



DABF – PRODUCT LIABILITY SEMINAR

Copenhagen February 2nd 2011

TOPICS

- Tort Reform in US – seen from a Insurer’s point of view
- ”Hell holes” – in the past and now
- Trends in US claims
- Punitive Damages
- Doing business in the US/consideration to make
- Differences in the market - from a Danish and US perspective
- Environmental Damages – what can Europe learn from US

Tort Reform in US – seen from a Insurer's point of view

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Tort Reform in US – seen from a Insurer’s point of view

Discussions started back in the 1980s as the litigations costs – damage and administrative - were increasing dramatically.

Tort law is the basis for the US Liability system, and have huge impact on the business in the US, including the insurance industry.

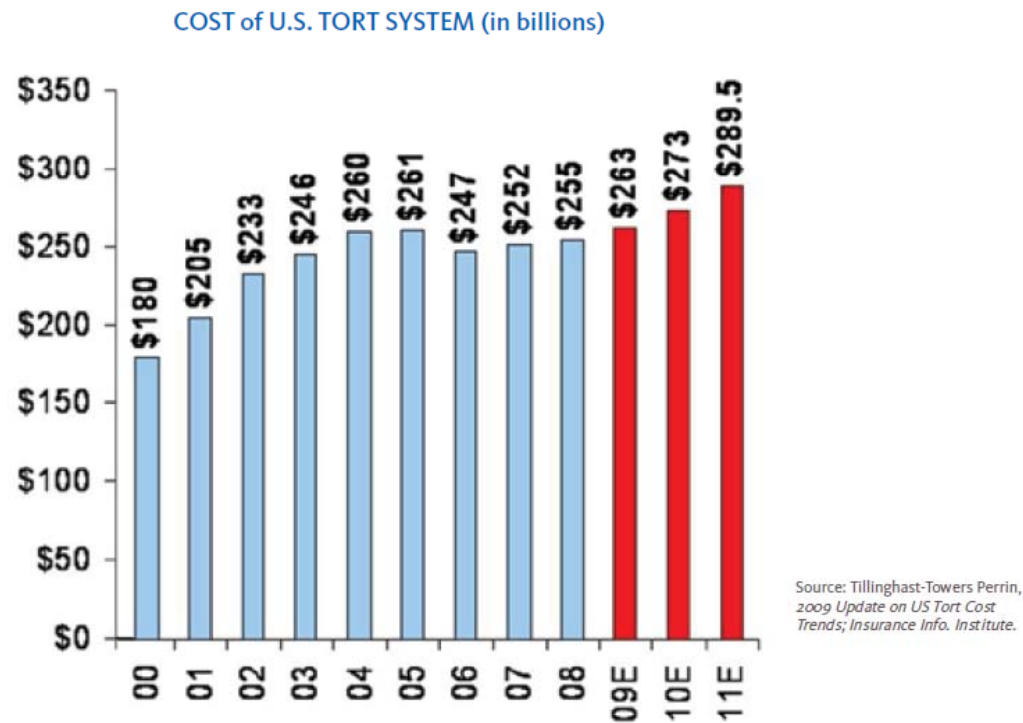
CAP on damages

- Several states have implemented caps
- American Bar Association have argued against cap on damages (stating being non-constitutional)
- States have – do to constitutional challenges – overturned the caps
- The overall impact on the US economy and the reputation

Tort Reform in US – seen from a Insurer’s point of view

Litigation costs

- Costs has increased over decades



Tort Reform in US – seen from a Insurer’s point of view

Litigation costs

- Economic impact on the US economy.

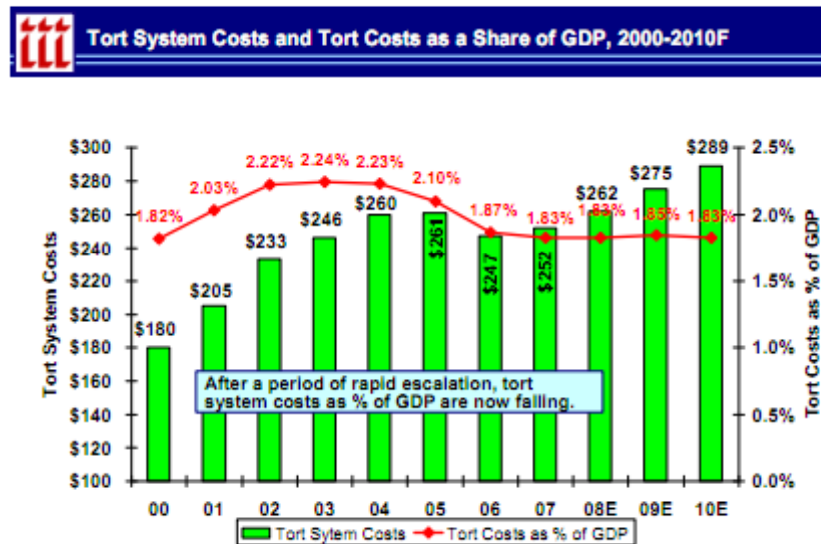


Fig. 4

Source: Tillinghast Towers-Perrin, 2008 Update on U.S. Tort Cost Trends

Tort Reform in US – seen from a Insurer’s point of view

How does this impact the Insurance Industry

- A more hostile legal environment may bring up prices
- Risk appetite may be reduced
- Terms and conditions may be less comprehensive
- May increase in self retention in general – Pharma industry have seen this trend many years ago
- Insurer may leave markets were the outlook for profit is small or non-existing
- The industry reputation may decline further – after a period were the industry have struggled



Tort Reform in US – seen from a Insurer’s point of view

How does this impact the customers

- Increase in costs for buying insurance protection
- Less capacity available ,which limits the competition and increase prices
- Increased costs related to higher retention
- Uncertainty and inconsistency
- Increase in own involvement in lawsuit – no insurance cover
- More lawyers on the pay role – HUGE increase in costs
- Reputational impact – why will none cover my company

Tort Reform in US – seen from a Insurer’s point of view

Future outlook

- Seen benefits from the struggle for Tort Reform
- Seems like the positive trend in 2004-2006 is now pushed in the opposite direction
- Both business in US and EU anticipate more legal disputes
- The credit crunch and subprime loan crisis have a negative impact – government involved in financial firms could lead to further litigation
- Increase in litigation relating to Employment practices liability - The whistleblower trend and compliance with Fair labor Standard act. Employees have won several litigation cases.
- Increase in gasoline prices have resulted in decrease in miles driven in the US and as a result fewer personal auto liability claims – is this permanent or will we see an increase again.
- The change in administration in the US
 - Change in the federal behavior and attitude towards commercial litigation?
 - Other debate that Democratic will not protect the commercial industry?
- Global warming – what impact do we see on litigation?

Hell Holes – now and in the past



Hell holes – now and in the past

American Tort reform Association publish every year a report of the worst jurisdictions for fair and equitable jurisprudence across the US.

Following will impact the

- Excessive verdicts
- Judges systematically apply laws and court procedures in an unfair and unbalanced manner
- Allowing consumer class actions
- High fee's for lawyers
- Decisions which differ dramatically from other jurisdictions

Generic report – you basically never know, but some keeps coming up.

Hell holes – now and in the past

Below the 2009/2010 & 2010/2011

- We will elaborate on why we focus on this – from a Insurance Industry perspective and why you should know about this.

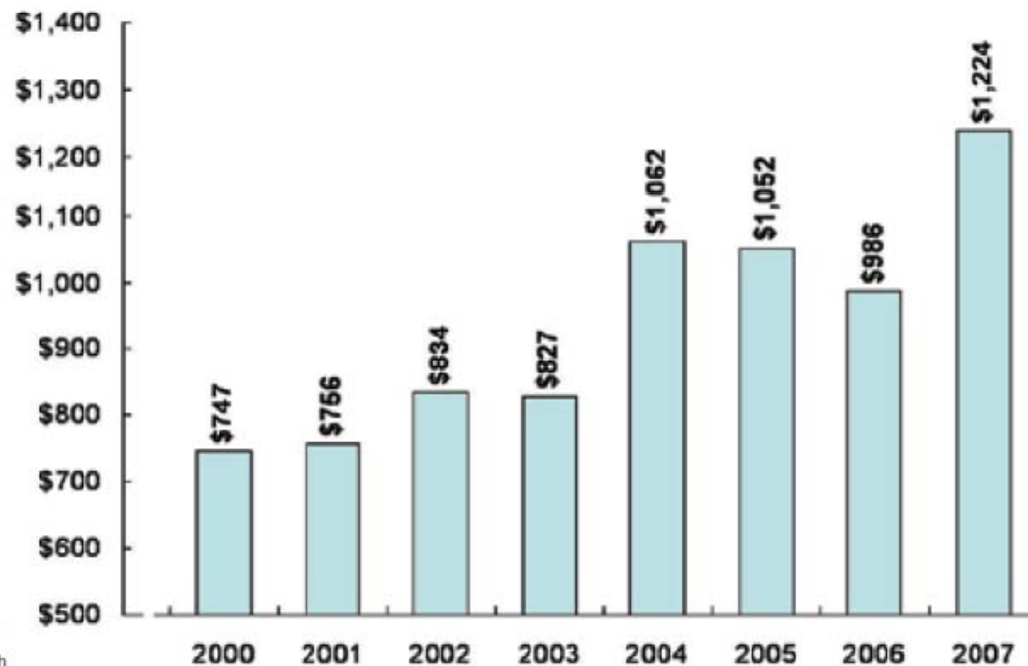


Trend in US Claims



Trend in US claims

Chartis has together with external law firm analyzed the trend in US claims – both from a frequency and severity perspective.



Source: Jury Verdict Research

Trend in US claims

Information is based on Jury Verdict Research (JVR) analysis of plaintiff and defense verdicts and settlement in personal injury claims.

There is consistency with the trend we see in the increase in cost of the Tort System.

Similar trend is seen when we look at our own excess claims book in Chartis.

Looking at the factors impacting the size of the claims – tort costs, jury awards and settlement and again our own experience, we see a movement from a flat or to some extent decreasing trend, and upward climb

Trend in US claims



Trend in US claims

Impacting factors;

- Financial industry's near meltdown – frequency/severity increase
- Implement new pro-plaintiff legislation
- Increased tort costs
- Single accumulative verdict increase
- Increased cost of resolving claims – legal costs
- New Avenues of Recovery – Public Nuisance Lawsuits

Trend in US claims

| 2009 Top Ten Verdicts: | | |
|------------------------|---|------------|
| \$370 Million | Defamation | California |
| \$330 Million | Personal Injury (Drunk Driving) | Florida |
| \$300 Million | Personal Injury (Tobacco) | Florida |
| \$89 Million | Personal Injury (Drunk Driving) | Missouri |
| \$79 Million | Personal Injury (Pharmaceutical) | New Jersey |
| \$77 Million | Personal Injury (Medical Malpractice) | New York |
| \$71 Million | Conversion and Breach of Fiduciary Duty | Texas |
| \$70 Million | Workers' Compensation | Texas |
| \$65 Million | Personal Injury (Auto) | Florida |
| \$60 Million | Personal Injury (Medical Malpractice) | New York |

Source Lawyers week

Trend in US claims

 **2008 Top Ten Verdicts**

| Value | Issue | State |
|---------------|---|--------------|
| \$388 Million | Fraud, Intentional Infliction of Emotional Distress | Nevada |
| \$316 Million | Breach of Contract | Georgia |
| \$188 Million | Defamation | New York |
| \$85 Million | Premises Liability | Pennsylvania |
| \$84 Million | Negligence, Personal Injury | Texas |
| \$66 Million | Breach of Fiduciary Duty | Oklahoma |
| \$60 Million | Insurance Bad Faith | Nevada |
| \$55 Million | Negligence | California |
| \$54 Million | Wrongful Death | Georgia |
| \$48 Million | Negligence | Indiana |

Fig. 9

Source: LawyersWeekly USA,
January 15, 2009

Punitive Damage

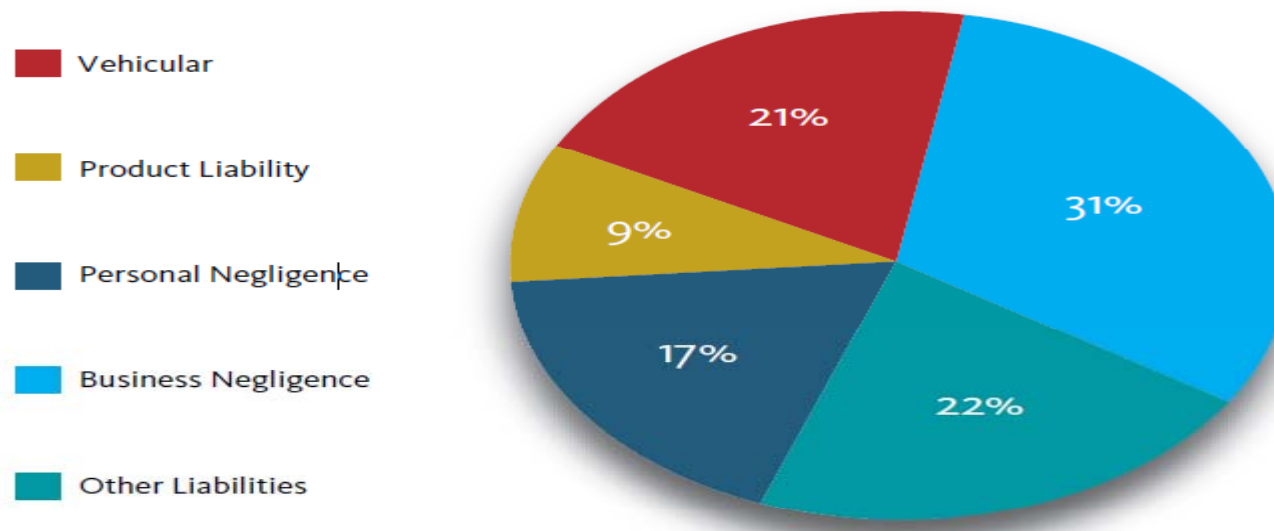
The background is a solid dark red color. It features several overlapping, semi-transparent circles of varying shades of red. Two white lines are drawn across the scene: a solid line that slopes upwards from the bottom center towards the right edge, and a dotted line that slopes downwards from the left edge towards the bottom right corner. The text 'Punitive Damage' is positioned in the upper left quadrant.

Punitive Damage

Punitive Damage awards are alleged and awarded in various cases.

- Perception has been that punitive damage was most frequently awarded to "deep pockets" – large co-operations.
- Reality is different – all defendants are exposed to punitive despite size.

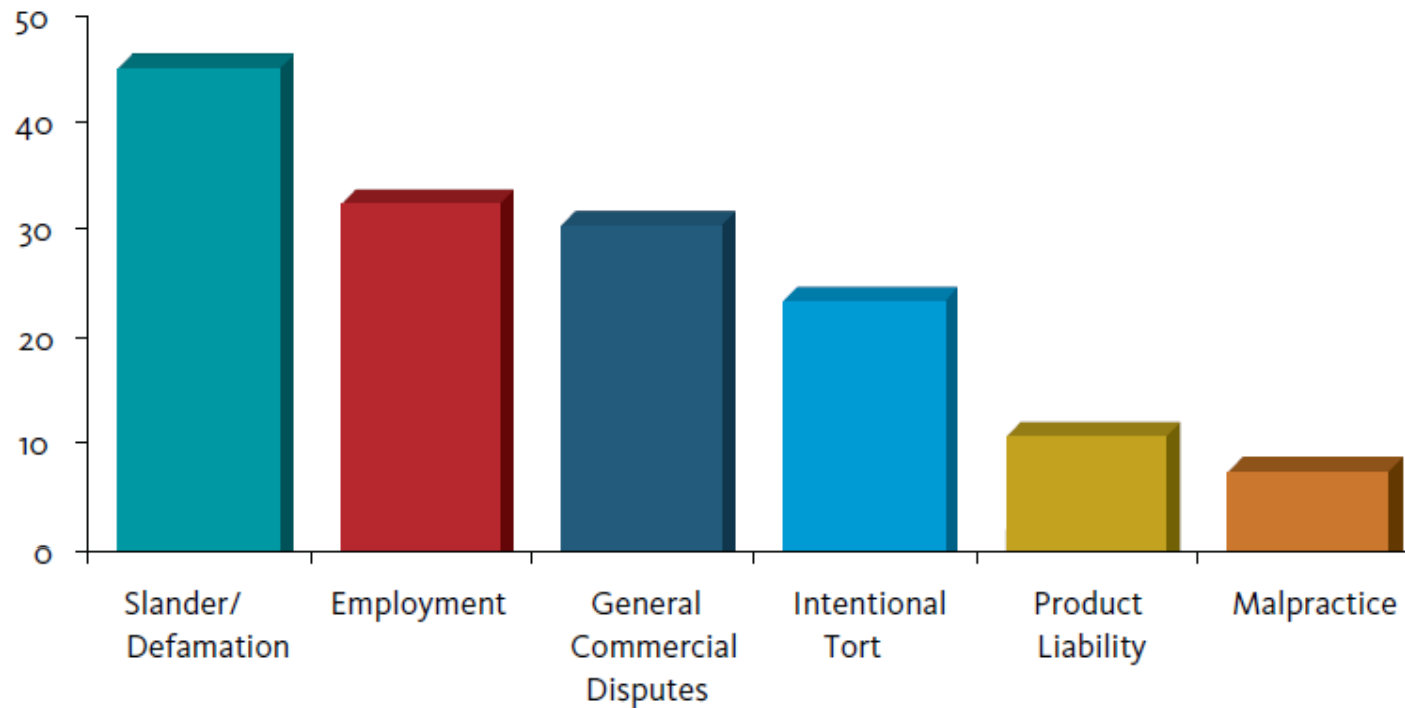
Percentage of Cases by Type Awarding Punitive Damages



Punitive damage

Cases where punitive damage is awarded

Percentage of Cases by Type Asserting Punitive Damages



Doing business in the US/
considerations to make

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Doing Business in the US/considerations to make

What do all this lead to?

Naturally be aware of the differences

- Federal vs. state – we are used to a system with one regulator
- Federal prevail, but local verdicts challenge the federal laws – several cases seen were local verdicts are in true contradiction to the Federal laws.
- Shall litigation climate be a part of the decision process when choosing location – why chose a hell hole county?
- The "common sense" we are used to does not apply?
- It's an industry it selves.....

Doing Business in the US/considerations to make

Do your home work

- Contract management
- Crisis response ready
- Consider the financial impact a huge litigation can have
- Consult with other companies – don't make the same mistakes
- Coverage vs. exposure
- Labeling
- Business to business vs. consumer
- Political impact

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Month Day, Year / Location

Experience from Nature Resource Damages (NRD) and Insurance Coverage Environmental Liability Directive

TOPICS

- What have we learned from Nature Resource Damages – US Equivalent

EU Environmental Liability Directive



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What have we learned from
Natural Resource Damages (NRD)
United States

NRD - Causes/Injuries

Natural Resource Damage

Damage is defined as injury to, destruction of, or loss of natural resources resulting from a release of hazardous substance or oil
[CERCLA § § 101(6); 107(a)(4)(C); OPA § § 1001(5); 1002(b)(2)]

Oil spill or chemical release to a waterway

PCB releases to waterways from power generators

Thermal pollution to waterways

Mine runoff (acid/metals/sediment)

Wastewater treatment plant discharges

Pulp and paper wastewater releases

Woodwaste in waterways

Sediment contamination

Loss of wetlands habitat from overpumping groundwater

Sudden vs. Gradual NRD

Sudden (e.g. oil spill)

Gradual = long term incremental releases, often PBTs (e.g. heavy metal accumulation in shipyard sediments)

Persistent Bioaccumulative Toxins (PBT):

heavy metals, organo-metals (e.g. tributyl tin)

polychlorinated biphenyls (PCBs)

polycyclic aromatic hydrocarbons (PAHs)

dioxin & furans

phthalates

herbicides / pesticides

phenols

creosote, coal tar

Other emerging contaminants (e.g. PBDEs)

Natural Resources

Land

Fish

Wildlife

Biota

Water

Groundwater

Drinking Water supplies

Air

Other such resources

held in the public trust

The responsibility for protection of natural resources falls to “**Trustees**” (Federal, State and Tribal).



Photo: State of Nevada Department of Conservation and Natural Resources, Boards & Commissions, <http://www.dcnr.nv.gov/board/board.htm>

NRD Liability Limitations

Liability limitations under CERCLA:

No NRD liability...

- When release and injury occurred "wholly before" Dec. 11, 1980 (re-releases?)
- For federally-permitted releases
- Liability capped at \$50 M "for each release" unless the release resulted from willful misconduct or willful negligence or from a violation of federal safety or operating standards (multiple releases?)

BEWARE OF LEGAL LOOPHOLES!

NRD Claims

Locations of Natural Resource Damage Assessment Activities



Warning Signs

- ✓ Nearby habitat for endangered or threatened species, fish, fowl or other wildlife?
- ✓ Nearby parks, public lands, wildlife refuges, wetlands or tribal lands?
- ✓ Nearby water bodies or aquifers?
- ✓ Conveyance or bulk storage of oil or hazardous substances (pipelines, tanks)?
- ✓ Pathway for oil or hazardous substances to reach receptors?
- ✓ Mining or other extraction activity?
- ✓ Known pollution conditions?
- ✓ Sediments impacted?
- ✓ Historical Discharges of Persistent Biological Toxins (PBTs)?
- ✓ On-site WWTP or wastewater discharges to surface water?
- ✓ Is a trustee requesting information?
- ✓ State or regional NRD climate?
- ✓ Public complaints, lawsuits, NRD claims, or nearby NRD issues?

What Have We Learned?

- Two categories of NRD risk: sudden vs. gradual.
- NRD is like a second phase of environmental protection (1st phase = cleanup, 2nd phase = NRD restoration)
- NRD risk not 'black and white' (especially long term)
- NRD liability VERY difficult to quantify
 Research State NRD Climate (Groundwater)
 Many Similarities to ELD (Environmental Liability Directive).



Photo: National Oceanic and Atmospheric Administration, Pearl Harbor, HI restoration project

EU Environmental Liability Directive

The background of the slide is a solid blue color. In the center, there is a faint, light blue outline of the map of Europe. Overlaid on this are several abstract geometric shapes in various shades of blue, including triangles and polygons. Two white lines are drawn across the slide: a solid line that starts near the bottom center and extends towards the top right, and a dotted line that starts near the middle left and extends towards the bottom right. The text 'EU Environmental Liability Directive' is written in white, sans-serif font in the upper left quadrant.

EU Environmental Liability Directive

Directive 2004/35/EF – Implemented April 30, 2007 –

EU framework based on the polluter-pays principle on the prevention and remedying of certain types of environmental damage (protected species and natural habitats, soil and water).

Framework Directive leaving wide margin of discretion to Member States on certain important issues (permit and development risk defences, financial security, joint and several or proportional liability).

Minimum rules.



No retrospective effect.

ELD (II)

Focus on ‘restoration in kind’ (restore, rehabilitate or replace damaged natural resources and/or impaired services, or to provide an equivalent alternative to those resources or services – see Annex II).

Breaking new ground in Europe on certain difficult technical issues as to how to ensure restoration in kind of damaged natural resources (e.g. ‘interim losses’).

Financial security providers (such as insurers), encouraged to develop over time appropriate and affordable products covering environmental liability risks.



Unlimited liability subject to proportionality principle.

ELD – Annex III

Annex III: activities subject to strict liability, such as:

IPPC installations

Waste management

Waste shipments

Releases of polluting substances

Manufacture, use, storage, processing, filling, release into the environment and onsite transport of:

Dangerous substances & preparations;

Plant protection products & biocides.

Contained use and deliberate release of GMOs.



ELD – Scope (Art. 3 & 4)

a) Environmental damage/imminent threat when caused by Annex III activities;

b) Damage to protected species and natural habitats/imminent threat when caused by non-Annex III activities if operator at fault or negligent.

Without prejudice to more stringent EU legislation.

Note: Danish legislation has strict liability for all business activities.

Does not give private parties a right of monetary compensation.



ELD – Financial security (Art. 14) & Transboundary damage (Art. 15)

Financial security:

- Member States to encourage the development of financial security instruments and markets.
- Commission report (30 April 2010)- if appropriate proposals for harmonised mandatory financial security.

Cooperation between Member States:

- Where damage affects or likely to affect several Member States, duty on those to cooperate to ensure preventive action and/or remedial action is taken.
- Duty to provide sufficient information to the other Member States.
- Member States affected may recommend preventive/ remedial measures & seek to recover costs incurred.



ELD – Annex II

Common framework to be followed in order to choose the most appropriate measures to ensure the remedying of environmental damage.

Remediation of damage to water or protected species or natural habitats: achieved through the restoration of the environment to its baseline condition by way of primary, complementary and compensatory remediation.

Remediation of land damage: remove significant human health risks.

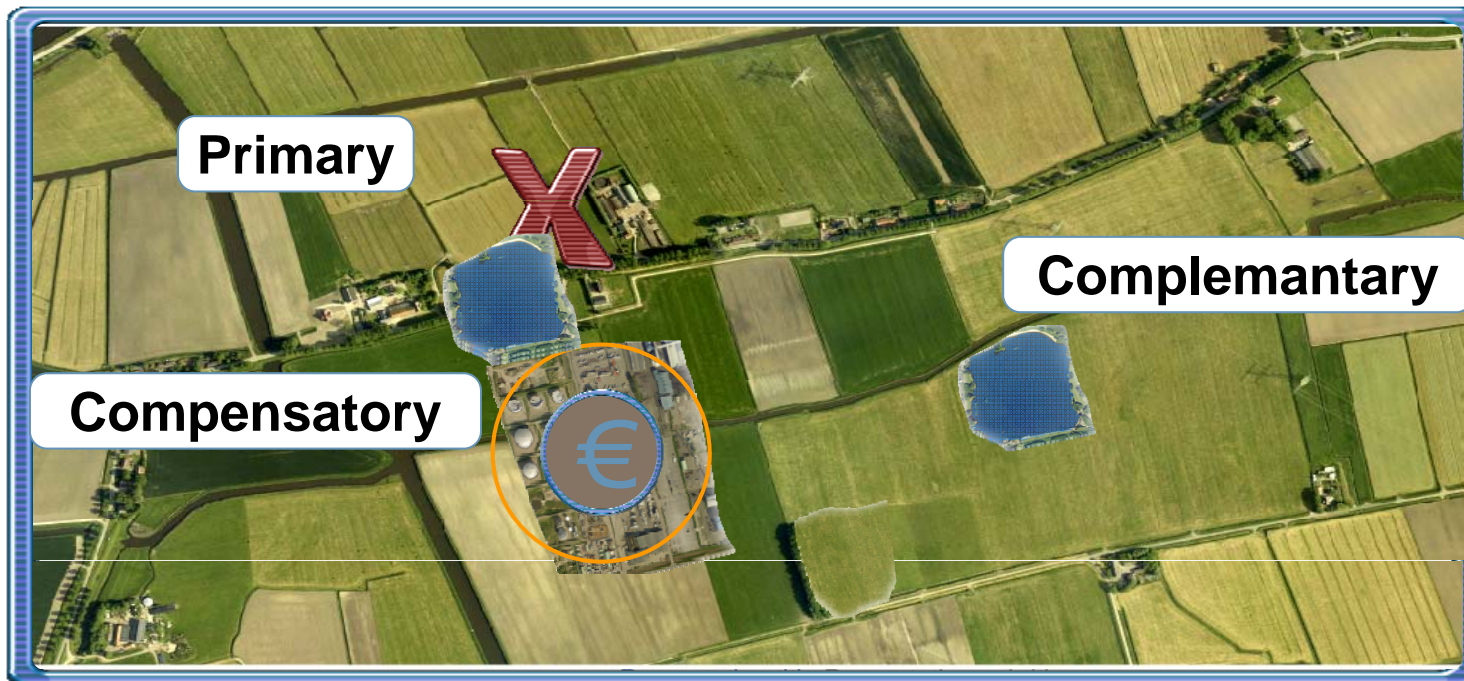
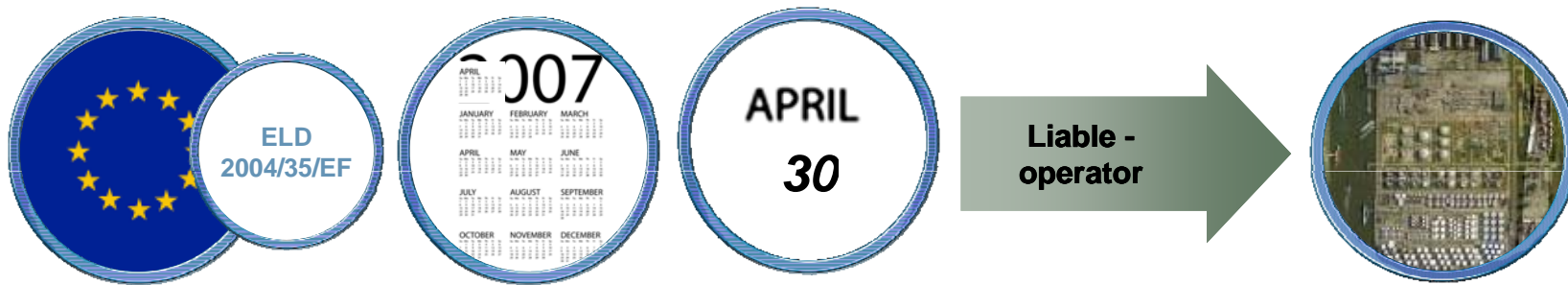


ELD – Annex II

- “Primary” remediation: any remedial measure which returns the damaged natural resources and/or impaired services to, or towards, baseline condition.
- “Complementary” remediation: any remedial measure taken in relation to natural resources and/or services to compensate for the fact that primary remediation does not result in fully restoring the damaged natural resources and/or services.
- “Compensatory” remediation: any action taken to compensate for interim losses of natural resources and/or services that occur from the date of damage occurring until primary remediation has achieved its full effect.



ELD - 2004/35/EF



Natural Resource Damages vs. Environmental Liability Damage

NRD

Primary Restoration

Cost of restoring injured resources to their baseline condition

Compensatory Restoration

Compensation for the interim loss of injured resources pending recovery

Damage Assessment Costs

ELD

Primary Remediation

Complementary Remediation

compensation for the fact that primary remediation is not practical (could be construction of an alternative woodland resource in the event the existing resource cannot be effectively restored)

Compensatory Remediation