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Environmental ADVISORY ■

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Seventh Circuit Addresses UAO Enforcement and CERCLA Arranger Liability in Fox River PCB Litigation

The United States Court of Appeals for the Seventh Circuit recently addressed several important CERCLA issues in litigation arising from the cleanup of PCBs in the Lower Fox River in Wisconsin. They include whether the U.S. EPA is permitted to obtain permanent injunctive relief to enforce a unilateral administrative order (UAO) and the type of "intent" necessary to establish a valid claim for arranger liability under CERCLA.

United States v. P.H. Glatfelter Co., 2014 WL 4755483 (7th Cir. Sept. 25, 2014) and UAO Enforcement

In 2007, the EPA issued UAOs to several potentially responsible parties (PRPs) directing them to perform the remedial work for Operable Unit Nos. 2-5 in the Lower Fox River. NCR Corporation initially complied with the UAO, but reduced its work in 2011 before stopping work altogether in 2012. The EPA sued NCR and certain other UAO recipients and in 2012 obtained a preliminary injunction compelling NCR to resume UAO work in Operable Unit No. 4. The Seventh Circuit affirmed the preliminary injunction on appeal. *United States v. NCR Corp.*, 688 F.3d 833 (2012). Following a subsequent bench trial, the district court ruled in the government's favor and entered a permanent injunction requiring NCR and the other remaining non-settling PRPs to complete the work required by the UAO.

The Seventh Circuit vacated the permanent injunction and held that the equities a district court is required to consider when it imposes permanent injunctive relief can play no part in an action to enforce an EPA UAO. The appellate court added that when the UAO involves implementing a complex cleanup, permanent injunctive relief may run afoul of the "reasonable detail" requirement of Rule 65(d)(1)(C) of the Federal Rules of Civil Procedure, "which requires that very injunction 'describe in reasonable detail–and not by referring to the complaint or other document–the act or acts restrained or required.'" The Seventh Circuit also distinguished its prior approval of the preliminary injunction, which required NCR to resume the UAO work, on the grounds that such relief can be appropriate in "emergency" situations. Lastly, the court noted that the EPA has other potential recourse in the event of UAO noncompliance, including seeking declaratory relief and civil penalties.

NCR Corp. v. George A. Whiting Paper Co., 2014 WL 4755491 (7th Cir. Sept. 25, 2014) and CERCLA Arranger Liability

In *Burlington Northern & Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 601 (2009), the U.S. Supreme Court held that a valid claim for CERCLA "arranger liability" requires showing a defendant took "intentional steps to dispose of a hazardous substance." 42 U.S.C. 9607(a)(3). Applying that legal standard, the Seventh Circuit affirmed the district court's ruling that NCR's predecessor, Appleton Coated Paper Company, did not "arrange for disposal" when it sold a byproduct containing PCBs to recycling paper mills. Two recycling mills argued that CERCLA liability should attach because Appleton knew (or should have known) that the recycling mills would separate out the PCBs and discharge them into the Fox River. In other words, Appleton's actions amounted to "intentional steps" to dispose of the PCBs in its byproduct given that Appleton knew that some of the PCBs would end up in the river.

The Seventh Circuit disagreed. In its view, these transactions constituted a sale of a useful product into a competitive market, even if it was not a "new" product and even though the sales proceeds did not cover the costs incurred in preparing the byproduct for sale to the recycling mills. The Seventh Circuit also noted that after Appleton sold its byproducts to the recycling mills, what was ultimately done with the PCBs embedded in the byproduct "was completely out of the seller's hands."

Conclusion

The breadth of CERCLA's liability continues to be a moving target. In addition to these two Seventh Circuit opinions, there have already been a number of important appellate decisions this year, including rulings from the U.S. Supreme Court and the Second, Sixth, Eighth and Ninth Circuits. Importantly, the Seventh Circuit's holding in *Glatfelter* makes clear that CERCLA does not permit the EPA to make an end-run around the legal requirements for permanent injunctive relief. Similarly, the holding in *Whiting* reconfirms that CERCLA arranger liability is not limitless. The Fourth Circuit will be hearing oral argument later this month on another arranger liability appeal, so we expect at least one more CERCLA appellate ruling soon.

If you have any questions, please feel free to contact **Doug Arnold** at Doug.Arnold@alston.com, **Jonathan Wells** at Jonathan.Wells@alston.com or **Ronnie Gosselin** at Ronnie.Gosselin@alston.com.

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