Sale of Contaminated Building Leads to CERCLA Arranger Liability

By Richard F. Ricci and Allison Gabala

On April 11, the U.S. Court of Appeals for the Eighth Circuit in *United States v. Dico, Inc., et al.* reinforced the evidentiary bar that trial courts must meet when determining whether a party is liable for response costs as an "arranger" under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) § 107(a)(3), 42 U.S.C. § 9607(a)(3).[1] Relying on the Supreme Court's holding in *Burlington Northern and Santa Fe Railway Co. v. United States*, the Eighth Circuit found that the usefulness of a product is important but not a dispositive factor in determining a seller's intent to arrange for the disposal of hazardous substances.

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 *Burlington Northern and Santa Fe Railway Co. v. United States*, decided by the U.S. Supreme Court in 2009.[2] Burlington Northern identified two extremes demonstrating the obvious existence and absence of arranger liability.[3] Recognizing the gray areas that "fall between these two extremes," such as cases where the seller's "motives for the 'sale' of a hazardous substance are less than clear," the Supreme Court found that "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 evaluating this in-between category, the Supreme Court concluded that a seller's knowledge that a buyer would dispose of a hazardous substance alone is not sufficient to constitute arrangement for disposal.[5] Rather, the central question is the intent of the seller in the particular transaction.6 More specifically, the Supreme Court held that "[i]n order to qualify as an arranger, [the seller] must have entered into the sale … with the intention that at least a portion of the product be disposed of during the transfer process by one or more of the methods described in §6903(3)."[7]

Case Background

Dico, Inc. (Dico) owned multiple buildings contaminated with polychlorinated biphenyls (PCBs). In 1994, the Environmental Protection Agency (EPA) issued an administrative order that required Dico to address the PCB contamination. Without informing EPA, in 2007, Dico, through its corporate affiliate Titan Tire Corp. (Titan), sold the building to Southern Iowa Mechanical (SIM). Dico did not inform SIM that the buildings were contaminated with PCBs and subject to an EPA order. SIM dismantled the buildings and disposed of all of the building materials except for steel beams, to which PCB-laden insulation was attached. The steel beams were stored in an open field (hereinafter the "SIM site"), where EPA later found PCBs.

Claiming that Dico and Titan (collectively, "Defendants") intended to arrange for the disposal of hazardous substances when they sold PCB-contaminated buildings without disclosing the contamination, EPA sued them to recover response costs incurred addressing the SIM site and penalties for violating the administrative order. The District Court concluded on summary judgment

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[1] 920 F.3d 1174 (8th Cir. 2019).
[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 612 ("While it is true in some instances that an entity's knowledge that its product will be leaked, spilled, dumped, or otherwise discarded may provide evidence of the entity's intent to dispose of its hazardous waste, knowledge alone is insufficient to prove that an entity 'planned for' the disposal, particularly when the disposal occurs as a peripheral result of the legitimate sale of an unused, useful product.").
[6] See Id. at 599.
[7] Id. at 612.

that Defendants were liable as arrangers, but the Eighth Circuit reversed, finding insufficient evidence to demonstrate as a matter of law that Defendants were merely trying to get rid of hazardous substances. The Court of Appeals remanded for additional fact-finding. After a bench trial, the District Court found Defendants were liable as arrangers and imposed both civil penalties and punitive damages. Defendants appealed, claiming the District Court "gave insufficient weight to evidence that the transaction was legitimate" and "erred by failing to presume the sale of useful products is a legitimate transaction."[8]

Analysis

Applying the reasoning in *Burlington Northern*, the Eighth Circuit found that Defendants, as the seller of a contaminated building, were subject to arranger liability, even though (1) the sale at issue mirrored the terms of a prior sale involving Defendants and SIM, and (2) the building's structural steel beams were reusable if decontaminated. Acknowledging that the District Court found the commercial usefulness of the beams "weigh[s] slightly in favor of concluding Defendants did not intend to arrange for the disposal of hazardous substances by selling the contaminated buildings to SIM," the court found that this factor was substantially outweighed by the evidence that Defendants intended to dispose of the PCB contamination through the sale. The Eighth Circuit relied on a number of the District Court's findings to conclude that Dico's intent was to avoid environmental liability through the sale of the contaminated building. Defendants knew the buildings would be dismantled once sold. They also knew that by selling the building, they would avoid remediation costs that would greatly exceed the purchase price. Defendants did not tell the purchaser that the building was contaminated and subject to an EPA order.[9]

The court opined that the usefulness of a product does not dispositively show the character of the transaction or the seller's intent as to preclude arranger liability under CERCLA. The court highlighted the lower court's finding that "[a] party may sell a still 'useful' product … with the full intention to rid itself of environmental liability rather than a legitimate sale, for example where the cost of disposal or contamination remediation would greatly exceed its purchase price."[10] The touchstone remains whether the arrangement was one Congress intended to fall within the scope of CERCLA's strict liability provisions.

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

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[8] *Dico*, 920 F.3d at 1178.
[9] Id at 1179.
[10] Id.

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