. Pa. 1984)).

[60] *Id.* at 832 (citing *In re* Acushnet River, 712 F. Supp. 994, 999–1001 (D. Mass. 1989)).

[61] *In re* Acushnet River, 712 F. Supp. 994, 1000 (D. Mass. 1989) (citations omitted).

[62] *Viking Res. Inc.*, 607 F. Supp. 2d at 831 (citing *In re Acushnet River*, 712 F. Supp. at 999).

[63] *Id.* at 831–32 (quoting *In re Acushnet River*, 712 F. Supp. at 999).

damages is legal, the *Viking Resources* court was quick to note that "Viking and Chambers' Seventh Amendment right to a jury trial is triggered by this one legal component of the remedy."[64] In addition, the elements of strict liability under the OPA must be satisfied before the Government can pursue damages, including the natural resource damages; therefore, the court held that these issues were "legal in nature such that they must be tried to the jury, even if they are also relevant to equitable components of the remedy."[65]

B. Bifurcation

Turning to Viking's Motion to Bifurcate, the court opined that since the legal issues within the natural resources damages matter must be tried before a jury, judicial efficiency would dictate that the entire trial be conducted before a jury.[66] Even though Federal Rule of Civil Procedure 42(b) gives a court the discretion to order separate trials, this discretion is meant to promote judicial efficiency, and the court found that no such purpose existed here.[67]

The court's reasoning is well grounded but difficult to follow. When Viking and Chambers requested bifurcation, their intention and hope was that there would be one trial for the liability issues, and another for the damages issues.[68] However, the liability issues are prerequisites to reaching the *legal* issue of natural resource damages, and, therefore, they must also be decided by a jury. This means that the two trials Viking requested would *both* include issues that must be tried before a jury; therefore, the parties essentially requested *two* jury trials, which would be a clear misuse of judicial resources.[69]

C. Preemption

Viking and Chambers asserted the "affirmative defenses of release, collateral estoppel, and/or res judicata."[70] Their argument was that a previous state action, regarding an order to cap certain oil wells, was preemptory to the federal action at bar.[71]

Since all preemption defenses are based on common assertions, the

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[64] *Id.* at 832.

[65] *Id.*

[66] *Id.* The court noted that the jury verdict on the equitable issues will be advisory. This is in the interest of judicial efficiency since the parties will only be required to present evidence once, and if one of the equitable issues is later deemed to be legal, a retrial will not be necessary. *Id.* at 832 n.82.

[67] *Id.* at 833 (citing FED. R. CIV. P. 42(b)).

[68] *Viking Res., Inc.*, 607 F. Supp. 2d at 833.

[69] *Id.*

[70] *Id.* at 825.

[71] *Id.* at 826–27.

court used the same fact findings to dismiss each of the preemption defenses.[72] First, the court starkly distinguished the Texas state government from the federal government, stating that the United States was clearly not a party to the state court action.[73] Second, the court noted that the two issues, (1) the order to cap certain oil wells and (2) the damages from the Highland Bayou spill, involved similar practices in the same geographical area but involved systemically different issues.[74]

V. IMPLICATIONS

The *Viking Resources* court's holding that natural resource damages are legal in nature is pivotal. However, the court's dicta on the legal nature of removal costs is extraordinarily persuasive and seems nearly prophetic of the developments that are soon to come. Given this dicta and the court's citation to the Supreme Court precedent of *Knudson,* it seems clear that the restitutionary nature of removal costs will soon cease to be enough to support a presumption that they are also equitable in nature. This presumption, that all restitutionary damages are equitable in nature, seems to have always been premature. From time immemorial some restitution damages were decided by English courts of equity and some in English courts of *law.*[75]

The court's frequent references to the similarities between CERCLA and the OPA portends an extension of the court's Seventh Amendment precedent to CERCLA cases. Countless courts have recognized that the two acts are nearly identical in structure with the only noticeable difference being that their scope is mutually exclusive because of CERCLA's petrochemical exclusion.[76] Therefore, just as the *Viking Resources* court so readily turned to CERCLA precedent to determine an issue under the OPA, so can future courts turn to *Viking Resources,* a case decided under the OPA, for guidance in determining issues under CERCLA. Thus *Viking Resources* is given precedential weight in adjudications concerning both CERCLA and the OPA.

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[72] *See id.*

[73] *Id.* The court was particularly dismissive of the contention when it said simply "[t]he United States was not a party to the state court action" and with respect to the res judicata and collateral estoppel defenses. *Id.*

[74] *Viking Res., Inc.*, 607 F. Supp. 2d at 826–27. The author of this Comment would like to note that if Viking contends that an action concerning another part of the facility (the oil wells which the state ordered be capped) is related to the tank battery spill, perhaps they should not have treated the Government's broad definition of "onshore facility" so indignantly. This argument by the Defendants betrays their own opinion of the Maco Stewart lease as a cohesive facility.

[75] *Sunoco*, 501 F Supp. 2d at 652 n.14 (citing *Knudson*, 534 U.S. at 212); *see also* DOBBS, *supra* note 48, § 4.2(1)).

[76] *See supra* notes 11, 42.

Counsel on either side of a statutory environmental damages case would do well to remember that either party may request a jury trial[77] and that such a request is not likely to benefit corporations. Information on the subject of jury bias in corporate cases is often said to be inconclusive; however, there is significant research indicating that juries treat corporate defendants differently and sometimes less favorably than individual defendants.[78] In a 1998 survey co-sponsored by the National Law Review, approximately 75% of the respondents said they felt that corporations undertook surreptitious means to conceal the harm that they did.[79] In another poll, a similar percentage of respondents said that corporations had obtained too much power in the United States.[80] Due to their extensive internal structure, expertise in their field, and deep pockets, corporations are often presumed to have insights into the risks they take, and, because of this presumption of foreknowledge, they are also thought to have heightened culpability.[81]

The citizenry is obviously concerned with the amount of power corporate entities possess and whether or not they wield it in a benevolent manner. When a case concerning something as fundamental and visible as the local ecosystem arises, the possibility for jury bias is particularly high.[82]

The government and the corporations they prosecute will increasingly find their matters tried before juries and, therefore, to a great extent in the court of public opinion. A party's ability to use this fact to their advantage, and to avoid its pitfalls, is more important now than ever.

VI. CONCLUSION

The holdings in *Viking Resources* regarding statutory interpretation and preemption are overshadowed by the court's dynamic decisions on the Seventh Amendment right to a jury trial. Either party can move for a jury trial,[83] and with this court's holdings as precedent coupled with Supreme Court precedent,[84] the motion will be difficult to deny. In the same vein, motions to bifurcate will likely be unsuccessful. *United States v. Viking Resources Inc.* is positioned at the forefront, in time and in the abstract, of a

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[77] FED. R. CIV. P. 38(b).

[78] Valerie P. Hans, *The Illusions and Realities of Jurors' Treatment of Corporate Defendants*, 48 DEPAUL L. REV. 327, 352 (1998).

[79] Peter Aronson et al., *Jurors: A Biased, Independent Lot*, NAT'L L.J., Nov.2, 1998, at A1.

[80] Hans, *supra* note 79, at 332 (citing *The Public is Willing to Take Business On*, BUS. WK., May 29, 1989, at 29).

[81] *Id.* at 335–36.

[82] There does exist some argument that this effect could be offset if the local community and economy are dependent upon the corporation for employment and general prosperity; however, this sympathetic element may be removed to an extent by way of objections during jury selection.

[83] FED. R. CIV. P. 38(b).

[84] *Knudson*, 534 U.S. 204 (2002); Pernell v. Southall Realty, 416 U.S. 363 (1974); Ross v. Bernhard, 396 U.S. 531 (1970).

change in the common law that will have dramatic effects on environmental law in the United States.