

# ***THE INTERPLAY OF WORKER PROTECTION AND FEDERAL CRIMINAL STATUTES IN ENVIRONMENTAL PROSECUTIONS***

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## **I. Preliminary Statement**

Through eight case studies, this article will discuss enforcement mechanisms successfully used to prosecute those responsible for environmental crimes that led to worker endangerment. Specifically, it demonstrates the use of Title 18 charges: to ensure the admission of evidence of violations of federal and *state* environmental and/or worker protection laws; to demonstrate the full scope of the defendants' crimes; and to appropriately enhance punishment.

## **II. The Interplay of Federal and State Environmental/Worker Protection Agencies**

No one agency, federal or state, regulates all aspects of environmental protection while simultaneously safeguarding workers to prevent their exposure to dangerous chemicals and substances. Rather, there are gaps and overlaps in jurisdiction. The United States Environmental Protection Agency (EPA) functions to safeguard our nation's air, water, and soil by applying federal statutes whose stated goals are to protect both human health and the environment. Nevertheless, these laws and their implementing regulations seldom focus specifically on worker protection. Indeed, many types of dangerous activities that put our nation's workforce at risk from chemicals and other toxic or hazardous substances are not subject at all to EPA enforcement. At the federal level, that function falls primarily to the Occupational Health and Safety Administration (OSHA), although, as is set forth below, the criminal penalties for even the most serious OSHA offenses are paltry. For these reasons, prosecutors at times turn to Title 18 offenses in an effort to obtain more appropriate sentencing dispositions. Moreover, many states have statutes and regulations that fill in gaps in the protections missing from EPA and OSHA laws relating to protecting workers and members of the public. As is explained in this article, when predicate circumstances are met in appropriately serious cases, certain Title 18 statutes can be used in federal prosecutions to address violations of the OSHA and state protections.

## **III. The Range of Penalties For OSHA and State Worker Protection Laws, Environmental Laws, and Specific Title 18 Offenses**

Unfortunately, for the most serious worker protection offenses, OSHA law contains a wholly inadequate criminal enforcement mechanism: a six-month maximum, misdemeanor penalty that applies only to *willful* violations, and only when the violation results in a worker's death. *See* 29 U.S.C. § 666(e). For instances of even willful violations of this agency's laws or regulations, including intentional misconduct that causes serious bodily injury to workers, or, where the exposure has a latency period that

results in death outside of the five-year statute of limitation, criminal enforcement of OSHA-administered laws is unavailable. Moreover, because the sentencing guidelines do not apply to any conviction that is a Class B misdemeanor, there is not even a sentencing guideline for OSHA offenses. U.S.S.G. § 1B1.9. Thus, judges are left to select what they feel is the most analogous guideline from which to set an advisory range.

Various federal environmental statutes delegate authority for their principal administration to states. These include the Clean Water Act, the Clean Air Act, and the Resource Conservation and Recovery Act. Although principal administration and enforcement of these laws is state-based once EPA has approved a delegation, federal criminal enforcement is still available. Not so OSHA crimes. Once a state has implemented an approved occupational safety and health program, federal enforcement falls away. While some states, like California, developed increased penalties for workplace endangerment, most have not.

All of that said, many states have statutes and regulations intended to protect workers and members of the public that are not tied to federal law. *See, e.g.*, Title 12, New York Code, Rules, and Regulations (N.Y.C.R.R.), Part 56 (Code Rule 56)(New York State regulation governing asbestos). Although state regulatory schemes such as Code Rule 56 are quite comprehensive, many have no or minimal criminal penalties. They are rarely used by state authorities to support prosecutions under general criminal provisions, even in the instance of extraordinarily serious knowing or willful misconduct that imperils the lives of workers or members of the public.

EPA-administered laws have criminal provisions that, for most knowing violations, contain five-year maximum periods of incarceration. *See e.g.*, 42 U.S.C. §§ 7413(c)(1) and 6928(d)(2), and 33 U.S.C. § 1319(c)(2). Although the applicability of federal sentencing guideline adjustments (U.S.S.G. §§ 2Q1.2 and 2Q1.3) substantially effect the total Offense Level, the terms of imprisonment for typical felony environmental offenses are commonly two years or less.

By contrast, five Title 18 offenses exist that, in appropriate circumstances, can enhance guideline ranges and increase statutory maximums: a *Klein* conspiracy carries a five-year maximum incarceration penalty; while mail/wire fraud, money laundering, and racketeering offenses provide for maximum penalties of up to 20 years. *See* 18 U.S.C. §§ 371, 1341, 1343, 1956, and 1963.

#### **IV. The Basis to Use Certain Title 18 Offenses to Enhance Environmental and Worker Protection Prosecutions, and to Incorporate State-Proscribed Violations into Federal Prosecutions**

##### **A. *Klein* Conspiracy—Conspiring to Fraudulently Defeat a Lawful Function**

Where a defendant's conduct was intended to conceal criminal activities from OSHA or the EPA so as to keep those agencies from ensuring compliance with laws they administer, a *Klein* conspiracy is a practical way to focus the jury's attention on this

aspect of criminal conduct. This charge is typically brought in conjunction with OSHA or EPA violations, and will often result in an obstruction enhancement under the guidelines. In cases where defendants conspire to impair, obstruct or defeat the lawful function of any department of government, this charging theory, under 18 U.S.C. § 371, is a familiar and effective way to develop a case where a regulated person or entity is fraudulently, defiantly violating an environmental or worker safety regulation.

### **B. Capturing State Law Violations in a Federal Fraud Indictment**

Invariably, when environmental remediation companies contract to engage in activities involving dangerous chemicals or substances, such as asbestos removal, they execute contracts in which they represent that the work will be performed in compliance with all applicable federal, state, and local laws. That is, they agree to comply with the range of laws and regulations created to ensure the safe and efficacious removal of the otherwise potentially deadly substance. Also invariably, all or portions of documents related to the transactions (bids, contracts, invoices, checks) are sent through the United States mails or via interstate wires (faxes and e-mails). Where serious state law violations are knowingly committed during the work, especially as part of a pattern of business conduct arising over a significant period of time, the federal indictment can readily describe those violations as part of a mail or wire fraud scheme, or cite such a mail or wire fraud scheme as specified unlawful activities or predicate crimes in money laundering or Racketeer Influenced and Corrupt Organization (RICO) charges.

Such indictments typically explain the defendant's promise to comply with an applicable state law – such as Code Rule 56 – at a time when he had no intention to do so, and set forth each part of the statutory or regulatory scheme violated. Where the same series of violations occur on multiple projects, the intentional nature of the misconduct becomes plain. And, importantly, the prosecution is insulated from claims of over criminalization. Charged in this manner, the federal indictment, and proof at trial, is able to comprehensively address actions that violate state requirements. As the reader will see in the description of the cases set forth below, providing the jury and judge with the full range of criminal conduct greatly enhances their understanding of the scope of the crimes and the defendant's mendacity. They see the many steps the defendant took that repeatedly circumvented lawful requirements to save time and improperly profit. They see how a defendant put his workers and members of the public in danger of death or injury from the chemicals or substances involved in the remediation project.

### **C. Other Federal Statutes**

Quite commonly, an indictment can productively add charges that may not fall within the strict confines of a *Klein* conspiracy or an effort to incorporate state law through federal fraud charges. A false statement charge is one common example. Obstruction of justice, if not related to a *Klein* conspiracy overt act, may be another. In the rare cases where a racketeering charge is appropriate, obstruction is, of course, a predicate act. *See United States v. Salvagno*, discussed below.)

## V. **Illegal Asbestos Abatement Projects: Background Underlying a Common Worker Endangerment Scenario**

Perhaps no other substance has caused more work-related deaths over a prolonged period than asbestos. Each year, for more than a century, over one hundred thousand deaths occur worldwide because of the inhalation of asbestos fibers. Styaner, Welch & Lemen, *The Worldwide Pandemic of Asbestos-Related Diseases*, 35 Annual Review of Public Health 205 (2013). Asbestos is a mineral substance that was mined and then milled for use as, among other things, insulation on pipes and boilers and ceiling material. It was installed in innumerable buildings throughout the United States and around the world. It presents a liability and, frequently, an obstacle to renovation, or even demolition, of a building. As a result, property owners often wish to have this dangerous substance removed. Unfortunately, when asbestos-containing materials are disturbed improperly (principally without being first thoroughly saturated with water), they release massive amounts of microscopic fibers into the air. The fibers are needle-shaped, extraordinarily light, and they remain suspended in the air for lengthy periods. After they settle onto floors, walls, or windowsills, they can reenter the air by slight breezes such as those caused by the opening of a door or a window. Occupational medical studies have revealed that a single cubic centimeter of heavily contaminated air (the size of a small cube of sugar) can contain over 5,000 asbestos fibers. Upon inhalation, the fibers lodge deep in the lungs of anyone in the area who lacks proper respiratory protection. Because asbestos is a mineral, such fibers do not dissolve, nor otherwise clear the lungs once lodged there. Given sufficient exposure, the lungs fill with scar tissue and over time become brittle and diseased. Medical science has determined that there is no minimum level at which exposure to asbestos fibers is safe. 20 U.S.C. § 3601(a)(3).

In the asbestos removal industry, to save time and enormous amounts of money, dishonest abatement owners and supervisors direct their workers to remove this substance from homes and buildings of nearly every sort without following environmental and safety requirements imposed by the Clean Air Act's asbestos regulations (40 C.F.R. §§ 61.141 - .157), OSHA regulations (29 C.F.R. §§ 1910.1001, 1926.1101), and sundry state laws (*see again*, in New York State, Code Rule 56). Asbestos diseases include lung cancer and asbestosis (both often fatal) and mesothelioma (invariably fatal). However, these diseases have a latency period from exposure to symptom onset that typically ranges from 15 to 30 years. Thus, employers who knowingly expose their workers to repeated asbestos fiber inhalation are seriously endangering and quite possibly killing them – with an increased probability of death within the work force depending on the number of workers exposed. Other factors that increase mortality are higher concentrations of the exposures and longer exposure periods.

Over the course of 17 years, from 1998 to 2014, in the Northern District of New York, the United States obtained more than 100 individual felony convictions in response to widespread illegal asbestos removal practices that seriously endangered workers and members of the public. Other districts similarly pursued many such prosecutions. The cases discussed below will begin with some of the most egregious examples of criminal misconduct and the corresponding charges and sentences imposed. Thereafter, this article will explore still unusually serious misconduct but on a smaller scale. The related charges

nevertheless resulted in significant terms of incarceration beyond those typically imposed in cases pursued using just EPA or OSHA administered laws. The overarching focus is on charging options that enhance, or even supplant, charges that at first blush seem most applicable.

## VI. Case Studies

### 1. *United States v. Alexander Salvagno, Raul Salvagno, and AAR Contractor, Inc.*

For ten years, Alex Salvagno, his father Raul Salvagno, and up to 500 hundred of their workers conducted illegal asbestos abatements throughout New York and adjacent states. The Salvagnos' company, AAR Contractor, Inc., (AAR) was one of the largest asbestos removal companies in New York State. *United States v. Salvagno*, 306 F. Supp. 2d 258, 263 (N.D.N.Y. 2004). To cover up their crimes, Alex Salvagno secretly and illegally co-owned an asbestos air-monitoring laboratory, Analytical Laboratories of Albany, whose workers were ordered to sample and falsify results from AAR projects. As was established during a five-month trial, the scope of the proven misconduct was staggering: 1555 illegal asbestos projects conducted in, among other places, elementary schools, churches, hospitals, cafeterias, theatres, gymnasiums, health facilities, government buildings, private residences, and industrial and commercial facilities of nearly every sort; approximately 50,000 air samples/laboratory results falsified; and up to 100 asbestos abatement workers and an unknown (but potentially massive) number of client employees and members of the public exposed to asbestos fibers at concentrations and durations that medical experts testified were substantially likely to result in death or serious bodily injury.

At the direction of the Salvagnos, workers stripped asbestos dry, often without respiratory protection. Such practices released massive amounts of asbestos fibers into the air, including into the breathing zones of those performing the removal. They routinely did not encapsulate the work area in a plastic enclosure. Such practices often allowed this cancer-causing substance to spread to other areas throughout the buildings. Rarely were workers given access to required decontamination units so they could properly clean themselves before they left the work areas and went home to their families. The Salvagnos routinely played down the dangers of asbestos exposure, and their often young and foolhardy workers took their pay and did as they were directed. Indeed, studies introduced during a week-long sentencing hearing showed that methods used by workers to broom up the dry asbestos likely resulted in their exposure at levels up to 500,000 times greater than that allowed by law for clearance results.

As part of the criminal investigation, EPA Special Agents inspected numerous buildings and invariably found copious asbestos debris remaining, scattered throughout work areas in high concentrations. The defendants had presented fraudulent laboratory reports to building owners that purported to demonstrate the abatements had been fully successful. By the time the Special Agents learned of these facilities' true conditions, often years had passed. Thus, the building occupants found out after the fact that they had

been exposed for lengthy periods to this dangerous material. Their presence for up to years in these buildings tragically posed a serious danger to their future health.

Sixteen high-level owners and supervisors of the abatement company and laboratory were charged with crimes. Only the Salvagnos and their company, AAR Contractor, Inc., did not plead guilty.

Alex and Raul Salvagno and AAR were charged in a 76-page indictment with a RICO conspiracy (18 U.S.C. § 1962(d)), with predicate acts of obstruction of justice, money laundering (with specified unlawful acts of mail and wire fraud), bid rigging, and with RICO forfeiture. RICO is the heavy hitter in federal criminal law, seldom used, but highly effective in the right case. It “proscribes no conduct that is not otherwise prohibited” by state or federal law. Charles Doyle, *RICO: A Brief Sketch*, Congressional Research Service (May 18, 2016). Rather, it elevates the potential sentence for those with a commercial interest in an enterprise that affects or engages in interstate commerce through *patterned* criminal conduct (or the collection of an unlawful debt). *See id.* The facts noted above and discussed below showed that the Salvagnos’ *patterned*, fraudulent self-dealing with an air monitoring company that AAR illegally owned so as to dupe a string of clients into believing they had received an expensive, legitimate decontamination (when, in fact, they had gotten a cheap rip and run), made this a solid racketeering case.

The Salvagnos were further charged with a Clean Air Act and Toxic Substances Control Act (TSCA) conspiracy (18 U.S.C. § 371), and with substantive Clean Air Act violations (42 U.S.C. § 7413(c)). Alex Salvagno was also charged with submitting fraudulent tax returns (26 U.S.C. § 7206). The defendants were convicted on all counts. Alex Salvagno’s prison sentence was 25 years – the longest environmental sentence in U.S. history. He was also ordered to pay forfeiture of \$23 million and a fine of \$2 million. Raul Salvagno was sentenced to 19.5 years in prison, forfeiture of nearly \$23 million, and a fine of \$1.7 million. AAR Contractor, Inc. was ordered to forfeit \$23 million, and fined \$2 million.

While the case was massive, the charging strategy was surprisingly straightforward. As explained above, the Clean Air Act regulates *some* of the important safety components of an asbestos project, such as the requirement to conduct inspections for the presence of asbestos prior to starting the removal work, and the obligation to thoroughly wet the material prior to its stripping, bagging, and disposal. Yet Clean Air Act regulations do not regulate other significant requirements that are imposed by OSHA and/or Code Rule 56 (or similar laws in other states), such as the requirements for: laboratory testing with sampling via air agitation to verify a proper cleanup; the testing of worker exposure levels during the work; worker respiratory and other personal protective equipment; negative air machines and work area containment to prevent fiber migration; and decontamination units for workers to clean themselves when leaving the work area.

As is standard, the defendants signed contracts for each project promising to comply with all federal, state, and local laws governing the asbestos removal. These

contracts allowed the use of federal Title 18 statutes to address not just EPA and OSHA administered laws, but also New York State's Code Rule 56. Because of the truly unprecedented scope of this case, and especially the highly organized, patterned, and ongoing nature of the criminal activity, the United States Attorney's Office (USAO) (with DOJ Criminal Division concurrence) determined that the prosecution could be most fully presented to the jury via, among other charges, a RICO conspiracy. In addition to standard Clean Air Act offenses, RICO permitted proof of predicate acts involving mail fraud and money laundering. Such proof included: the secret laboratory ownership; various obstructions of justice (destruction of laboratory records and endeavoring to convince workers to lie when questioned by authorities); worker exposures via no respiratory protection; and an extraordinarily long list of other instances of non-compliance with OSHA and Code Rule 56 mandates. In sundry ways the proof – applicable to almost all of the projects – gave the judge and jury a far more complete picture of the extensive nature of the Salvagnos' criminal conduct that was critical for sentencing purposes.

Without the RICO conspiracy (or some other federal charge such as mail fraud that would pick up the state violations), it is unclear whether the prosecution could have gotten all such proof before the jury. While the Federal Rules of Evidence might have opened the door for some of the proof under Rule 404(b), the prosecution would have had to deal with a Rule 403 balancing test for each and every piece of evidence relating to non-charged conduct. Instead, because of the RICO charge, the evidence poured in, and is almost certainly the reason why the sentence appropriately matched the scope of the crimes. While the trial evidence involved myriad "regulatory violations," the gravamen of the case before the judge and jury was the pattern of years of misconduct that put the Salvagnos' huge work force in substantial danger of death. That, of course, was the appropriate focus.

Ironically, had the United States merely sought to pursue worker endangerment charges pursuant to the OSHA criminal statute, prosecution would have been barred because no actual deaths had (*yet*) occurred. The RICO/money laundering/mail fraud provisions allowed for conviction and lengthy terms of incarceration as part of fraud conduct including OSHA and state violations that could not have been pursued alone. AAR's repeated fraud was, among other things, its invariable promise to comply with federal and state laws, including OSHA laws. Thus, even though OSHA proscribed no separate criminal penalty for this kind of conduct, willful violation of OSHA provisions was punished because of the part those violations played in AAR's criminal business model. The same is true for the New York State Code Rule 56 violations.

The United States also proved a separate Clean Air Act and TSCA conspiracy and related substantive charges that required only general intent proof. *See United States v. Weintraub*, 273 F.3d 139 (2d Cir. 2001). The prosecution could not combine a § 371 conspiracy (or the specific substantive environmental crimes) with the RICO § 1962(d) conspiracy because, unlike the Clean Water Act, the Clean Air Act and TSCA are not predicate crimes under a RICO conspiracy charge.

Finally, it should be noted that, perhaps surprisingly, the environmental (not OSHA) and RICO offense levels under the U.S. Sentencing Guidelines were approximately equal. This was because, except for the “simple recordkeeping” provision, the district court properly found applicable every single environmental upward adjustment, including the 9-level enhancement for the substantial likelihood of death posed by the Salvagnos’ misconduct: U.S.S.G. §§ 2Q1.2(b)(1)(A) (repetitive discharge), (b)(2) (likely death), (b)(3) (substantial cleanup), and (b)(4) (lack of permits related to Clean Water Act discharges). Moreover, the district court found applicable several Chapter 3 enhancements: U.S.S.G. §§ 3B1.1 (organizer or leader), 3B1.3 (abuse of trust), and 3C1.1 (obstruction of justice). Yet, without the RICO charge, the district court might have looked for grounds to impose a lower sentence. That is, in the author’s opinion, the district court’s familiarity with long terms of incarceration for racketeering offenses ensured that the court recognized the nature of the crimes before it. It may well have acted differently had it “just” been confronted with environmental statutes that rarely garner sentences of greater than five years.

Thus, in appropriately serious instances of violations where contracts explicitly promise compliance with federal and state laws, and where relevant mailings or wirings exist, prosecutors should carefully review all potentially applicable statutes, including Title 18 crimes, OSHA, and state environmental laws. As to concerns regarding higher burdens of proof related to mental state (specific versus general intent) for fraud offenses, at least as to asbestos prosecutions, states implement a federal requirement for yearly training in their applicable laws. Any heightened level of intent attached to fraud charges can be readily overcome by a showing of the training the violators took and ignored. Indeed, the United States called the training providers as witnesses to explain the numerous times each defendant and co-conspirators were taught the asbestos requirements that they subsequently violated. Moreover, in an era when prosecutions are subject to scrutiny for “over criminalization” where regulations form part of the basis for prosecution, proof of fraudulent, willful conduct can be important in the court of public opinion.

## 2. *United States v. Joseph Thorn and A+ Environmental Services, Inc.*

Joseph (Jay) Thorn, owner of A+ Environmental Services, Inc., was both a competitor and a friend of Alex Salvagno. The two rigged bids together, deciding who would win or lose. The winner paid the loser a kickback. Thorn ran a remarkably similar asbestos operation to that of Salvagno. While Thorn did not secretly own a laboratory, he recruited multiple laboratory officials who prepared reports on Thorn’s behalf to dupe clients/victims by falsely showing that cleanups were successful. He had his workers rip and run, often without respiratory protection and functioning decontamination units. But while Thorn committed his many crimes during the same 10-year time frame as the Salvagnos, his approximately 1100 rip and runs were, on balance, far smaller in overall scope than the ones they directed. Of Thorn’s approximately 1100 illegal projects, roughly 1000 were performed in private homes rather than within much larger facilities open to the public. While it was no comfort to homeowners and their children, Thorn exposed his workers to less contamination overall.



That is not to say that some of Thorn's rip and run projects were not tragically impressive. One Thorn worker testified to driving in the wintertime to a removal action at an immense commercial facility during the middle of a snowstorm. As he explained to the jury, when he entered the building, it was "snowing" harder inside than outside due to all the asbestos fibers that were being released improperly into the air. When EPA Special Agents learned of this site, purportedly fully abated years earlier, they found extraordinary amounts of asbestos sitting loosely on top of pipes and other overhead areas throughout the building. The evidence of rip and run asbestos removal – the scattering and leaving of dry asbestos fibers behind – was obvious to those who knew what asbestos looked like, where it would be found, and then looked for such evidence. However, for years the company and its employees who re-occupied this facility lacked such knowledge. A supervisor for the company testified that he and his thirty to forty co-workers were regularly showered with an unknown white substance that fell from the pipes whenever their forklifts nudged them.

Ultimately, the property owner decided to have the entire building demolished. Once the contamination had been spread throughout this enormous facility, the greatly enhanced cost to re-clean every inch was many times the expense of the original abatement, and more than the property was worth. Additionally, more than one million dollars of products had to be destroyed, as the cumulative cleaning process for each piece totaled more than the total price of the inventory.

Beyond the rip and run activities to which Thorn regularly exposed his large work force, the defendant hired two teenaged boys – 14 and 16 years old – to work after school at the A+ shop. The boys' parents assumed they were cutting grass, but A+ Environmental had no grass. Rather, Thorn had the boys rip open innumerable bags of friable asbestos brought back by workers from various projects, turn the bags inside-out to hide the asbestos warning labels, and then dispose of the waste as normal trash. The process of breaking open and dumping the bags resulted in the boys being covered head to toe in asbestos dust. Thorn refused their requests for respirators. A nationally recognized medical expert testified that it was a virtual certainty the boys would contract asbestos disease.

From time to time Thorn met with homeowners who had children and who were particularly frightened of the dangers inherent in the asbestos removal process. In one poignant instance, despite knowing the contrary was true, Thorn patiently explained all of the careful steps his company would take to safeguard them. Well after Thorn's rip and run abatement, Special Agents found high levels of asbestos throughout the work area, including covering the children's toys that had remained in the basement play room.

Thorn was charged with a money laundering conspiracy, which included mail fraud as the specified unlawful activity for the numerous projects; and with a Clean Air Act conspiracy and related substantive counts. As with the Salvagno, Thorn had signed contracts promising to comply with all federal, state, and local laws. He was convicted on all counts. At sentencing, among other positions, the United States argued that Thorn's

activities required a 9-level enhancement as his conduct created a substantial likelihood of death or bodily injury to his workers; a 2-level enhancement for his abuse of trust, and a 2-level enhancement for his use of a minor in the commission of his crimes (U.S.S.G. § 3B1.4).

*Thorn* and *Salvagno* are examples where the proof at trial not only supported the convictions but went far to establish appropriate sentencing enhancements. Yet the trial records alone were insufficient. The *Thorn* prosecution represents an example of the importance of requesting a sentencing hearing when necessary to supplement the trial record. In a string of decisions, the Second Circuit repeatedly ruled in favor of the government, reversing and remanding unfavorable sentencing determinations made by the district court. See *United States v. Thorn*, 317 F.3d 107 (2d Cir. 2003); 446 F.3d 378 (2d Cir. 2006); 659 F.3d 222 (2d Cir. 2011). In clear and unequivocal terms, the Second Circuit found that sentencing enhancements requested by the United States were appropriate. Among other notable rulings, it held that U.S.S.G. § 2Q1.2(b)(2), governing the substantial likelihood of death or serious bodily injury, applies even where the endangered abatement workers were knowing participants in the offense. 317 F.3d at 118. Thus, from a worker protection prospective, this 9-level enhancement – properly limited to only the most serious cases – is a powerful tool even if workers are ordered to, and knowingly participate in, the criminal misconduct that endangered them.

Ultimately, *Thorn* was sentenced to 12 years in jail, ordered to forfeit \$937,000, and to pay \$299,593 in restitution.

### 3. *United States v. Andre Parker, a/k/a Dr. Parker, Parker Environmental Management Group, Inc.*

To make it seem as if he had impressive credentials, Andre Parker bought fraudulent degrees: a Bachelor of Science, a Masters, and a Ph.D. in purported environmental subject areas, all without taking any courses or exams. Thereafter, he held himself out to potential clients as “Dr. Parker” and obtained contracts for his company to perform laboratory analysis. In separate, unrelated projects, he won contracts to engage in asbestos abatement. One abatement project involved the removal of asbestos from 31 low-income public housing facilities in Plattsburg, New York. Parker’s workers – largely undocumented aliens from New York City – engaged in rip and run activities. They left asbestos scattered behind in areas where residents stored their possessions, including on children’s toys and kitchen tools. On orders, workers dumped voluminous amounts of asbestos around the city, including by roadsides, in a graveyard, and in a 7-11 store parking lot. Laboratory test results forwarded to the Plattsburg Housing Authority purported to show that no asbestos remained despite EPA Special Agents finding it in numerous locations. The prosecutors forced an official from the international air monitoring company hired to take the samples to explain to the jury how that false report got made: “Dr. Parker” took the official to Canada and paid for his prostitutes. In return, the official ensured that the samples were improperly obtained from a location and in a manner designed to find no asbestos.

EPA Special Agents executed search warrants at the Parker laboratory headquarters in New York City. They seized air-monitoring cassettes that demonstrated Parker had falsified countless laboratory results for other abatement contractors throughout New York State, including one project performed inside a day care center.

Following a 6-week trial, Parker and his company were convicted of conspiracy to violate the Clean Air Act, Superfund Act (CERCLA), and mail fraud, together with substantive counts related to the Clean Air Act, CERCLA, mail fraud, obstruction of justice, and filing false claims for money with the Department of Housing and Urban Development. The prosecution introduced potent evidence of his OSHA and Code Rule 56 misconduct. For his criminal conduct, Andre Parker received 48 months in jail. The United States did not seek the 9-level enhancement for creating a substantial likelihood of death or serious bodily injury under U.S.S.G. § 2Q1.2(b)(2) because EPA Special Agents discovered the rip and run in process and, accordingly, the period of victim exposures were sufficiently short to render proof on this point uncertain.

#### 4. *United States v. Paul, Stephen, Lester (and Ronald) Mancuso*

Paul Mancuso had a history of crooked dealings. Prior to the case described here, he was caught directing his workers to engage in illegal asbestos removal activities, and pled guilty to a Clean Air Act felony violation. As a standard condition, he was ordered not to violate federal, state or local laws for the duration of his probation. New York State authorities subsequently prosecuted him for insurance fraud, again related to his previous asbestos business activities. And he was barred for 5 years from having any involvement in any manner with the asbestos removal business.

Not prepared to accept these restrictions, but looking for a clever means to avoid a third criminal conviction, Paul, aided by his brother Stephen, an attorney, decided to establish and operate an asbestos abatement company from inside Stephen's law firm. The government postulated that their theory was that the attorney-client privilege would prevent prying federal agents from being able to seek evidence of wrongdoing. Unfortunately for the Mancusos, EPA Special Agents were not so easily deterred when information surfaced that Paul Mancuso was ripping and running again. Using a taint team that had been given thorough prosecutorial and judicial instructions, EPA Special Agents executed a search warrant inside Stephen's law office, seizing overwhelming evidence of environmental crimes. Prior to filing charges, in a joint meeting with all the Mancusos and counsel, the federal prosecutor offered family members plea dispositions, including Lester (the father), and Ronald (a third brother). The government's assumption was that the family would all accept or reject the offers. Surprisingly, Ronald accepted the plea deal and agreed to cooperate against his family. Lester ultimately agreed to plead guilty so long as he was not required to cooperate.

The United States charged Paul and Stephen with a multiple-prong conspiracy: to defraud the United States, to violate the Clean Air Act, to violate CERCLA, and to commit mail fraud. Paul was charged with substantive Clean Air Act and CERCLA crimes. Both were convicted of the charges. As with the cases discussed above, the United States was able to use the mail fraud statute to present evidence of OSHA and

state asbestos violations due to contracts that promised to follow federal and state laws. Because the agreed-upon conspiracy violated the prior federal (and state) sentence, prosecutors added a “conspiracy to defraud” prong to help ensure the full nature of the scheme got before the jury. That is, the indictment spelled out his prior criminal conduct, federal and state convictions, and the sentences that required no future illegal conduct while on probation, and no involvement of any sort with regard to asbestos activities. Beyond introducing proof of these crimes, the trial evidence established that Paul Mancuso had a very large associate savagely attack a potential witness to prevent, in part, the United States from carrying out its investigatory function. Ultimately, Paul Mancuso received 54 months in prison, Steven received 41 months, Lester received 36 months, and Ronald, who cooperated and testified, received a probationary sentence.

**5. *United States v. Longley-Jones Management Company, Inc.***

Abatement companies are not the only businesses that carry out asbestos removal operations and, as explained above, some crimes are not discovered until long after the illegalities have occurred. Longley-Jones Management Company, Inc. (Longley-Jones) was a well-known and respected property management entity that managed (and, through related companies, owned) rental properties in upstate New York, principally in the Syracuse area. Many of its extensive holdings contained asbestos. Yet unlike most commercial and industrial companies that handle hazardous substances, Longley-Jones did not have an environmental compliance policy or trained supervisory officials to guide and instruct employees as to how to deal with such problems. Accordingly, for at least 15 years, at 98 separate large commercial residential facilities, Longley-Jones employees removed asbestos illegally, at times by simply dumping large piles in places such as facilities’ laundry room floors, where numerous renters and workers were almost certainly exposed.

Longley-Jones ultimately pled guilty, as did a number of their supervisory employees. The company pled to 8 felonies, including a Clean Air Act and Mail Fraud conspiracy and seven substantive Clean Air Act crimes. The company was sentenced to pay a \$4 million fine, a portion of which was suspended on the condition that it be used to clean up its facilities and develop and implement an environmental compliance plan. More pertinent to this article, an immense, yet impossible to determine, number of victims existed. There was no meaningful way to identify victims, nor, given the latency period for asbestos disease of up to 30 years, determine who might become ill. Nevertheless, notice to potential victims is critical. Courts have statutory discretion to fashion an appropriate remedy including permitting notice by publication in mega-victim cases. 18 U.S.C. § 3771(d)(2). The prosecutor worked with the district’s victim-witness coordinator to provide notice to victims by publication. Absent such notification, there would have been no practical method to achieve compliance with the requirement to notify victims of crimes.

**6. *United States v. Julius DeSimone, Donald Torriero, Cross Nicastro, Dominick Mazza, and Mazza & Sons, Inc.***

Julius DeSimone, Donald Torriero, Cross Nicastro, and another person now deceased, decided to create a massive landfill on a rural farm owned by Nicastro, and to accept hundreds of millions of tons of waste from downstate New York and adjacent states. The property-turned-landfill was merely a huge open field that contained significant wetlands and immediately abutted the Mohawk River in Frankfort, New York, near Utica. Aware that the process of siting and obtaining permits for a landfill was arduous and would take years to complete, the conspirators simply ignored the many federal and state requirements. Instead, several defendants participated in fraudulently altering a letter from the New York State Department of Environmental Conservation (DEC). They endeavored to make it appear that a one-page permit letter sanctioned their activities, substituting that for the voluminous document containing numerous requirements and restrictions that would have constituted a valid authorization. Thereafter, tractor-trailers carrying waste from downstate New York and New Jersey poured onto this property, depositing immense quantities of materials. Notably, this open field did not have even the most basic appearances of a licensed landfill: no fence, no signs, no weighing stations, no offices, and no paved areas. Truckers just pulled off the road into the field and dumped their waste.

After having multiple loads of waste rejected at a properly licensed landfill in Delaware because the contents included asbestos, Mazza & Sons, Inc. sent similarly contaminated shipments to the Frankfort, New York site. When DEC Investigators arrived at the site, they caught the dumping in progress. They also observed bicycle tracks, likely from local children who had been playing on the debris mounds. A bulldozer operator had been pushing the waste piles around to make room for new loads. He, and undoubtedly the bicyclists, had no awareness of the presence of asbestos, and, accordingly, took no respiratory precautions. The property is now a designated Superfund site and will require millions of dollars to clean up.

The defendants were charged with a conspiracy to defraud the United States, to violate the Clean Water Act, to commit wire fraud, to obstruct justice, and to make false statements. Sundry defendants were also charged with substantive CERCLA violations, wire fraud, obstruction of justice, false statements, and aiding and abetting. Through this charging mechanism, prosecutors were able to introduce evidence of state laws governing landfills. They set forth the steps the defendants took to avoid compliance in a manner that defrauded Special Agents in carrying out their duty to ensure federal laws were followed. Ultimately, the defendants were convicted and received sentences ranging from 51 months to probation. They face potentially multi-million dollar sums to be determined as the Superfund cleanup and attendant cost recovery process unfolds.

**7. *United States v. Atlantic States Cast Iron Pipe Company, John Prisque, Scott Faubert, Craig Davidson, and Jeffrey Maury***

Environmental Crime Section (ECS) attorneys and AUSAs from the District of New Jersey participated in a nearly seven-month trial of Atlantic States Cast Iron Pipe Company (a division of McWane, Inc.), and company officials John Prisque, Scott Faubert, Craig Davidson, and Jeffrey Maury for a multitude of criminal environmental

offenses, many of which endangered their employees. The privately held McWane, Inc. and its divisions were among the largest manufacturers in the world of ductile iron pipe with more than a dozen plants in the United States and Canada. McWane's products were used primarily for municipal and commercial water and sewer installations. The charges related to the regular discharge of oil into the Delaware River, concealing serious worker injuries from health and safety inspectors, and maintaining a dangerous workplace that contributed to multiple severe injuries and the death of one employee at the Phillipsburg, New Jersey plant. Evidence further showed that the defendants repeatedly violated the facility's Clean Air Act permits by, among other things, burning tires and excessive amounts of hazardous waste paint; systematically altering accident scenes; and routinely lying to federal, state, and local officials who were investigating environmental and worker safety violations.

The 34-count indictment charged Atlantic States, and the named managers, with an 8-year long *Klein* conspiracy to defeat the lawful purpose of the EPA and OSHA, and to violate federal clean air and water regulations and laws governing workplace safety. Defendants were also charged with obstruction of EPA and OSHA criminal and regulatory investigations. The charges went beyond the mere environmental violations to the lengthy history of falsification and concealment.

This case differed from the asbestos abatement cases in that the McWane companies were producing a product not offering a service. As such, the prosecutors did not focus on pipe sales contracts to establish wire or mail fraud. Instead, they applied the conspiracy statute to take the lid off of hellish working conditions that McWane's managers and executives took extreme measures to hide from OSHA. Specifically, in order to maximize productivity and profits at the plant, the defendants repeatedly violated OSHA regulations designed to ensure that industrial workers can perform their jobs without substantial risk of accident, and then covered up those violations so that regulators would not have reason to inspect the facility.

In addition to general testimony about lack of safety training, lack of personal protective equipment, having to work overtime if the next shift failed to appear, and having to repair and maintain dangerous equipment while it was in use, the prosecution called worker victims to testify about injuries they personally suffered and the lengths that defendants went to hide those injuries from OSHA. These injuries included a broken back (absence of fall protection equipment); loss of an eye and a crushed skull (safety shield between saw operator and blade had been by-passed); amputated fingers (cleaning a cement mixer – whose safety switch had been removed -- without first locking out/tagging out as required); broken leg (struck by untrained, uncertified forklift operator); and third-degree burns (directive not to seek medical treatment led to hospitalization and near death). The most serious accident introduced into evidence was the death of a worker hit by a forklift being operated with no brakes, no headlights, no horn, and no warning lights. Evidence was presented that drivers were taught to stop these brakeless forklifts by either shifting them to reverse or dropping the load. The forklifts were hidden from sight whenever safety regulators were present at the plant. The forklift involved in the fatality was repaired prior to being inspected by OSHA. *See*

*United States v. Maury, et al.*, 695 F.3d 227 (3rd Cir. 2012).

The conspiracy to defraud charge was critical to allowing the jury to see the full range of illegal activities pursued by company officials. Moreover, it allowed the prosecution address conduct that could not have been criminally prosecuted under the Occupational Safety and Health Act as none of the individual defendants were “employers” under the Act, and only one of the worker safety violations resulted in a death. Through charges for false statements and obstruction of justice, 18 U.S.C. §§ 1001, 1505, 1519), the prosecution emphasized the many lies to inspectors, misrepresentations and omissions on required injury logs, forcing workers to lie to regulators, altering accident scenes, and tampering with equipment.

Ultimately, plant manager Prisque was sentenced to serve 70 months; maintenance supervisor Maury was sentenced to serve 30 months; former human resources manager Faubert was sentenced to serve 41 months; and finishing superintendent Davidson received six months of incarceration. The company was sentenced to pay an \$8 million fine, and complete a four-year term of probation subject to oversight by a court-appointed monitor.

#### 8. *United States v. Martin Kimber*

Finally, a brief mention of an unusual case in which an individual not just knowingly, but intentionally, used dangerous hazardous waste to expose hospital workers and members of the public – not *his* workers, but those with whom he had come into contact and sought to punish.

Martin Kimber worked for nearly 36 years as a licensed pharmacist, trained in, among other things, how to research the dangerous interactions between various chemicals and substances on and the human body. After sustaining injuries to his arm in a non-work related event, Kimber drove 50 miles to seek treatment at the Albany Medical Center in Albany, New York, the area’s best hospital and only level-one trauma center. Upon receiving his bill, he wrote to express concern about having to pay for his medical care. He was dissatisfied with the lengthy and thorough response he received from the hospital.

On four separate instances thereafter, taking place over more than one-year, Kimber returned and secretly spread liquid mercury throughout the hospital, including where patients and medical staff were sure to be, including the Post-Operative Care Unit, in the Emergency Room, on bathroom sinks, and in an elevator lobby. His avowed purpose was to cause panic in the hospital and to ultimately shut the facility down. Dissatisfied with the results of his first three efforts, he returned and deposited more mercury in the hospital’s public cafeteria: in the salad bar salad, in the fruit bowl, inside a toaster, on the coffee station, in the cooler for the packaged salad dressing, in the ice cream freezer, and in the container of chicken tenders that were being warmed under heating lamps.

Mercury is a well-documented and particularly dangerous hazardous substance.

Among other things, in even very small quantities, it is a potentially fatal neurotoxin that kills human nerve cells and is readily absorbed through unbroken skin. Inhalation and other forms of absorption can cause death, brain, and lung damage, and numerous other serious bodily injuries. One of the hospital workers found mercury under a piece of chicken she had been consuming.

Ultimately, with the help of local TV stations and their viewers, Kimber was identified through surveillance camera footage placing mercury in the cafeteria. When apprehended, Kimber admitted understanding these dangers, and knowing well that the heating of mercury, including the placing of mercury on hot surfaces, greatly increased the likelihood that the substance would vaporize into the air and be inhaled by individuals consuming such food or using or standing near such heating devices.

A search warrant at Kimber's home uncovered more mercury, a large stash of guns, and Nazi and terrorist materials. Although Kimber was initially arrested on a complaint charging RCRA knowing endangerment, (and his conduct well-satisfied all elements of this offense), ultimately he pled guilty to a three-count information including two counts of Use of a Chemical Weapon (18 U.S.C. § 229), and one count of Consumer Product Tampering (18 U.S.C. § 1365). For his conduct Kimber was sentenced to 14 years in prison, ordered to forfeit his house and car (the places where he stored and transported the hazardous substances/chemical weapons), pay restitution to the Albany Medical Center of over \$200,000, and forfeit his computer (used to research obtaining more mercury and which contained child pornography).

Although Kimber had waived his right to appeal his guilt and any sentence over 120 months, he challenged his conviction and sentence nonetheless, claiming that his actions did not constitute offenses cognizable under the Chemical Weapons statute, and that sentencing enhancements did not apply. In a well-reasoned opinion, the Second Circuit found, among other things, that his conduct constituted "quintessential terrorism." *United States v. Kimber*, 777 F.3d 553 (2d Cir. 2015). Moreover, it upheld the top-of-the-guidelines sentence, and found applicable sentencing enhancements for Kimber's use of a special skill (U.S.S.G. § 3B1.3), and his selection of vulnerable victims (U.S.S.G. § 3A1.1(b)(1)).

## **VII. Conclusion**

The OSHA criminal statute is usually insufficient to obtain the general deterrence necessary to protect workers from knowing or intentional criminal misconduct by employers. Prosecutors have used a variety of federal statutes to address these shortcomings, including, in appropriate instances, RICO, money laundering, and fraud statutes that allow OSHA and state environmental violations to be presented to the jury. In the process, prosecutors have presented juries and presiding judges with the "full story" of the events that endangered or killed workers. By doing so, prosecutors have often succeeded in obtaining appropriately long sentences that are commensurate with the true nature of the crimes and the danger they caused to our nation's workforce. These sentences send a clear message to would-be offenders that the consequence of endangering lives is costly indeed.