



WOODS ROGERS LLC
ATTORNEYS AT LAW

Derivative Actions for Environmental Health and Safety Violations

By: Paul R. Thomson, Jr.

Environmental and Safety Issues Update

WOODS ROGERS PLC

If you were not concerned about the rumors of increased emphasis on enforcement of federal regulations, both civilly and criminally, here is a case that will cause most of us to pause and reflect.

Mercier v. Blankenship, ___ F. Supp. 2d ___, 2009 WL 3188234 (S.D. W.Va. 2009) was a shareholder's derivative action brought on behalf of Massey Energy Company (Massey) against members of its board and key executives alleging breach of fiduciary duty by operating the company in violation of health and safety regulations and environmental laws.

You may recall that Massey has had its share of safety and environmental issues including:

2000 – Marin County, Kentucky coal slurry release called by EPA the worst in the Southeast.

2001 to 2002 – a total of five other significant slurry spills

2002 - two subsidiaries plead guilty to 4100 Clean Water Act violations

2005 – October 10, Chairman Blankenship sends a memo to mine superintendents to “run coal” rather than perform other work to keep mines safe

2006 – Aracoma Mine fire kills two

2006 – 147 NPDES violations of the Clean Water Act, violations continue into 2007

2008 – Massey settles CWA violations with EPA for \$20,000,000

Based upon the above Mercier claimed (among other things) that Massey's board, Blankenship and other executives breached fiduciary duties to the company and shareholders by operating in violation of those laws thereby incurring huge fines and cleanup costs while at the same time bonusing themselves.

While the District Court ultimately dismissed the case it was not so much because of the theory of the case but because there had been two earlier shareholder derivative suits making similar allegations that had gone to notice and settlement in state courts in which plaintiff had not participated in the process established for objecting to the settlement.

The take away lesson here is twofold. Failure to obey environmental, health and safety laws can result in shareholder derivative actions and their settlements are expensive. At least as important, what is alleged in these suits can be a road map for EPA and OSHA criminal charges to be brought against both the company, the board and responsible executives down the road.

If you have concerns about compliance with environmental, health and safety issues please contact Paul Thomson at (540) 983-7742 or Dan Summerlin at (540) 983-7546.