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ENVIRONMENTAL LAW & LITIGATION

CERCLA ARRANGER-LIABILITY EXCEPTION EXPANDED

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On March 28, the U.S. District Court for the Eastern District of New York interpreted "arranger" liability under the Comprehensive Environmental Response, Compensation and Liability Act § 107(a)(3), 42 U.S.C. § 9607(a)(3) ("CERCLA"), to require knowledge that the disposed or treated substances are hazardous.[1]

CERCLA Arranger Liability

CERCLA § 107(a)(3) defines potentially responsible parties to include "any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person." As we discussed previously, the touchstone arranger-liability case is the *Burlington Northern* and *Santa Fe Railway Co. v. United States* opinion issued by the Supreme Court of the United States in 2009.[2] *Burlington Northern* identified two extremes demonstrating the obvious existence and absence of arranger liability.[3] For any circumstances that "fall between these two extremes," however, "the determination whether an entity is an arranger requires a fact-intensive inquiry that looks beyond the parties' characterization of the transaction as a 'disposal' or a 'sale' and seeks to discern whether the arrangement was one Congress intended to fall within the scope of CERCLA's strict-liability provisions."[4]

In deciding what types of arrangements fall into this in-between category, the Supreme Court concluded that CERCLA arranger liability implicitly creates an exception to the statute's strict liability provisions.[5] More specifically, the Court held that because "the word 'arrange' implies action directed to a specific purpose," "an entity may qualify as an arranger under § 9607(a)(3) when it takes intentional steps to dispose of a hazardous substance."[6]

Case Background

In April 2014, the Suffolk County District Attorney's Office launched an investigation into the dumping of construction and demolition debris and illegal fill at the Roberto Clemente Park ("the Park") and other locations in Suffolk County in 2013 and 2014. Analysis of soil samples taken from the Park revealed the presence of hazardous substances. Based on these investigations, The Town of Islip sued numerous defendants. Its complaint included a claim under CERCLA.

Defendants IEV Trucking Corp. and COD Services Corp. (collectively, the "Arranger Defendants") allegedly acted as brokers by arranging for other defendants to collect fill material from various locations and dispose of the materials at the subject locations. The Arranger Defendants moved to dismiss the complaint. The district court concluded "that, for CERCLA 'arranger' liability to apply, the complaint must allege that the arranger knew, or should have known, that the material in question was hazardous."[7]

Analysis

In their motion to dismiss, the Arranger Defendants contended that a plaintiff must establish that the arranger knew (1) that the material was meant for disposal (as opposed to, for example, a sale of useful product); (2) where the material was to be deposited; and (3) that the material was hazardous. In contrast, the plaintiff argued that it need only allege that the Arranger Defendants intended to arrange for disposal of the subject materials. Both parties essentially agreed on – and the district court did not address – the first element. Turning to the second element – and relying on decisions from the U.S. Courts of Appeals for the Second, Sixth, Eighth, and Eleventh Circuits – the district court disagreed with the Arranger Defendants and found "that a defendant may still be held liable as an arranger even if it has 'no intent to have the waste disposed in a particular manner or at a particular site.'"[8]

Relying on two decisions, *Appleton Papers Inc. v. George A. Whiting Paper Co.*[9] and *Burlington Northern*, the district court addressed the third element and held that to survive a motion to dismiss, the plaintiff must allege that the defendant knew or should have known that the materials being disposed of were hazardous. This reliance is somewhat misplaced, however, in that those cases focused primarily on the nature of the transaction (sale v. disposal), and not on the nature of the waste.[10]

The district court found support for its interpretation in language from *Burlington Northern* suggesting

an arranger must know that the subject material was hazardous. Recall that the Supreme Court held in *Burlington Northern* that because "the word 'arrange' implies action directed to a specific purpose," "an entity may qualify as an arranger under § 9607(a)(3) when it takes intentional steps to dispose of a hazardous substance."[11] Here, the district court interpreted the intentionality of the *Burlington Northern* decision to apply to both the nature of the transaction and the hazardousness of the waste. Accordingly, "just as the term 'arrange' implies a specific intent to dispose of the substance..., so too does it imply knowledge that the substance is hazardous."[12]

The district court then provided some guidance for the types of facts needed to demonstrate knowledge or the inference of knowledge of the subject material's hazardous nature. Examples included allegations that the price paid for the disposal of the material was so unusually low as to suggest wrongdoing or that the generators had a history of environmental contamination of which the would-be arrangers were aware.

The *Town of Islip* decision constitutes a potentially significant expansion of the defense to arranger liability that *Burlington Northern* created. *Burlington Northern* requires a fact-specific inquiry into the nature of the transaction that results in the disposal to determine the existence of arranger liability. The *Town of Islip* decision expands that inquiry into the nature of the waste.

A number of possibly unintended consequences flow from this decision. First, historically CERCLA has been interpreted to apply retroactively.[13] As a result, courts have found CERCLA liability based on disposal activities that long predate the enactment of CERCLA. However, the term "hazardous substances" is a creature of CERCLA. Prior to its enactment in 1980, there was no such thing as a CERCLA hazardous substance, and there could be no knowledge that an arrangement for disposal involved a CERCLA hazardous substance. The *Town of Islip* holding, thus, effectively negates CERCLA's retroactive application to arrangers.

Moreover, the *Town of Islip* decision did not address what duty, if any, a potential arranger has to learn about the characteristics of the materials to be disposed or treated. Accordingly, to the extent that knowledge of the hazardous nature of the materials is an element of arranger liability, the decision discourages would-be arrangers from sampling materials before disposal to determine whether they contain hazardous substances.

In both respects, the decision represents a significant departure from traditional CERCLA jurisprudence.

contacts

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[1] *Town of Islip v. Datre*, No. 16-CV-2156, 2017 WL 1157188, at *1 (E.D.N.Y. Mar. 28, 2017). A copy of the slip opinion is available here.

[2] 556 U.S. 599, 611 (2009).

[3] *Id.* at 609-10. ("It is plain from the language of the statute that CERCLA [arranger] liability would attach . . . if an entity were to enter into a transaction for the sole purpose of discarding a used and no longer useful hazardous substance. It is similarly clear that an entity could not be held liable as an arranger merely for selling a new and useful product if the purchaser of that product later, and unbeknownst to the seller, disposed of the product in a way that led to contamination.")

[4] *Id.* at 610.

[5] *Id.* at 611.

[6] *Id.*

[7] *Town of Islip*, 2017 WL 1157188, at *2.

[8] *Id.* at *17 (quoting *United States v. Cello-Foil Prod., Inc.*, 100 F.3d 1227, 1232 (6th Cir. 1996)).

[9] No. 08-C-16, 2012 WL 2704920, at *11 (E.D. Wis. July 3, 2012), *aff'd sub nom. NCR Corp. v. George A. Whiting Paper Co.*, 768 F.3d 682 (7th Cir. 2014).

[10] *See Burlington Northern*, 556 U.S. at 602–03 (regarding the defendant's sale of products contaminated with hazardous substances to a distributor); *Appleton Papers*, 2012 WL 2704920, at *1 (concerning the recycling of "broke," which refers to the trim, cuttings, and waste created during the process of making or coating paper). The *Appleton Papers* decision did, however, indicate that it was "doubtful" that one could be found liable as an arranger absent knowledge that the substance in question was hazardous. *Appleton Papers*, 2012 WL 2704920, at *11.

[11] *Burlington Northern*, 556 U.S. at 611.

[12] *Town of Islip*, 2017 WL 1157188, at *20.

[13] *See, e.g., United States v. Ne. Pharm. & Chem. Co.*, 810 F.2d 726, 732–33 (8th Cir. 1986).