R E P O R T E R

VOLUME 33 — *TOXIC TORTS/ ENVIRONMENTAL LAW* — JULY 2005

ILLINOIS

Actions Pursuant to CERCLA and RCRA Brought Against City of Chicago

Plaintiff, T & B Limited, Inc., owned a parcel of real property in Chicago Illinois. Plaintiff leased the property to Defendant, City of Chicago, pursuant to a commercial lease agreement. The City leased the property to use as an auto impound lot. Plaintiff brought an action against Defendant alleging violations pursuant to the Comprehensive Environmental Response Compensation and Liability Act (CERCLA) and the Resource Conservation and Recovery Act (RCRA). Defendant filed a motion to dismiss.

Plaintiff alleged that Defendant used the property for the demolition of automobiles. Environmental tests performed on the property revealed elevated levels of bezo-anthracene, benzo-fluouranthene, benzo-pyrene, dibenzo-anthracene, arsenic, lead and carbazole. Plaintiff alleged that these chemicals were associated with the disassembly and crushing of automobiles.

Count I of Plaintiff's complaint pled a cause of action pursuant to RCRA. However, corresponding state law preempts this chapter of RCRA. Specifically, this chapter of the RCRA allows each state to promulgate its own program. If a state program receives EPA authorization, its standards supersede the federal regulations. Illinois has such an EPA approved program.

Therefore, as Plaintiff failed to plead a cause of action as required under this chapter of RCRA, count I was dismissed. Plaintiff pled further counts pursuant to a different chapter of RCRA. Pursuant to this chapter, Plaintiff pled first that certain chemicals were released during Defendant's activities. Second, Plaintiff pled that Defendant's use of the property contributed to the contamination of the property. Third, Plaintiff pled that as a result of this contamination, there was an imminent and substantial endangerment to the health and environment by polluting or threatening to pollute the soil and water around the property. The court found that Plaintiff established standing and adequately pled all of the elements of the RCRA claim pursuant to this chapter.

Plaintiff next pled a cause of action pursuant to CERCLA. To establish a cause of action under CERCLA, Plaintiff must allege that: 1) Defendant is a covered person under the code; 2) there is a release or threatened release of a hazardous substance from a facility as defined by the statute; 3) the release caused Plaintiff to incur response costs and; 4) Plaintiff did not pollute the site.

Although Defendant disputed the response costs claimed by Plaintiff and further denied that Defendant was responsible for the release of any hazardous substance, the court found that Plaintiff's allegations sufficiently stated a cause of action. Defendant's motion to dismiss was granted as it related to count I and denied as to all other counts. *T & B Limited, Inc. v. City of Chicago*, 2005 WL 1172898 (N.D. IL May 13, 2005).

Cost Recovery and Contribution Sought Pursuant to CERCLA

Plaintiff, Water Reclamation District of Greater Chicago, was a property owner who entered into a long-term lease with Defendant, Lake River Corporation. Defendant operated the property as an industrial chemical storage, mixing and packaging facility. Plaintiff filed action pursuant to the Comprehensive Environmental Response Compensation and Liability Act (Act), alleging that during the term of the lease, chemicals were spilled and/or released into the property's soil and ground water.

Plaintiff voluntarily undertook cleanup efforts on the site and incurred costs of approximately $1.8 million for such clean up efforts. Defendant filed a motion to dismiss, arguing that Plaintiff was not entitled to reimbursement for clean up costs that were completed pursuant to voluntary efforts. Plaintiff could only seek costs pursuant to a contribution action for those costs by another potentially responsible party (PRP) or a governmental body.

The court held that the Seventh Circuit has only allowed a claim for one who voluntarily undertook cleanup efforts when an exception was satisfied. The exception, known as the innocent landowner exception, is available to a landowner seeking direct recovery for an injury to its property to which the landowner did not contribute and for which the landowner had no liability. Parties who have qualified for the innocent landowner exception fall into two categories: those who have unknowingly acquired a contaminated property and those whose property was contaminated by a third party's surreptitious dumping.

In order for a plaintiff to invoke the innocent landowner exception, the party must show that: 1) the defendant is a covered person under the Act; 2) there is a release or a threatened release of a hazardous substance from a facility as defined by the Act; 3) the release caused the plaintiff to incur response costs; and 4) the plaintiff did not pollute the site in any way. In the case at bar, the court held that Plaintiff had knowledge of Defendant's intention to keep and process chemical materials on the property pursuant to the long term lease. As such, Plaintiff could not satisfy the fourth prong of the exception and was therefore not able to seek contribution pursuant to the Act. *Metropolitan Water Reclamation District of Greater Chicago v. Lake River Corp.*, 365 F.Supp.2d 913 (N.D. IL 2005).

Quarry Owners Challenge Permit Fees on Holders of NPDES Permits

Plaintiffs, quarry owner Valstad Quarry, Inc. and 40 other owners and operators of Illinois quarries, brought an action against Defendants, the Environmental Protection

Agency (EPA), the EPA Director and the state treasurer, challenging the provision of the Illinois Environmental Protection Act (the Act), that imposed permit fees on holders of National Pollutant Discharge Elimination System (NPDES) permits and the bill that adopted the provision. Defendants prevailed on a motion to dismiss and Plaintiffs appealed.

On July 1, 2003, the General Assembly enacted Public Act 93-32. P.A. 93-32, in part, added to the Act and required the Act to collect annual fees from certain holders of NPDES permits. A request was issued to all permit holders asking that they pay fees under the newly added section of P.A. 93-32. Plaintiffs paid the fees under protest. Subsequently, Plaintiffs filed a cause of action alleging that the newly added section violated various sections of the Illinois Constitution, the Clean Water Act and the United States Constitution. Defendants filed a motion to dismiss.

Plaintiffs argued that Defendants' motion to dismiss was legally deficient. Specifically, Plaintiffs argued that Defendants' motion improperly asserted that no similar permit program existed to control non-point-source pollution and of the 40 states authorized by the U.S. EPA to issue NPDES permits, Illinois was the last one to impose permit fees. In contrast, the court held that the assertions summarized two aspects of the law related to Plaintiffs' claims and that the trial court may take judicial notice of law promulgated by other states and the federal government. Thus, the court ruled that Defendants inclusion of these assertions was appropriate.

Plaintiffs argued that there was no real and substantial difference between aggregate mines, which constituted point sources of pollutants, and entities that constituted non-point-sources of pollutants. Defendants argued that point sources of pollutants are required by the Clean Water Act to obtain NPDES permits, whereas non-point-sources of pollutants are not required to hold such permits.

The court found that a real and substantial difference existed between point sources of pollutants and non-point-sources of pollutants, which was reasonably related to the legislative purpose. Specifically, the court upheld that that the uniformity clause did not mandate that Illinois establish the administrative systems necessary to both identify all non-point sources of pollutants and impose a fee on those newly identified entities that are comparable to fees imposed on point sources of pollutants.

Plaintiffs claimed that there was no valid justification for the tax classification that treated persons differently based solely upon whether they were required by law to have an NPDES permit and federal law does not require the imposition of fees on NPDES permit holders. However, the court found that a real and substantial difference exists between point sources of pollutants and non-point-sources. A valid justification exists for differentiating between those entities that require the use of state administrative processes and resources to issue NPDES permits and maintain the NPDES program and those entities that do not. The mere fact that federal law does not require Illinois to impose fees on NPDES permit holders does not preclude the state from doing so.

Plaintiffs argued that P.A. 93-32 violated the Clean Water Act. Specifically, Plaintiffs argued that the Clean Water Act preempted the imposition of NPDES permit fees. Plaintiffs argued that the Clean Water Act provides that the administrator of the U.S. EPA is required to impose fees that reflect reasonable administrative costs on those entities seeking modifications of effluent limitations. Plaintiffs thus claimed that fees may only be prescribed and collected from those dischargers who apply for modifications. However, the court held that one subsection of the Clean Water Act that requires the U.S. EPA administrator to levy a fee under certain circumstances and this provision does not expressly preclude states from imposing fees upon NPDES permit holders. The court agreed with Defendants that the Clean Water Act recognizes that states impose fees for NPDES permits, limiting those fees only with respect to federal entities. Therefore, the court concluded that the Clean Water Act does not preempt the imposition of permit fees under P.A. 93-32.

Plaintiffs argued that the state's imposition of NPDES permit fees constituted a revision of the Illinois NPDES permit program, which required approval by the U.S. EPA administrator. However, the court held that a state's decision to impose NPDES permit fees did not rise to the level of a program revision. The court held that the state's imposition of fees did not constitute a modification related to the state's basic statutory or regulatory authority, its forms, procedures or priorities for its NPDES program. Therefore, the trial court's grant of Defendants' motion to dismiss was affirmed. *Valstad v. Cipriano*, 2005 WL 1134837 (Ill.App. 4th Dist. May 10, 2005).

CERCLA

Matter of First Impression in Supreme Court of Alaska

Plaintiffs, property owners who owned and operated a laundry and dry cleaning business from 1972 until 1978, brought an action against Defendant, the laundry and dry cleaning equipment manufacturer, pursuant to the Comprehensive Environmental Response Compensation and Liability Act (CERCLA) and Alaska's state hazardous waste law, seeking contribution for a portion of costs incurred in remediation and payment of costs resulting from discovery of percholoroethylene (PCE) emanating from sewer lines in the ground that connected to Plaintiff's dry cleaning business.

The Ninth Circuit certified two questions to the Supreme Court of Alaska. The first question dealt with the difference between CERCLA and the Alaskan statute. The meaning of this state statute was determined to be one of first impression and the Ninth Circuit requested the court determine whether the Alaskan statute required that a person own, possess, have authority to control or have a duty to dispose of the hazardous substance that is released before that entity can be subject to arranger liability as required by CERCLA.

The second question certified, if the answer to the first was in the negative, was whether an entity may be subject to liability pursuant to the state statute if it manufacturers, sells and installs a useful product that, when used as designed, directs a hazardous substance into the city sewer system.

Plaintiffs owned and operated the dry cleaners from 1972 until 1978. The business was sold and then Plaintiffs repurchased the business and operated it from 1980 until 1983. The equipment utilized a cleaning solvent that contained the hazardous substance PCE." The equipment utilized a separator that recaptured the PCE while the separated water was flushed through a drainage system into the local sewer lines.

At some undetermined time, PCE escaped into the environment from either the premises or from the sewer pipes leading from the property, perhaps through underground leaks. Plaintiffs argued that throughout the time they owned and operated the equipment, they used and maintained the equipment exactly as specified

by the manufacturer and that they never spilled PCE. The court accepted that the contamination could only have been through the factory designed, approved and installed drain lines.

In 1987 or 1988, the State discovered the presence of PCE in the soil near the property. Plaintiffs were notified that they were potentially responsible parties (PRPs). The Alaskan statute makes owners of a facility from which there is a release of a hazardous substance strictly liable to the State for the costs of cleanup and remediation. Plaintiff was compelled to pay into a cleanup fund with other PRPs as part of the remediation effort for this site.

After incurring over $1 million in costs associated with the PCE cleanup, Plaintiffs sought contribution from the equipment manufacturer. Plaintiffs' action was brought under a theory of "arranger liability." Defendant removed the matter to federal court and then sought dismissal. The federal court granted dismissal because arranger liability was inapplicable under CERCLA or the Alaskan statute. Plaintiffs appealed.

On appeal, Plaintiffs did not contest dismissal of the CERCLA claim, but argued that the action pursuant to the Alaskan statute was proper. Both parties admitted that CERCLA was the source of the arranger liability provision of the Alaskan statute; however, the parties disagreed on how closely the Alaskan statute was meant to track that of CERCLA.

Defendant argued that the subsections of the arranger liability provisions were worded identically and the case law regarding interpretation of CERCLA was strong, persuasive authority as to the interpretation of the Alaskan statute interpretation of arranger liability. Plaintiffs argued that the federal law was different from the Alaskan statute because of their linguistic dissimilarities. They argued that the Alaskan statute was broader and due to the differences, the federal cases offered little help in interpreting the Alaskan statute.

The supreme court held that there are differences between CERCLA and the Alaskan statute. Therefore, the court turned to the legislative history and text of the Alaskan statute. The supreme court held that the difference between CERCLA and the Alaskan statute inferred the legislature's intent to expand liability beyond CERCLA's standards.

The supreme court adopted a standard of arranger liability that is broader than that of the Ninth Circuit based upon the textual distinctions between the federal and state statutes and the review of the legislative history. The supreme court held that arranger liability under the Alaskan statute requires some actual involvement in the decision to dispose of waste that was substantial or integral. This actual involvement can encompass involvement in deciding how to dispose of waste or in facilitating such disposal. These actions can include designing, installing or connecting a system that disposes of waste on behalf of a third party.

Therefore, the supreme court held the answer to the first certified question in the negative and continued to examine the second certified question. To answer this question, the supreme court looked to the federal court decisions regarding interpretation of the word, "arranged." The court found that that courts have limited arranger liability by reading "arranged" in the context of "for disposal or treatment." Courts have further recognized the "useful product" exception to liability.

The useful product exception is based upon a theory that a manufacturer who does nothing more than sell a useful, albeit hazardous, product to an end user has not arranged for disposal of a hazardous substance. Under this theory, a company that sells hazardous materials can escape liability as an arranger under CERCLA. Therefore, the court stated that the second certified question asked whether the Alaskan statute included CERCLA's useful product exception to arranger liability. This doctrine had never been addressed.

The court held that the useful product exception was clearly intended to be a part of the Alaskan statute. Application of this doctrine was necessary to remedy the concern that a broad interpretation would lead to exorbitant insurance costs and deter commerce. The court further held that the useful product exception is not applicable to this action. Specifically, the court held that although the Alaskan statute recognizes a useful product exception to arranger liability, the exception does not protect from arranger liability for an entity manufacturing, selling, or installing a useful product that is intended to direct a hazardous substance into a city sewer system. *Berg v. Popham*, 2005 WL 1189660 (Ala. S.Ct. May 20, 2005).

SOLID WASTE DISPOSAL ACT

Supreme Court of Texas Decides Intended Scope of "Arranger Liability"

Plaintiff, the owner of several dry cleaning facilities filed suit against Defendant, Pilgram Enterprises, Inc., seeking to recover costs incurred as a result of the remediation of environmental contamination. The action was filed pursuant to the Texas Solid Waste Disposal Act (SWDA). The case presented an issue of first impression regarding the intended scope of arranger liability under SWDA.

Defendant used perchloroethylene, (PCE) in its dry cleaning operations. In 1994, while conducting a mandatory environmental assessment Defendant discovered that the soil and groundwater at many of Defendant's facilities were contaminated with PCE. Defendant notified the appropriate governmental entities and entered into a voluntary cleanup agreement to remediate the sites.

Defendant purchased the PCE and equipment from Plaintiff who designed, manufactured and distributed dry cleaning equipment and products. Plaintiff sold Defendant equipment that recycled dirty PCE for reuse. One such piece of equipment was a disposable filter that had to be replaced periodically. Following the common industry practice, Defendant disposed of these filters by discarding them in dumpsters located on the premises. Plaintiff also sold Defendant stills that would be used to heat dirty PCE until it evaporated and rose to the top. The soil and un-evaporated PCE was also discarded in dumpsters in accord with industry practice at the time.

After Defendant discovered the contamination and began the voluntary clean up efforts, Defendant brought suit against Plaintiff and several other PCE and PCE-equipment manufacturers and distributors. All other parties settled prior to trial, however, Defendant's action remained as to Plaintiff. After Defendant presented its evidence, the trial court refused Plaintiff's request to submit jury questions regarding Plaintiff's arranger liability under SWDA, instead ruling as a matter of law in Defendant's favor and apportioning $1.5 of the $7 million clean up costs to Plaintiff. Both parties appealed. With regard to the SWDA claim, the court of appeals affirmed in part and reversed in part.

Specifically, the appellate court held that although Plaintiff was entitled to have a jury resolve the fact issues relating to the

SWDA claim, the trial court did not err in failing to submit the SWDA liability issue to the jury because Defendant established Plaintiff's liability as a matter of law. After a careful review of the trial court testimony, the appellate court found held that Plaintiff, through an agent, was a person responsible for the waste under the SWDA because it arranged for the disposal by the instructions Plaintiff provided to Defendant. The appellate court further found that the remedial actions taken were approved, there was a release of a solid waste into the environment, the remedial costs were reasonable and necessary and Defendant made reasonable attempts to notify Plaintiff of the release and Defendant's intent to remedy it.

The court of appeals concluded that causation is not an element of liability under SWDA, therefore Defendant did not have to prove that Plaintiff's actions caused Defendant to incur response costs in order to sustain its cause of action. Causation is only a factor for the trial court to consider in apportioning costs after liability is established. Thereafter, Plaintiff filed a petition for review to consider whether Plaintiff was an "arranger" within SWDA's meaning.

The Texas Supreme Court agreed that barring a dispute as to the underlying facts, whether a defendant is a "person responsible for solid waste" is a question of law. Due to the fact that Texas state law is void of any cases that discuss the scope of arranger liability under SWDA, the Texas Supreme Court looked to federal case law for guidance. The federal case law is clear that a transaction to sell a product containing a hazardous substance that is ultimately disposed of does not in itself constitute an arrangement for disposal. The court turned its attention to the case law that addressed allegations of the arranger statute based upon conduct other than or in addition to the sale of a hazardous substance.

The parties agreed that there is no rule for determining whether a defendant "otherwise arranged" to dispose of hazardous waste under CERCLA. However, Plaintiff argued that no court has imposed arranger liability on a party who did not have either the authority to dispose of the waste together with the actual involvement in its disposal or the obligation to dispose of the waste. Defendant argued that federal case law supports the proposition that actual involvement in the decision to dispose of waste is sufficient to invoke arranger status even when the authority or obligation to control disposal is lacking.

The Texas Supreme Court held that in determining whether a potentially responsible party is an arranger under CERCLA, courts generally agree that there must be a nexus between the party's conduct and the disposal of the hazardous substance. In evaluating whether the requisite nexus exists, courts have employed a "totality of the circumstances" approach. The Texas Supreme Court held that an analysis of the arranger status based on the totality of the circumstances under guidelines that the federal cases established is most faithful to the statutory language and purposes of SWDA.

When examining the facts, the Texas Supreme Court held that courts should take into consideration whether a defendant owned or possessed the solid waste in question, had the authority to make disposal decisions, had the obligation to make disposal decisions, exercised control over decisions regarding the waste's disposal or actually disposed of the solid waste. The court went on to hold that in the context of arranger liability, a court's inquiry should focus on the degree of the defendant's actual control over the decision regarding the specific method or manner of disposal.

Plaintiff argued that it did not become an arranger by providing technical services and advice to Defendant even when the advice related to waste disposal because Plaintiff had neither the authority nor the obligation to control such disposal. Defendant argued that Plaintiff did not merely sell products and equipment; instead, Plaintiff regularly came into Defendant's facilities and gave direct instructions on how to dispose of waste knowing that Defendant relied upon these instructions.

The Texas Supreme Court noted that there are few federal cases that address whether a defendant's provision of technical services and advice renders it an arranger under CERCLA. However, the court held that due to the extent of Plaintiff's involvement with Defendant over the years and the fact that Plaintiff gave advice regarding disposal methods and Defendant followed Plaintiff's advice, Plaintiff still did not actually control the specific method and manner in which Defendant disposed of the waste at issue. The court held that authority to make disposal decisions is a key factor when arranger status is based on mere advice regarding disposal that another party is free to ignore. Given an absence of any obligation with regard to waste disposal decisions, Plaintiff's lack of ownership of or authority over the chemicals that Defendant discarded and the fact that Defendant never ceded ultimate control over this aspect of its operations, the Texas Supreme Court disagreed with the appellate court ruling that Plaintiff was a "person responsible for solid waste" under the SWDA.

Plaintiff argued that even if its actions constituted an arrangement for disposal of waste, it could not be found liable as an arranger because Defendant failed to prove that the contamination at its sites resulted from the PCE that Plaintiff poured into the sewer system. The Texas Supreme Court held that for a defendant to qualify as a PRP under CERCLA, the plaintiff need not show a direct causal link between the waste for which the defendant is responsible and the environmental harm at the site.

CERCLA's legislative history and text support that a plaintiff is not required to show that a particular defendant caused either the release or the incurrence of response costs in order to prove liability. Analogous to CERCLA, SWDA does not have any causation requirement. The courts have uniformly held that there is no *de minimis* exception to responsible party liability. The amount of waste attributable to the defendant may be taken into account when the trial court is determining the extent of a defendant's liability by apportioning costs.

In the end, the Texas Supreme Court held that the appellate court erred in holding that Plaintiff's advice to Defendant regarding disposal of waste subjected Plaintiff to potential arranger liability. The Texas Supreme Court reversed, in part, and remanded the matter to the trial court for further proceedings. *R.R. Street & Co. Inc. v. Pilgrim Enterprises, Inc.*, 2005 WL 1366511 (Tex. S.Ct. June 10, 2005).

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