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ENVIRONMENTAL LAW & LITIGATION

FOURTH CIRCUIT ADDRESSES CERCLA ARRANGER LIABILITY

By: James Stewart, Esq. and Nikki Adame Winningham, Esq.

In March 2015, the United States Court of Appeals for the Fourth Circuit evaluated arranger liability under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601-75. In its *Consolidation Coal Co. v. Georgia Power Co.* opinion, the Fourth Circuit applied the holding of the Supreme Court of the United States in *Burlington Northern and Santa Fe Railway Co. v. U.S.*[1] and the useful product doctrine to find that the seller of used transformers to a facility that released hazardous substances into the environment while repairing those transformers was not subject to arranger liability under CERCLA.

CERCLA Section 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," i.e., "arrangers."[2] Before *Burlington Northern*, the Courts of Appeals agreed that the arranger liability determination was a fact-sensitive inquiry and that courts must look beyond the defendant's characterization of the transaction at issue in order to determine whether it involves an arrangement for the disposal or treatment of a hazardous substance. The courts did not agree on which factors to include in the analysis. Additionally, some courts applied the useful product defense to arranger liability. This defense prevents a seller of a useful product from being subject to arranger liability even when the product itself is or contains a hazardous substance that will require future disposal.

In 2009, the Supreme Court held in *Burlington Northern* that an arranger under CERCLA must take intentional steps to dispose of a hazardous substance. The Court confirmed that this liability determination requires a fact-intensive and case-specific inquiry. To establish intent to dispose, more is required than mere knowledge that a product will be leaked, spilled, dumped, or otherwise discarded, particularly when the disposal occurs as a peripheral result of the legitimate sale of an unused, useful product. The Court also acknowledged the useful product defense, but left open the question of how to determine whether a transaction involves an intent to dispose of a hazardous substance or an arrangement for something other than disposal.

Recently, the Fourth Circuit in *Consolidation Coal Co.* addressed whether a recycling transaction was an arrangement for disposal. Georgia Power Company sold its used, "scrap" transformers to Ward Transformer Company. The transformers contained insulating oil, which contained polychlorinated biphenyls ("PCBs"). Ward repaired and rebuilt these and other transformers at its facility in North Carolina for resale to third-party customers per their individual specifications. In 2003, the U.S. Environmental Protection Agency determined that the PCB contamination at Ward's North Carolina facility required remediation and added the facility to the National Priority List.

To determine whether Georgia Power intended to dispose of its transformers when it sold them to Ward, the Fourth Circuit relied on four factors outlined in its pre-*Burlington Northern* opinion in P*neumo Abex Corp. v. High Point, Thomasville and Denton R.R. Co.*[3] The *Pneumo Abex* factors are: 1) "the intent of the parties to the contract as to whether the materials were to be reused entirely or reclaimed and then reused," 2) "the value of the materials sold," 3) "the usefulness of the materials in the condition in which they were sold," and 4) "the state of the product at the time of transferal (was the hazardous material contained or leaking/loose)."[4] Applying these factors, the majority determined that Georgia Power sold useful products to Ward. The court relied on Georgia Power's proof that Ward sold the repaired or rebuilt transformers for a profit and that Georgia Power had no knowledge of Ward's production processes or the resulting releases of PCBs to the environment. Accordingly, Georgia Power's transactions with Ward did not constitute arrangements for disposal under CERCLA.

Judge James A. Wynn, Jr., however, filed a dissent that focused largely on whether it was appropriate to rule on the intent of the transaction between Georgia Power and Ward on Georgia Power's motion for summary judgment. Reviewing the evidence in the light most favorable to the non-moving party as required for summary judgment, Judge Wynn determined that a reasonable factfinder could infer that at least one purpose of Georgia Power's transaction was to dispose of its transformers and that consideration of the arranger liability issue should have been reserved for the factfinder. Indeed, "issues regarding parties' intent … 'present interpretive issues traditionally understood to be [reserved] for the trier of fact.'"[5]

With the Fourth Circuit's *Consolidation Coal Co.* opinion, six circuits have now addressed arranger liability since the Court issued *Burlington Northern*.

- In *United States v. GE*, the First Circuit determined that GE was liable as an arranger under CERCLA for its sale of "scrap Pyranol," GE's trade name for transformer fluid containing PCBs.[6] The First Circuit explained that instead of being "a legitimate new and useful product, the record . . . contain[ed] ample evidence that GE viewed scrap Pyranol as waste material and that any profit it derived from selling scrap Pyranol . . . was subordinate and incidental to the immediate benefit of being rid of an overstock of unusable chemicals."[7]

- In *DVL, Inc. v. Niagara Mohawk Power Corp.*, the Second Circuit held that the plaintiff failed to offer sufficient evidence that defendants disposed or arranged for disposal of PCBs.[8] For example, the plaintiff offered circumstantial evidence regarding the defendant's activities at an unrelated facility that was also contaminated with PCBs. Additionally, evidence of the presence at the DVL site of electric capacitors and transformers – potential sources of PCBs – did not identify the source of that equipment.

- The Fifth Circuit held, in *Celanese Corp. v. Martin K. Eby Const. Co.*,[9] that the defendant had no intent to damage a pipeline that leaked hazardous substances and "conscious disregard" of a duty to investigate does not constitute intent to dispose.

- In *NCR Corp. v. George A. Whiting Paper Co.*,[10] the Seventh Circuit held that NCR was not liable as an arranger because even sales of useful, but not new, products "can still qualify, particularly when they are for more than token amounts and take place on a competitive market."[11] "And unlike the products in both *Burlington Northern* and *General Electric*, the 'product' at issue . . . was not the harmful chemicals themselves, but a useful input that also contained the hazardous material. Purchasing this product was essential to the recycling mills' [i.e., plaintiffs'] business operations, and they must take the bitter with the sweet of operating in that market."[12]

- Finally, in *Team Enterprises, LLC v. Western Investment Real Estate Trust*,[13] the Ninth Circuit applied *Burlington Northern* and explained that "[t]he useful product doctrine serves as a convenient proxy for the intent element [of arranger liability] because of the general presumption that persons selling useful products do so for legitimate business purposes."[14] The court also noted that "control is a crucial element of the determination of whether a party is an arranger under" CERCLA.[15]

There are two conclusions that can be drawn from comparison of these cases. First, the useful product doctrine may be applicable not only to sales of new products, but also to transactions involving recycling or refurbishment of used products. Second, arranger liability will continue to be a fact-sensitive inquiry.

To view related appeal, click **here**.

contacts

If you have any questions about CERCLA arranger liability or any other CERCLA issues, please contact any of the attorneys named below.

James Stewart, Esq.
973 597 2522
jstewart@lowenstein.com

Nikki Adame Winningham, Esq.
973 597 2534
nadame@lowenstein.com

1 556 U.S. 599, 611 (2009).
2 42 U.S.C. § 9607(a)(4).
3 142 F.3d 769, 775 (4th Cir. 1998).
4 *Id.*
5 *Id.* (quoting *Charbonnages de France v. Smith*, 597 F.2d 406, 415 (4th Cir.1979)).
6 670 F.3d 377 (1st Cir. 2012).
7 *Id.* at 380.
8 490 F. App'x 378, 382-83 (2d Cir. 2012).
9 620 F.3d 529, 533 (5th Cir. 2010).
10 768 F.3d 682, 707 (7th Cir. 2014), reh'g denied (Nov. 5, 2014).
11 *Id.*
12 *Id.*
13 647 F.3d 901, 909 (9th Cir. 2011).
14 *Id.* at 908.
15 *Id.* at 910 (internal citations omitted).